TEXAS REGISTER

Volume 47 Number 37 *September 16, 2022* *Pages 5525 - 5932*

a section of the
Office of the Secretary of State
P.O. Box 12887
Austin, Texas 78711
(512) 463-5561
FAX (512) 463-5569

https://www.sos.texas.gov
register@sos.texas.gov

Texas Register, **(ISSN 0362-4781, USPS 12-0090),** is published weekly (52 times per year) for $340.00 ($502.00 for first class mail delivery) by Matthew Bender & Co., Inc., 3 Lear Jet Lane Suite 104, P. O. Box 1710, Latham, NY 12110.

The *Texas Register* is published under the Government Code, Title 10, Chapter 2002. Periodicals Postage Paid at Easton, MD and at additional mailing offices.

POSTMASTER: Send address changes to the *Texas Register,* 4810 Williamsburg Road, Unit 2, Hurlock, MD 21643.

In This Issue

ADOPTED RULES

RULE REVIEW

TABLES AND GRAPHICS

IN ADDITION

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 August 25, 2022

Appointed to serve as Justice of the Supreme Court of Texas in Case No. 21-0130, *State v. Volkswagen Aktiengesellschaft* and Case No. 21-0133, *State v. Audi Aktiengesellschaft,* Bonnie Sudderth of Fort Worth, Texas (replacing Justice Jimmy Blacklock, who recused himself in the referenced cases under Rule 16.2 of the Texas Rules of Appellate Procedure).

Appointed to serve as Justice of the Supreme Court of Texas in Case No. 21-0130, *State v. Volkswagen Aktiengesellschaft* and Case No. 21-0133, *State v. Audi Aktiengesellschaft,* Jaime E. Tijerina of Edinburg, Texas (replacing Justice Evan A. Young, who recused himself in the referenced cases under Rule 16.2 of the Texas Rules of Appellate Procedure).

Appointments for September 1, 2022

Appointed to the Board of Pardons and Paroles for a term to expire February l, 2023, Elodia G. Brito of Amarillo, Texas (replacing James W. "Jim" LaFavers of Amarillo, who resigned).

Appointments for September 6, 2022

Appointed to the Child Fatality Review Team Committee for a term to expire at the pleasure of the Governor, Madelyn Fletcher of Austin, Texas (replacing Heather Fleming of Austin).

Appointed as Judge of the 480th Judicial District Court, Williamson County, effective October 1, 2022, for a term until December 31, 2024, or until his successor shall be duly elected and qualified, Scott K. Field of Liberty Hill, Texas.

Appointments for September 7, 2022

Re-designating Robert B. "Bryan" Daniel as chair of the Texas Workforce Commission for a term to expire September 7, 2024.

Greg Abbott, Governor

TRD-202203588

♦ ♦ ♦

Proclamation 41-3926

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, GREG ABBOTT, Governor of the State of Texas, do hereby certify that severe storms and significant flooding pose a threat of imminent disaster, including widespread and severe property damage, injury, and loss of life, due to river flooding, flash flooding, and damaging winds in Camp, Culberson, Dallas, Duval, Ellis, El Paso, Henderson, Hopkins, Hudspeth, Kaufman, Kerr, Live Oak, Marion, Montague, Navarro, Pecos, Rains, Smith, Tarrant, Upshur, Van Zandt, Webb, and Wood counties;

NOW, 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, 2022.

Greg Abbott, Governor

TRD-202203513

♦ ♦ ♦

Proclamation 41-3927

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, GREG ABBOTT, Governor of Texas, do hereby certify that the shooting that occurred on May 24, 2022, at Robb Elementary School in the City of Uvalde has caused widespread and severe damage, injury, and loss of life in Uvalde County, Texas; and

WHEREAS, those same conditions continue to exist in Uvalde County;

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 Uvalde County.

Pursuant to Section 418.017, 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(a), 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 25th day of August, 2022.

Greg Abbott, Governor

TRD-202203514

♦ ♦ ♦

Proclamation 41-3928

TO ALL TO WHOM THESE PRESENTS SHALL COME:

WHEREAS, I, GREG ABBOTT, Governor of the State of Texas, issued a disaster proclamation on July 8, 2022, and amended that declaration on July 15, 2022, certifying that exceptional drought conditions posed a threat of imminent disaster in several counties; and

WHEREAS, the Texas Division of Emergency Management has confirmed that those same drought conditions continue to exist in these and other counties in Texas, with the exception of Archer, Bowie, Camp, Carson, Cass, Chambers, Clay, Culberson, Denton, Duval, Franklin, Grayson, Gregg, Harris, Harrison, Haskell, Hudspeth, Jack, Jeff Davis, Jefferson, Jim Hogg, Jim Wells, Kleberg, Liberty, Marion, Nueces, Potter, San Patricio, Smith, Upshur, Wise, and Wood counties;

NOW, THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby amend and renew the aforementioned proclamation and declare a disaster in Anderson, Andrews, Aransas, Armstrong, Atascosa, Austin, Bailey, Bandera, Bastrop, Baylor, Bee, Bell, Bexar, Blanco, Borden, Bosque, Brazoria, Brazos, Brewster, Briscoe, Brown, Burleson, Burnet, Caldwell, Calhoun, Callahan, Cameron, Castro, Childress, Cochran, Coke, Coleman, Collin, Vollingsworth, Colorado, Comal, Comanche, Concho, Cooke, Coryell, Cottle, Crane, Crockett, Crosby, Dallam, Dallas, Dawson, Deaf Smith, Delta, DeWitt, Dickens, Dimmit, Donley, Eastland, Ector, Edwards, Ellis, Erath, Falls, Fannin, Fayette, Fisher, Floyd, Foard, Fort Bend, Freestone, Frio, Gaines, Galveston, Garza, Gillespie, Glasscock, Goliad, Gonzales, Grimes, Guadalupe, Hale, Hall, Hamilton, Hansford, Hardeman, Hartley, Hays, Henderson, Hidalgo, Hill, Hockley, Hood, Hopkins, Howard, Hunt, Hutchinson, Irion, Jackson, Johnson, Jones, Karnes, Kaufman, Kendall, Kent, Kerr, Kimble, King, Kinney, Knox, La Salle, Lamar, Lamb, Lampasas, Lavaca, Lee, Leon, Limestone, Live Oak, Llano, Loving, Lubbock, Lynn, Madison, Martin, Mason, Matagorda, Maverick, McCulloch, McLennan, McMullen, Medina, Menard, Midland, Milam, Mills, Mitchell, Montague, Montgomery, Moore, Motley, Navarro, Nolan, Ochiltree, Oldham, Palo Pinto, Parker, Parmer, Pecos, Polk, Presidio, Rains, Randall, Reagan, Real, Red River, Reeves, Refugio, Roberts, Robertson, Rockwall, Runnels, San Jacinto, San Saba, Schleicher, Scurry, Shackelford, Sherman, Somervell, Starr, Stephens, Sterling, Stonewall, Sutton, Swisher, Tarrant, Taylor, Terrell, Terry, Tom Green, Travis, Trinity, Upton, Uvalde, Val Verde, Van Zandt, Victoria, Walker, Waller, Ward, Washington, Webb, Wharton, Wichita, Wilbarger, Willacy, Williamson, Wilson, Winkler, Yoakum, Zapata, and Zavala counties.

Pursuant to Section 418.017 of the Texas Government 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 Texas Government 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 or 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, 2022.

Greg Abbott, Governor

TRD-202203515

♦ ♦ ♦

Emergency Rules include new rules, amendments to existing rules, and the repeals of existing rules. A state agency may adopt an emergency rule without prior notice or hearing if the agency finds that an imminent peril to the public health, safety, or welfare, or a requirement of state or federal law, requires adoption of a rule on fewer than 30 days' notice. An emergency rule may be effective for not longer than 120 days and may be renewed once for not longer than 60 days (Government Code, §2001.034).

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE JUSTICE DEPARTMENT

CHAPTER 344. EMPLOYMENT, CERTIFICATION, AND TRAINING
SUBCHAPTER B. QUALIFICATIONS FOR CERTIFICATION AND EMPLOYMENT

37 TAC §344.200

The Texas Juvenile Justice Department (TJJD) adopts, on an emergency basis, amendments to Texas Administrative Code Chapter 344, Subchapter B, §344.200, relating to general qualifications for positions requiring certification. The amended section establishes the minimum qualifications for certification as a juvenile probation officer, juvenile supervision officer, and community activities officer.

This section is adopted on an emergency basis to ensure compliance with statutory changes to Chapter 53, Occupations Code, which requires a review prior to denying or revoking a certification based on criminal history.

Pursuant to Section 2001.034, Government Code, TJJD finds that a requirement of state law (i.e., SB 1314) requires adoption of this section on fewer than 30 days' notice.

The amended section is adopted under the following: (1) §221.002(a)(3), Human Resources Code, which requires TJJD to adopt reasonable rules that provide appropriate educational, preservice, and in-service training and certification standards for probation and detention officers or court-supervised community-based program personnel; and (2) §§222.001, 222.002, and 222.003, Human Resources Code, which establish minimum requirements for appointment in a position requiring certification from TJJD.

No other statute, code, or article is affected by this emergency adoption.

§344.200. General Qualifications for Positions Requiring Certification.

(a) Juvenile Probation Officer. To be eligible for certification as a juvenile probation officer, supervisor of a juvenile probation officer, or chief administrative officer, an individual must:

(1) be at least 21 years of age;

(2) be of good moral character;

(3) have no disqualifying criminal history as described in this chapter;

(4) have no criminal history as described in §344.410(a) of this chapter unless TJJD has reviewed it and determined the person is not ineligible for certification due to the criminal history;

(5) [~~(4)~~] have acquired a bachelor's degree conferred by a college or university accredited by an organization recognized by the Texas Higher Education Coordinating Board;

(6) [~~(5)~~] possess the work experience required in §344.210 of this chapter [~~title~~] or graduate study required in §344.204 of this chapter [~~title~~];

(7) [~~(6)~~] never have had any type of certification revoked by TJJD;

(8) [~~(7)~~] complete the training required by this chapter; and

(9) [~~(8)~~] pass the certification exam as required by §344.700 of this chapter [~~title~~].

(b) Juvenile Supervision Officer. To be eligible for certification as a juvenile supervision officer, an individual must:

(1) be at least 21 years of age;

(2) be of good moral character;

(3) have no disqualifying criminal history as described in this chapter;

(4) have no criminal history as described in §344.410(a) of this chapter unless TJJD has reviewed it and determined the person is not ineligible for certification due to the criminal history;

(5) [~~(4)~~] have acquired a high school diploma or its equivalent as specified in §344.204 of this chapter [~~title~~];

(6) [~~(5)~~] never have had any type of certification revoked by TJJD;

(7) [~~(6)~~] complete the training required by this chapter; and

(8) [~~(7)~~] pass the certification exam as required by §344.700 of this chapter [~~title~~].

(c) Community Activities Officer. To be eligible for certification as a community activities officer, an individual must:

(1) be at least 21 years of age;

(2) be of good moral character;

(3) have no disqualifying criminal history as described in this chapter;

(4) have no criminal history as described in §344.410(a) of this chapter unless TJJD has reviewed it and determined the person is not ineligible for certification due to the criminal history;

(5) [~~(4)~~] have acquired a high school diploma or its equivalent as specified in §344.204 of this chapter [~~title~~];

(6) [~~(5)~~] never have had any type of certification revoked by TJJD; and

(7) [(6)] complete the training required by this chapter.

The agency certifies that legal counsel has reviewed the emergency adoption 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, 2022.

TRD-202203311
Christian von Wupperfeld
General Counsel
Texas Juvenile Justice Department
Effective date: September 1, 2022
Expiration date: December 29, 2022
For further information, please call: (512) 490-7278

♦ ♦ ♦

SUBCHAPTER C. CRIMINAL HISTORY AND BACKGROUND CHECKS

37 TAC §§344.300, 344.320, 344.330

The Texas Juvenile Justice Department (TJJD) adopts, on an emergency basis, amendments to Texas Administrative Code Chapter 344, Subchapter C, §§344.300, 344.320, and 344.330, relating to criminal history checks. The amended sections establish who must have a criminal history check and who may not have direct, unsupervised access to juveniles; require a criminal history check when a person transfers into a position requiring certification or when a certified officer accepts simultaneous or subsequent employment in a different department or private facility; require the juvenile probation department serving the county where a private juvenile justice facility is located to conduct criminal history checks on behalf of the private facility; and explain the responsibilities of the department and the private facility.

These sections are adopted on an emergency basis to ensure compliance with statutory changes to Chapter 53, Occupations Code, which requires a review prior to denying or revoking a certification based on criminal history.

Pursuant to Section 2001.034, Government Code, TJJD finds that a requirement of state law (i.e., SB 1314) requires adoption of these sections on fewer than 30 days' notice.

The amended sections are adopted under the following: (1) §221.002(a)(3), Human Resources Code, which requires TJJD to adopt reasonable rules that provide appropriate educational, preservice, and in-service training and certification standards for probation and detention officers or court-supervised community-based program personnel; and (2) §§222.001, 222.002, and 222.003, Human Resources Code, which establish minimum requirements for appointment in a position requiring certification from TJJD.

No other statute, code, or article is affected by this emergency adoption.

§344.300. Criminal History Checks.

(a) Department or facility policy must prohibit direct, unsupervised access to juveniles in a juvenile justice program or facility by the following:

(1) any person with a disqualifying criminal history as described in §344.400 of this chapter [title]; and

(2) any person with a criminal history described in §344.410(a) of this chapter, unless the person's criminal history has been reviewed by TJJD or the juvenile board or designee, as appropriate, and the review results in a determination that the person is not ineligible for certification, employment, or service in the position.

(b) A criminal history check as described in this section must be conducted for:

(1) an individual who is in a position requiring certification [or eligible for optional certification]; [and]

(2) an individual who is in a position eligible for optional certification who is seeking certification; and

(3) [(2)] an individual who may have direct, unsupervised access to juveniles in a juvenile justice facility or program and who is:

(A) an employee in a position neither [not] requiring certification nor [and not] eligible for optional certification;

(B) an employee in a position eligible for optional certification who is not seeking certification;

(C) [(B)] a volunteer;

(D) [(C)] an intern; or

(E) [(D)] an individual who provides goods or services under contract on the premises of a juvenile justice facility or program, except as provided in subsection (c) of this section.

(c) A criminal history check as specified in this section is not required for employees of a public school district who:

(1) provide services in a juvenile justice facility or program; and

(2) have completed all criminal history checks required by the Texas Education Agency.

(d) Before any individual listed in subsection (b) of this section begins employment or service provision:

(1) the department or facility must ensure the individual has electronically submitted fingerprints using Fingerprint Applicant Services of Texas (FAST) and verify that the department is able to subscribe to the individual's Fingerprint-Based Applicant Clearinghouse of Texas (FACT) record;

(2) the department must subscribe to that individual's record in FACT; and

(3) the department must ensure the criminal history is reviewed [use the information in FACT to determine if the individual has a disqualifying criminal history] as specified in this chapter and must ensure the reviewing entity has determined the person is not ineligible for certification, employment, or providing services based on the person's criminal history, in accordance with this chapter [§344.400 of this title].

(e) The department must maintain a FACT subscription for each individual in a position requiring a criminal history check for as long as the individual remains in such a position. This requirement applies regardless of the date employment or service provision began.

(f) The requirements of this section do not apply to the juvenile's attorney, family members, managing conservator, guardians, individuals listed as a juvenile's approved visitors, or any other individual not listed in subsection (b) of this section.

§344.320. Criminal History Checks for Position and Departmental Transfers and for Optional Certification.

(a) The employing department or facility must complete a criminal history check in accordance with §344.300 and §344.302 of this chapter [~~title~~] when:

(1) an individual who was not previously certified accepts a position requiring certification; [~~or~~]

(2) a certified officer employed by a department or facility accepts simultaneous or subsequent employment at a department or facility operated by or under contract with a different juvenile board; or[~~.~~]

(3) the department or facility is seeking certification for a person in a position that allows for optional certification as provided in §344.802 of this chapter.

(b) For individuals with a record in the Fingerprint-Based Applicant Clearinghouse of Texas (FACT), the searches may be conducted using the existing fingerprints.

§344.330. Criminal History Checks for Employees of Private Juvenile Justice Facilities.

The following provisions apply when a private juvenile justice facility is operating under contract with a governmental entity as required by Sections 51.12, 51.125, and 51.126, Texas Family Code [~~§51.12~~].

(1) The juvenile probation department serving the county where the private facility is located is responsible for performing the checks and subscribing to the Fingerprint-Based Applicant Clearinghouse of Texas (FACT), as required under §344.300 of this chapter, [~~title~~] for the private facility.

(2) The department and the private facility must have a written agreement that:

(A) authorizes the private facility to have access to information resulting from the criminal history checks;

(B) limits the private facility's use of the information to the purpose for which it is given;

(C) requires the private facility to ensure the confidentiality of the information; and

(D) provides for sanctions if the private facility violates a requirement in subparagraphs (B) or (C) of this paragraph.

(3) The private facility must provide the following information to the department in writing:

(A) identifying information necessary for the department to conduct the criminal history checks as required by this chapter; and

(B) notification within 10 calendar days after an individual subject to criminal history checks separates from employment, ceases to provide services, or transfers out of a position that requires criminal history checks.

(4) The chief administrative officer or designee of the juvenile probation department serving the county where the private facility is located must notify the private facility in writing of the results of each initial criminal history check and each check required for renewal of certification.

(5) The department must immediately notify the private facility administrator in writing if the department receives a FACT alert regarding an arrest, conviction, or deferred adjudication for any offense punishable by confinement or imprisonment [~~a disqualifying offense~~] for an individual who is employed by or provides services at the private facility.

The agency certifies that legal counsel has reviewed the emergency adoption 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, 2022.

TRD-202203312
Christian von Wupperfeld
General Counsel
Texas Juvenile Justice Department
Effective date: September 1, 2022
Expiration date: December 29, 2022
For further information, please call: (512) 490-7278

♦ ♦ ♦

SUBCHAPTER D. DISQUALIFYING CRIMINAL HISTORY

37 TAC §§344.400, 344.410, 344.420, 344.430

The Texas Juvenile Justice Department (TJJD) adopts, on an emergency basis, amendments to Texas Administrative Code Chapter 344, Subchapter D, §344.400, relating to disqualifying criminal history. The amended section establishes the disqualifying criminal history for positions requiring certification and for certain noncertified positions. In addition, TJJD adopts, on an emergency basis, new §§344.410, 344.420, and 344.430, relating to other criminal history, review of criminal history, and arrest or conviction of current employees. The new sections establish which types of criminal history would make an individual ineligible for certification without prior TJJD approval and ineligible for certain noncertified positions without an exemption from the juvenile board, the process TJJD will use to review a person's criminal history, and the steps to be taken when a person who is certified or is in the process of being certified is arrested or convicted.

These sections are adopted on an emergency basis to ensure compliance with statutory changes to Chapter 53, Occupations Code, which requires a review prior to denying or revoking a certification based on criminal history.

Pursuant to Section 2001.034, Government Code, TJJD finds that a requirement of state law (i.e., SB 1314) requires adoption of these sections on fewer than 30 days' notice.

The amended sections are adopted under the following: (1) §221.002(a)(3), Human Resources Code, which requires TJJD to adopt reasonable rules that provide appropriate educational, preservice, and in-service training and certification standards for probation and detention officers or court-supervised community-based program personnel; and (2) §§222.001, 222.002, and 222.003, Human Resources Code, which establish minimum requirements for appointment in a position requiring certification from TJJD.

No other statute, code, or article is affected by this emergency adoption.

§344.400. Disqualifying Criminal History.

(a) Applicants for Certification. An individual with the following criminal history is not eligible for [~~initial~~] certification or for [~~initial~~] employment in a position requiring certification:

(1) deferred adjudication or conviction for a felony listed in Texas Code of Criminal Procedure Article 42A.054 (formerly known as "3(g) offenses" under former Article 42.12) or a substantially equiv-

alent violation against the laws of another state or the United States (as determined by TJJD), regardless of the date of disposition; or

(2) deferred adjudication or conviction for a sexually violent offense as defined in Article 62.001, Texas Code of Criminal Procedure, or a substantially equivalent violation against the laws of another state or the United States (as determined by TJJD), regardless of the date of disposition.

[(2) deferred adjudication or conviction for a felony other than those referenced in paragraph (1) of this subsection or a substantially equivalent violation against the laws of another state or the United States within the past 10 years;]

[(3) deferred adjudication or conviction for any Class A or B misdemeanor in Texas or a substantially equivalent violation against the laws of another state or the United States within the past five years; or]

[(4) current requirement to register as a sex offender under Texas Code of Criminal Procedure Chapter 62.]

[(b) Individuals Employed in a Position Requiring Certification. An individual with the criminal history described in subsection (a) of this section is not eligible for continued employment in a position requiring certification unless a variance has been granted in accordance with §344.410 of this title.]

(b) [(c)] Other Individuals Subject to Criminal Background Checks. An individual with the criminal history described in subsection (a) of this section is not eligible to serve in a position listed in §344.300(b)(3) [§344.300(b)(2)] of this chapter [title unless an exemption has been granted in accordance with §344.410 of this title.]

(c) [(d)] General Provisions.

[(1) The date of conviction or order of deferred adjudication is used to determine when applicable time periods expire.]

[(2) Regardless of the time periods set forth in subsection (a) of this section, at least one year must have elapsed since the completion of any period of incarceration, community supervision, or parole.]

[(3) If a department receives notification of an arrest for potentially disqualifying criminal conduct of a person hired in the capacity of a certified officer, the department must notify TJJD's certification office in writing of the alleged offense no later than 10 calendar days after receiving notice of the arrest.]

[(4) If a department receives notification of a conviction for disqualifying criminal conduct of a person hired in the capacity of a certified officer, the department must notify TJJD's certification office in writing of the offense no later than 10 calendar days after receiving notice of the conviction.]

(1) [(5)] Subsection (a)(1) of this section does not apply to individuals [officers] certified before February 1, 2018, [the effective date of this section] unless the certification expires.

(2) [(6)] Subsection (a)(1) of this section does not apply to individuals in a position listed in §344.300(b)(3) [§344.300(b)(2)] of this chapter [title] who began service provision before February 1, 2018, [the effective date of this section] with no break in service after that date.

(3) Subsection (a)(2) of this section does not apply to individuals certified before the most recent effective date of this section unless the certification expires.

(4) Subsection (a)(2) of this section does not apply to individuals in a position listed in §344.300(b)(3) of this chapter who began service provision before the most recent effective date of this section with no break in service after that date.

[(7) Any conviction occurring before January 1, 2010, will not disqualify an individual in a position listed in §344.300(b)(2) of this title who began employment or service provision before January 1, 2010, with no break in service after that date.]

[(8) Any felony conviction, felony deferred prosecution, felony deferred adjudication, misdemeanor conviction, misdemeanor deferred prosecution, or misdemeanor deferred adjudication occurring before September 1, 2003, will not disqualify a certified officer who held an active certification on September 1, 2003.]

§344.410. Other Criminal History.

(a) Applicants for Certification.

(1) An individual with the following criminal history is not eligible for certification, employment, or otherwise providing service in a position requiring certification without prior review and approval by TJJD as provided in §344.420 of this chapter:

(A) deferred adjudication or conviction for a felony other than those referenced in §344.400(a) of this chapter or a substantially equivalent violation against the laws of another state or the United States (as determined by TJJD) if the date of deferred adjudication or conviction was less than 10 years prior to the date the review is requested; or

(B) deferred adjudication or conviction for any Class A or B misdemeanor in Texas or a substantially equivalent violation against the laws of another state or the United States (as determined by TJJD) if the date of deferred adjudication or conviction was less than five years prior to the date the review is requested.

(2) Regardless of the date of conviction or deferred adjudication, a review is required if an individual was incarcerated or placed on community supervision for an offense described by paragraph (1) of this subsection and less than one year has elapsed since the completion of any period of incarceration, community supervision, or parole.

(3) Regardless of the date of conviction or deferred adjudication, a review is required if an individual has a current requirement to register as a sex offender under Chapter 62, Texas Code of Criminal Procedure, for an offense other than an offense described by §344.400(a) of this chapter.

(b) Other Individuals Subject to Criminal Background Check.

(1) An individual with the criminal history described in subsection (a) of this section is not eligible to begin serving or continue serving in a position listed in §344.300(b)(3) of this chapter unless the juvenile board or its documented designee has granted an exemption after considering the factors in §344.420 of this chapter.

(2) Exemptions may be granted only on a case-by-case basis. The justification for the exemption must be documented.

(3) If the department or facility receives notification of a new conviction or deferred adjudication, the individual may not continue serving in the position unless the juvenile board or its documented designee grants a new exemption in accordance with this subsection. An exemption may not be granted for a conviction or deferred adjudication described in §344.400(a) of this chapter.

(4) An exemption granted under this subsection is valid for the individual only at the juvenile probation department or facility operated by or under contract with the juvenile board granting the exemption.

(5) The exemption is not valid if the person moves to a position requiring certification or if the department or facility seeks certification for the person in a position that allows for optional certification as provided in §344.802 of this chapter; in such cases, prior review and approval from TJJD is required as provided by subsection (a) of this section.

§344.420. Review of Criminal History.

(a) A department or facility must request review from TJJD and receive confirmation from TJJD that approval has been granted before:

(1) hiring, contracting with, or otherwise placing a person with a criminal history described by §344.410(a) of this chapter into a position requiring certification; or

(2) seeking optional certification as provided in §344.802 of this chapter for a person with a criminal history described by §344.410(a) of this chapter.

(b) The purpose of the review by TJJD is to determine whether TJJD will deny a certification for the individual due to ineligibility for certification based on the criminal history. TJJD will conduct the review in accordance with this section.

(c) TJJD will first determine if the criminal history offense(s) directly relate to the duties and responsibilities of the position for which certification is required or sought. In making this determination, TJJD will consider:

(1) the nature and seriousness of the crime(s);

(2) the relationship of the crime(s) to the purposes for requiring a certification to engage in the occupation;

(3) the extent to which a certification might offer an opportunity to engage in further criminal activity of the same type as that in which the person was previously involved;

(4) the relationship of the crime(s) to the ability or capacity required to perform the duties and discharge the responsibilities of the position; and

(5) any correlation between the elements of the crime(s) and the duties and responsibilities of the position.

(d) If TJJD determines the criminal history offense(s) do not directly relate to the duties and responsibilities of the position, TJJD will not deny the certification based on the criminal history.

(e) If TJJD determines the criminal history offense(s) directly relate to the duties and responsibilities of the position, TJJD will consider the following in determining whether to deny certification:

(1) the extent and nature of past criminal activity;

(2) the age of the person when each crime was committed;

(3) the amount of time that has elapsed since the person's last criminal activity;

(4) the conduct and work activity of the person before and after the criminal activity;

(5) evidence of the person's rehabilitation and rehabilitative effort while incarcerated or after release;

(6) evidence of the person's compliance with any conditions of probation, community supervision, parole, or mandatory supervision; and

(7) any other evidence of the person's fitness to perform the duties of the position requiring certification, including any letters of recommendation.

(f) The individual to be certified is responsible for providing TJJD with the information required by TJJD to make its decision. Failure to timely provide TJJD with requested information may result in a denial of certification.

(g) In making its determinations under this section, TJJD will not consider an arrest that did not result in a conviction or placement on deferred adjudication.

(h) If TJJD determines that the criminal history will not result in a denial of certification, TJJD will inform the individual and the department or facility, which may then proceed, as appropriate, with hiring, contracting with, or otherwise placing the individual into a position requiring certification or with seeking certification for the individual.

(i) If TJJD determines that the criminal history should result in a certification being denied, TJJD will provide the individual with written notice of the reason for the intended denial and will give the individual at least 30 calendar days to submit any relevant information for consideration. The written notice will comport with the requirements in Section 53.0231, Texas Occupations Code. TJJD will provide a copy of the written notice to the administrative officer of the hiring entity.

(j) Upon receipt of additional information as provided in subsection (i) of this section, TJJD will conduct an additional review in accordance with this section and will provide its final decision to the individual and to the department or facility that requested the initial review.

§344.430. Arrest or Conviction of Current Employees.

(a) This section applies to individuals employed by, under contract with, or otherwise providing services at a department or facility who are certified or for whom the department or facility is seeking certification, whether they are serving in a position requiring certification or in a position for which certification is optional under §344.802 of this chapter.

(b) If a department or facility receives notification that an individual to whom this section applies has been arrested for criminal conduct described in §344.400(a) or §344.410(a) of this chapter, the department or facility must notify TJJD's certification office in writing no later than 10 calendar days after receiving notice of the arrest. The department or facility must provide information regarding the circumstances of the arrest and respond to any questions from TJJD regarding the arrest.

(c) If a department or facility receives notification that an individual to whom this section applies has been convicted of or placed on deferred adjudication for criminal conduct described in §344.400(a) or §344.410(a) of this chapter, the department or facility must:

(1) remove the person from the position requiring certification and from any position allowing the person unsupervised access to juveniles; and

(2) notify TJJD's certification office in writing no later than 10 calendar days after receiving such notice. The department or facility must provide information regarding the conviction or deferred adjudication and respond to any questions from TJJD regarding the disposition.

(d) Upon receipt of a notification under subsection (c) of this section for criminal conduct described in §344.400(a) of this chapter, TJJD will:

(1) deny certification if the person is not yet certified; or

(2) revoke certification if the person is certified.

(e) Upon receipt of a notification under subsection (c) of this section for criminal conduct described in §344.410(a) of this chapter,

TJJD will conduct the review described in §344.420 to determine if certification should be denied if the person is not yet certified or if certification should be revoked or suspended if the person is certified.

(f) Notwithstanding subsection (d) of this section, TJJD will revoke or deny certification if the individual is imprisoned following a felony conviction, revocation of community supervision, revocation of probation, or revocation of mandatory supervision.

The agency certifies that legal counsel has reviewed the emergency adoption 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, 2022.

TRD-202203313
Christian von Wupperfeld
General Counsel
Texas Juvenile Justice Department
Effective date: September 1, 2022
Expiration date: December 29, 2022
For further information, please call: (512) 490-7278

♦ ♦ ♦

37 TAC §344.410

The Texas Juvenile Justice Department (TJJD) repeals, on an emergency basis, Texas Administrative Code Chapter 344, Subchapter D, §344.410, relating to exemption or variance for disqualifying criminal history.

This section is repealed on an emergency basis to ensure compliance with statutory changes to Chapter 53, Occupations Code, which requires a review prior to denying or revoking a certification based on criminal history. The repeal of the section will allow for the content to be revised and republished within new §344.410.

Pursuant to Section 2001.034, Government Code, TJJD finds that a requirement of state law (i.e., SB 1314) requires repeal of this section on fewer than 30 days' notice.

The section is repealed under the following: (1) §221.002(a)(3), Human Resources Code, which requires TJJD to adopt reasonable rules that provide appropriate educational, preservice, and in-service training and certification standards for probation and detention officers or court-supervised community-based program personnel; and (2) §§222.001, 222.002, and 222.003, Human Resources Code, which establish minimum requirements for appointment in a position requiring certification from TJJD.

No other statute, code, or article is affected by this emergency adoption.

§344.410. Exemption or Variance for Disqualifying Criminal History.

The agency certifies that legal counsel has reviewed the emergency adoption 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, 2022.

TRD-202203314
Christian von Wupperfeld
General Counsel
Texas Juvenile Justice Department
Effective date: September 1, 2022
Expiration date: December 29, 2022
For further information, please call: (512) 490-7278

♦ ♦ ♦

SUBCHAPTER G. CERTIFICATION

37 TAC §344.804

The Texas Juvenile Justice Department (TJJD) adopts, on an emergency basis, an amendment to Texas Administrative Code Chapter 344, Subchapter G, §344.804, relating to dual certification. The amended section establishes the circumstances under which a person may hold more than one TJJD certification.

This section is adopted on an emergency basis to ensure compliance with statutory changes to Chapter 53, Occupations Code, which requires a review prior to denying or revoking a certification based on criminal history.

Pursuant to Section 2001.034, Government Code, TJJD finds that a requirement of state law (i.e., SB 1314) requires adoption of this section on fewer than 30 days' notice.

The amended section is adopted under the following: (1) §221.002(a)(3), Human Resources Code, which requires TJJD to adopt reasonable rules that provide appropriate educational, preservice, and in-service training and certification standards for probation and detention officers or court-supervised community-based program personnel; and (2) §§222.001, 222.002, and 222.003, Human Resources Code, which establish minimum requirements for appointment in a position requiring certification from TJJD.

No other statute, code, or article is affected by this emergency adoption.

§344.804. Dual Certification.

(a) Individuals may hold more than one certification by TJJD if they meet all criteria required for each certification and their job duties are consistent with all certifications held, except as noted in subsection (b) of this section.

(b) An individual may not hold an active certification as a juvenile supervision officer and as a community activities officer unless the individual [~~individually~~] is concurrently employed by more than one department or facility.

(c) Training received may be used for credit toward more than one type of TJJD-issued certification if the topic is relevant to each certification sought or held.

The agency certifies that legal counsel has reviewed the emergency adoption 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, 2022.

TRD-202203315
Christian von Wupperfeld
General Counsel
Texas Juvenile Justice Department
Effective date: September 1, 2022
Expiration date: December 29, 2022
For further information, please call: (512) 490-7278

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 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 11. TEXAS HEALTHCARE TRANSFORMATION AND QUALITY IMPROVEMENT PROGRAM REIMBURSEMENT

1 TAC §355.8212, §355.8214

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §355.8212, concerning Waiver Payments to Hospitals for Uncompensated Charity Care, and §355.8214, concerning Waiver Payments to Physician Group Practices for Uncompensated Charity Care.

BACKGROUND AND PURPOSE

The Uncompensated Care (UC) payments are made by HHSC to qualifying hospitals that serve a large number of Medicaid and uninsured individuals. Attachment H of the 1115 Waiver establishes rules and guidelines for the State to claim federal matching funds for UC payments to hospitals, clinics, and other provider types. The purpose of Texas Physician Uncompensated Care (TXPUC) is to determine the physician professional costs related to services provided to charity care patients by physician organizations that may be reimbursable from the Uncompensated Care pool. This proposal defines certain TXPUC provider classes and updates and makes other clarifying amendments.

This amendment updates the definition and the methodology used to allocate funds to physician groups. The current rule does not define the different classes of physician groups and allocates funds equally. The amended rule will add "State-owned" and "Non-State-owned" physician group classes and allow the application of different allocation methodologies to each newly defined class. "State-owned" physician groups will now have a different allocation methodology of funds while the "Non-State-owned" physician groups' methodology remains unchanged. Minor grammatical and formatting edits were made to the rule text.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §355.8212(d) confirms the requirement that all transfers must meet applicable federal requirements.

The proposed amendment to §355.8212(f)(2) defines the physician group practice pool for demonstration years nine and after. Subparagraph (B)(i) and (ii) is added to subsection (f)(2) to define the physician group practice pool for demonstration years ten and after and to provide the physician group practice allocation for state-owned pool funds at an amount less than or equal to the total annual maximum uncompensated-care payment amount for these physicians. Subparagraph (C) is amended to define the physician group practice allocation for non-state-owned provider pools. Subparagraph (C)(i) is amended to define the applicability of the physician group practice non-state-owned provider pools to the applicable demonstration year. Subparagraph (C)(i)(II) is amended to clarify the use of physician's charity-care costs used for the current demonstration year and charity-care costs used for the prior demonstration year for dental and ambulance. Subparagraph (C)(ii)(II) is amended to include "non-state-owned physician group."

The proposed amendment to §355.8214(b)(1) defines the allocation amount for state-owned and non-state owned physician groups for demonstration years eleven and forward. New paragraph (9) defines "non-state-owned physician group." New paragraph (12) defines "Service Delivery Area." New paragraph (13) defines "state-owned physician group."

The proposed amendment to §355.8214(d)(1) confirms the requirement that all transfers must meet applicable federal requirements.

The proposed amendment to §355.8214(f)(1) defines funding limitations for demonstration years nine and ten. Paragraph (2) is amended to define funding limitations for demonstration years eleven and forward.

The proposed amendment to §355.8214(g) adds paragraph (5) and (6) to define physician group service delivery area sub-pools. Old paragraph (6) is deleted.

Minor edits are made to §355.8214(h)(2)(B).

Grammatical and formatting edits are made to §355.8212 and §355.8214. Edits include spelling out abbreviated terms, adding lead-in phrases for consistency, and correcting formatting, references, and punctuation.

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 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 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 required to comply with the rules and do not require any change in current business practices.

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 these rules do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Victoria Grady, Director of Provider Finance, has determined that for each year of the first five years the rules are in effect, the public benefit will be increased transparency in the distribution of UC funding.

Trey Wood 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 these rules update the percentage allocation of funds in the UC program but do not add additional requirements or costs to comply.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to their 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 held by HHSC through a hybrid webinar (in person and online). The meeting date and time will be posted on the HHSC Communications and Events Website at https://hhs.texas.gov/about-hhs/communications-events and the HHSC Provider Finance Hospitals website at https://pfd.hhs.texas.gov/hospitals-clinic/hospital-services/disproportionate-share-hospitals.

Please contact PFD_Hospitals@hhsc.state.tx.us if you have questions.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to the HHSC Provider Finance for Hospitals department at pfd_hospitals@hhsc.state.tx.us.

Written comments on the proposal may be submitted to the HHSC Provider Finance Department, 4601 Guadalupe Street, Austin, Texas 78751 (Mail Code H-400); P.O. Box 149030, Austin, Texas 78714-9030 (Mail Code H-400); by fax to (512) 730-7475; or by email to UCTools@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) faxed or 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 faxing or emailing comments, please indicate "Comments on Proposed Rule 22R110" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out HHSC's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with authority to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code §531.021(b-1), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code Chapter 32.

The amendments affect Texas Government Code §531.0055, Chapter 531, and Texas Human Resources Code Chapter 32.

§355.8212. Waiver Payments to Hospitals for Uncompensated Charity Care.

(a) Introduction. Texas Healthcare Transformation and Quality Improvement Program §1115(a) Medicaid demonstration waiver payments are available under this section to help defray the uncompensated cost of charity care provided by eligible hospitals on or after October 1, 2019. Waiver payments to hospitals for uncompensated care provided before October 1, 2019, are described in §355.8201 of this division (relating to Waiver Payments to Hospitals for Uncompensated Care). Waiver payments to hospitals must be in compliance with the Centers for Medicare & Medicaid Services approved waiver Program Funding and Mechanics Protocol, HHSC waiver instructions, and this section.

(b) Definitions.

(1) Affiliation agreement--An agreement, entered into between one or more privately-operated hospitals and a governmental entity that does not conflict with federal or state law. HHSC does not prescribe the form of the agreement.

(2) Allocation amount--The amount of funds approved by the Centers for Medicare & Medicaid Services for uncompensated-care payments for the demonstration year that is allocated to each uncompensated-care provider pool or individual hospital, as described in subsections (f)(2) and (g)(6) of this section.

(3) Anchor--The governmental entity identified by HHSC as having primary administrative responsibilities on behalf of a Regional Healthcare Partnership (RHP).

(4) Centers for Medicare & Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(5) Charity care--Healthcare services provided without expectation of reimbursement to uninsured patients who meet the provider's charity-care policy. The charity-care policy should adhere to the charity-care principles of the Healthcare Financial Management Association Principles and Practices Board Statement 15 (December 2012). Charity care includes full or partial discounts given to uninsured patients who meet the provider's financial assistance policy. Charity care does not include bad debt, courtesy allowances, or discounts given to patients who do not meet the provider's charity-care policy or financial assistance policy.

(6) Data year--A 12-month period that is described in §355.8066 of this subchapter (relating to Hospital-Specific Limit Methodology) and from which HHSC will compile cost and payment data to determine uncompensated-care payment amounts. This period corresponds to the Disproportionate Share Hospital data year.

(7) Delivery System Reform Incentive Payments (DSRIP)--Payments related to the development or implementation of a program of activity that supports a hospital's efforts to enhance access to health care, the quality of care, and the health of patients and families it serves. These payments are not considered patient-care revenue and are not offset against the hospital's costs when calculating the hospital-specific limit as described in §355.8066 of this subchapter.

(8) Demonstration year--The 12-month period beginning October 1 for which the payments calculated under this section are made. This period corresponds to the Disproportionate Share Hospital (DSH) program year. Demonstration year one corresponded to the 2012 DSH program year, October 1, 2011, through September 30, 2012.

(9) Disproportionate Share Hospital (DSH)--A hospital participating in the Texas Medicaid program that serves a disproportionate share of low-income patients and is eligible for additional reimbursement from the DSH fund.

(10) Governmental entity--A state agency or a political subdivision of the state. A governmental entity includes a hospital authority, hospital district, city, county, or state entity.

(11) HHSC--The Texas Health and Human Services Commission, or its designee.

(12) Institution for mental diseases (IMD)--A hospital that is primarily engaged in providing psychiatric diagnosis, treatment, or care of individuals with mental illness.

(13) Intergovernmental transfer (IGT)--A transfer of public funds from a governmental entity to HHSC.

(14) Large public hospital--An urban public hospital - Class one as defined in §355.8065 of this subchapter (relating to Disproportionate Share Hospital Reimbursement Methodology).

(15) Mid-Level Professional--Medical practitioners which include the following professions only:

(A) Certified Registered Nurse Anesthetists;

(B) Nurse Practitioners;

(C) Physician Assistants;

(D) Dentists;

(E) Certified Nurse Midwives;

(F) Clinical Social Workers;

(G) Clinical Psychologists; and

(H) Optometrists.

(16) Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a governmental entity. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(17) Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform. Regional Healthcare Partnerships will support coordinated, efficient delivery of quality care and a plan for investments in system transformation that is driven by the needs of local hospitals, communities, and populations.

(18) RHP plan--A multi-year plan within which participants propose their portion of waiver funding and DSRIP projects.

(19) Rural hospital--A hospital enrolled as a Medicaid provider that:

(A) is located in a county with 60,000 or fewer persons according to the 2010 U.S. Census; or

(B) was designated by Medicare as a Critical Access Hospital (CAH) or a Sole Community Hospital (SCH) before October 1, 2021; or

(C) is designated by Medicare as a CAH, SCH, or Rural Referral Center (RRC); and is not located in a Metropolitan Statistical Area (MSA), as defined by the U.S. Office of Management and Budget; or

(D) meets all of the following:

(i) has 100 or fewer beds;

(ii) is designated by Medicare as a CAH, SCH, or an[a] RRC; and

(iii) is located in an MSA.

(20) Service Delivery Area (SDA)--The counties included in any HHSC-defined geographic area as applicable to each Managed Care Organization (MCO) [~~MCO~~].

(21) Uncompensated-care application--A form prescribed by HHSC to identify uncompensated costs for Medicaid-enrolled providers.

(22) Uncompensated-care payments--Payments intended to defray the uncompensated costs of charity care as defined in paragraph (5) of this subsection.

(23) Uninsured patient--An individual who has no health insurance or other source of third-party coverage for the services provided. The term includes an individual enrolled in Medicaid who received services that do not meet the definition of medical assistance in section 1905(a) of the Social Security Act (Medicaid services), if such inclusion is specified in the hospital's charity-care policy or financial assistance policy and the patient meets the hospital's policy criteria.

(24) Waiver--The Texas Healthcare Transformation and Quality Improvement Program Medicaid demonstration waiver under §1115 of the Social Security Act.

(c) Eligibility. A hospital that meets the requirements described in this subsection may receive payments under this section.

(1) Generally. To be eligible for any payment under this section:

(A) a hospital must be enrolled as a Medicaid provider in the State of Texas at the beginning of the demonstration year; and

(B) if it is a hospital not operated by a governmental entity, it must have filed with HHSC an affiliation agreement and the documents described in clauses (i) and (ii) of this subparagraph.

(i) Eligible Hospitals. The hospital must certify on a form prescribed by HHSC:

(I) that it is a privately-operated hospital;

(II) that no part of any payment to the hospital under this section will be returned or reimbursed to a governmental entity with which the hospital affiliates; and

(III) that no part of any payment to the hospital under this section will be used to pay a contingent fee, consulting fee, or legal fee associated with the hospital's receipt of the supplemental funds.

(ii) Governmental Entity Acknowledgments. The governmental entity that is party to the affiliation agreement must certify on a form prescribed by HHSC:

(I) that the governmental entity has not received and has no agreement to receive any portion of the payments made to any hospital that is party to the agreement;

(II) that the governmental entity has not entered into a contingent fee arrangement related to the governmental entity's participation in the waiver program;

(III) that the governmental entity adopted the conditions described in the certification form prescribed by or otherwise approved by HHSC pursuant to a vote of the governmental entity's governing body in a public meeting preceded by public notice published in accordance with the governmental entity's usual and customary practices or the Texas Open Meetings Act, as applicable; and

(IV) that all affiliation agreements, consulting agreements, or legal services agreements executed by the governmental entity related to its participation in this waiver payment program are available for public inspection upon request.

(iii) Submission requirements.

(I) Initial submissions. The parties must initially submit the affiliation agreements and certifications described in this subsection to the HHSC Provider Finance Department on the earlier of the following occurrences after the documents are executed:

(-a-) the date the hospital submits the uncompensated-care application that is further described in paragraph (2) of this subsection; or

(-b-) the new affiliation cut-off date posted on HHSC Provider Finance Departments' website for each payment under this section.

(II) Subsequent submissions. The parties must submit revised documentation to HHSC as follows.[:]

(-a-) When the nature of the affiliation changes or parties to the agreement are added or removed, the parties must submit the revised affiliation agreement and related hospital and governmental entity certifications.

(-b-) When there are changes in ownership, operation, or provider identifiers, the hospital must submit a revised hospital certification.

(-c-) The parties must submit the revised documentation thirty days before the projected deadline for completing the IGT for the first payment under the revised affiliation agreement. The projected deadline for completing the IGT is posted on HHSC Provider Finance Department's website for each payment under this section.

(III) Notification Requirement. A hospital that submits new or revised documentation under subclause (I) or (II) of this clause must notify the Anchor of the RHP in which the hospital participates.

(IV) Request for Modifications. The certification forms must not be modified except for those changes approved by HHSC prior to submission.

(-a-) Within 10 business days of HHSC Provider Finance Department receiving a request for approval of proposed modifications, HHSC will approve, reject, or suggest changes to the proposed certification forms.

(-b-) A request for HHSC approval of proposed modifications to the certification forms will not delay the submission deadlines established in this clause.

(V) Failure to Submit Required Documentation. A hospital that fails to submit the required documentation in compliance with this subparagraph is not eligible to receive a payment under this section.

(2) Uncompensated-care payments. For a hospital to be eligible to receive uncompensated-care payments, in addition to the requirements in paragraph (1) of this subsection, the hospital must:

(A) submit to HHSC an uncompensated-care application for the demonstration year, as is more fully described in subsection (g)(1) of this section, by the deadline specified by HHSC; and

(B) submit to HHSC documentation of:

(i) its participation in an RHP; or

(ii) approval from CMS of its eligibility for uncompensated-care payments without participation in an RHP.

(3) Changes that may affect eligibility for uncompensated-care payments.

(A) If a hospital closes, loses its license, loses its Medicare or Medicaid eligibility, withdraws from participation in an RHP, or files bankruptcy before receiving all or a portion of the uncompensated-care payments for a demonstration year, HHSC will determine the hospital's eligibility to receive payments going forward on a case-by-case basis. In making the determination, HHSC will consider multiple factors including whether the hospital was in compliance with all requirements during the demonstration year and whether it can satisfy the requirement to cooperate in the reconciliation process as described in subsection (i) of this section.

(B) A hospital must notify HHSC Provider Finance Department in writing within 30 days of the filing of bankruptcy or of changes in ownership, operation, licensure, Medicare or Medicaid enrollment, or affiliation that may affect the hospital's continued eligibility for payments under this section.

(d) Source of funding. The non-federal share of funding for payments under this section is limited to public funds from governmental entities. Governmental entities that choose to support payments under this section affirm that funds transferred to HHSC meet federal requirements related to the non-federal share of such payments, includ-

ing §1903(w) of the Social Security Act. Prior to processing uncompensated-care payments for the final payment period within a waiver demonstration year for any uncompensated-care pool or sub-pool described in subsection (f)(2) of this section, HHSC will survey the governmental entities that provide public funds for the hospitals in that pool or sub-pool to determine the amount of funding available to support payments from that pool or sub-pool.

(e) Payment frequency. HHSC will distribute waiver payments on a schedule to be determined by HHSC and posted on HHSC's website.

(f) Funding limitations.

(1) Payments made under this section are limited by the maximum aggregate amount of funds allocated to the provider's uncompensated-care pool for the demonstration year. If payments for uncompensated care for an uncompensated-care pool attributable to a demonstration year are expected to exceed the aggregate amount of funds allocated to that pool by HHSC for that demonstration year, HHSC will reduce payments to providers in the pool as described in subsection (g)(6) of this section.

(2) HHSC will establish the following uncompensated-care pools: for demonstration years nine and ten, a state-owned hospital pool, a non-state-owned hospital pool, a physician group practice pool, a governmental ambulance provider pool, and a publicly owned dental provider pool. Beginning with demonstration year eleven and after, the physician group practice pool will be further divided into a state-owned physician group practice pool and a non-state-owned physician group practice pool.

(A) The state-owned hospital pool.

(i) The state-owned hospital pool funds uncompensated-care payments to state-owned teaching hospitals, state-owned IMDs, and the Texas Center for Infectious Disease.

(ii) HHSC will determine the allocation for this pool at an amount less than or equal to the total annual maximum uncompensated-care payment amount for these hospitals as calculated in subsection (g)(2) of this section.

(B) The state-owned physician group practice pool.

(i) Beginning in demonstration year eleven, the state-owned physician group practice pool funds uncompensated-care payments to state-owned physician groups, as defined in §355.8214 of this division (relating to Waiver Payments to Physician Group Practices for Uncompensated Charity Care).

(ii) HHSC will determine the allocation for this pool at an amount less than or equal to the total maximum uncompensated-care payment amount for these physicians.

(C) [~~(B)~~] Non-state-owned provider pools. HHSC will allocate the remaining available uncompensated-care funds, if any, among the non-state-owned provider pools as described in this subparagraph. The remaining available uncompensated-care funds equal the amount of funds approved by CMS for uncompensated-care payments for the demonstration year less the sum of funds allocated to the state-owned hospital pool under subparagraph (A) and the state-owned physician group practice pool under subparagraph (B) of this paragraph. HHSC will allocate the funds among non-state-owned provider pools based on the following amounts.

(i) For the physician group practice pool in demonstration years nine and ten, or the non-state-owned physician group practice pool beginning in demonstration year eleven, the governmental ambulance provider pool, and the publicly owned dental provider pool:

(I) for demonstration year nine, an amount to equal the percentage of the applicable total uncompensated-care pool amount paid to each group in demonstration year six; and

(II) for demonstration years ten and after, an amount to equal a percentage determined by HHSC annually based on factors including the amount of reported charity-care costs [~~for the previous demonstration year~~] and the ratio of reported charity-care costs to hospitals' charity-care costs. For physicians, current year charity-care costs will be used, while for dental and ambulance providers, prior year charity-care costs will be used.

(ii) For the non-state-owned hospital pool, all of the remaining funds after the allocations described in clause (i) of this subparagraph. HHSC will further allocate the funds in the non-state-owned hospital pool among all hospitals in the pool and create non-state-owned hospital sub-pools as follows:

(I) calculate a revised maximum payment amount for each non-state-owned hospital as described in subsection (g)(6) of this section and allocate that amount to the hospital; and

(II) group all non-state-owned hospitals and non-state-owned physician groups into sub-pools based on their geographic location within one of the state's Medicaid service delivery areas (SDAs), as described in subsection (g)(7) of this section.

(3) Payments made under this section are limited by the availability of funds identified in subsection (d) of this section and timely received by HHSC. If sufficient funds are not available for all payments for which the providers in each pool or sub-pool are eligible, HHSC will reduce payments as described in subsection (h)(2) of this section.

(4) If for any reason funds allocated to a provider pool or to individual providers within a sub-pool are not paid to providers in that pool or sub-pool for the demonstration year, the funds will be redistributed to other provider pools based on each pool's pro-rata share of remaining uncompensated costs for the same demonstration year. The redistribution will occur when the reconciliation for that demonstration year is performed.

(g) Uncompensated-care payment amount.

(1) Application.

(A) Cost and payment data reported by a hospital in the uncompensated-care application is used to calculate the annual maximum uncompensated-care payment amount for the applicable demonstration year, as described in paragraph (2) of this subsection.

(B) Unless otherwise instructed in the application, a hospital must base the cost and payment data reported in the application on its applicable as-filed CMS 2552 Cost Report(s) For Electronic Filing Of Hospitals corresponding to the data year and must comply with the application instructions or other guidance issued by HHSC.

(i) When the application requests data or information outside of the as-filed cost report(s), a hospital must provide all requested documentation to support the reported data or information.

(ii) For a new hospital, the cost and payment data period may differ from the data year, resulting in the eligible uncompensated costs based only on services provided after the hospital's Medicaid enrollment date. HHSC will determine the data period in such situations.

(2) Calculation.

(A) A hospital's annual maximum uncompensated-care payment amount is the sum of the components described in clauses (i) - (iv) of this subparagraph.

(i) The hospital's inpatient and outpatient charity-care costs pre-populated in or reported on the uncompensated-care application, as described in paragraph (3) of this subsection, reduced by interim DSH payments for the same program period, if any, that reimburse the hospital for the same costs. To identify DSH payments that reimburse the hospital for the same costs, HHSC will:

(I) use [~~Use~~] self-reported information on the application to identify charges that can be claimed by the hospital in both DSH and Uncompensated Care (UC) [~~UC~~], convert the charges to cost, and reduce the cost by any applicable payments described in paragraph (3) of this subsection;

(II) calculate [~~Calculate~~] a DSH-only uninsured shortfall by reducing the hospital's total uninsured costs, calculated as described in §355.8066 of this subchapter [~~chapter~~], by the result from subclause (I) of this clause; and

(III) reduce [~~Reduce~~] the interim DSH payment amount by the sum of:

(-a-) the DSH-only uninsured shortfall calculated as described in subclause (II) of this clause; and

(-b-) the hospital's Medicaid shortfall, calculated as described in §355.8066 of this subchapter [~~chapter~~].

(ii) Other eligible costs for the data year, as described in paragraph (4) of this subsection.[~~;~~]

(iii) Cost and payment adjustments, if any, as described in paragraph (5) of this subsection.[~~; and~~]

(iv) For each large public hospital, the amount transferred to HHSC by that hospital's affiliated governmental entity to support DSH payments to that hospital and private hospitals for the same demonstration year.

(B) A hospital also participating in the DSH program cannot receive total uncompensated-care payments under this section (related to inpatient and outpatient hospital services provided to uninsured charity-care individuals) and DSH payments that exceed the hospital's total eligible uncompensated costs. For purposes of this requirement, "total eligible uncompensated costs" means the hospital's state payment cap for interim payments or DSH hospital-specific limit (HSL) in the UC reconciliation plus the unreimbursed costs of inpatient and outpatient services provided to uninsured charity-care patients not included in the state payment cap or HSL for the corresponding program year.

(3) Hospital charity-care costs.

(A) For each hospital required by Medicare to submit schedule S-10 of the CMS 2552-10 cost report, HHSC will pre-populate the uncompensated-care application described in paragraph (1) of this subsection with the uninsured charity-care charges and payments reported by the hospital on schedule S-10 for the hospital's cost reporting period ending in the calendar year two years before the demonstration year. For example, for demonstration year 9, which coincides with the federal fiscal year 2020, HHSC will use data from the hospital's cost reporting period ending in the calendar year 2018. Hospitals should also report any additional payments associated with their uninsured charity charges that were not captured in worksheet S-10 in the application described in paragraph (1) of this subsection.

(B) For each hospital not required by Medicare to submit schedule S-10 of the CMS 2552-10 cost report, the hospital must report its hospital charity-care charges and payments in compliance with the instructions on the uncompensated-care application described in paragraph (1) of this subsection.

(i) The instructions for reporting eligible charity-care costs in the application will be consistent with instructions contained in schedule S-10.

(ii) An IMD may not report charity-care charges for services provided during the data year to patients aged 21 through 64.

(4) Other eligible costs.

(A) In addition to inpatient and outpatient charity-care costs, a hospital may also claim reimbursement under this section for uncompensated charity care, as specified in the uncompensated-care application, that is related to the following services provided to uninsured patients who meet the hospital's charity-care policy:

(i) direct patient-care services of physicians and mid-level professionals; and

(ii) certain pharmacy services.

(B) A payment under this section for the costs described in subparagraph (A) of this paragraph are not considered inpatient or outpatient Medicaid payments for the purpose of the DSH audit described in §355.8065 of this subchapter.

(5) Adjustments. When submitting the uncompensated-care application, a hospital may request that cost and payment data from the data year be adjusted to reflect increases or decreases in costs resulting from changes in operations or circumstances.

(A) A hospital:

(i) may request that costs not reflected on the as-filed cost report, but which would be incurred for the demonstration year, be included when calculating payment amounts; and

(ii) may request that costs reflected on the as-filed cost report, but which would not be incurred for the demonstration year, be excluded when calculating payment amounts.

(B) Documentation supporting the request must accompany the application, and provide sufficient information for HHSC to verify the link between the changes to the hospital's operations or circumstances and the specified numbers used to calculate the amount of the adjustment.

(i) Such supporting documentation must include:

(I) a detailed description of the specific changes to the hospital's operations or circumstances;

(II) verifiable information from the hospital's general ledger, financial statements, patient accounting records or other relevant sources that support the numbers used to calculate the adjustment; and

(III) if applicable, a copy of any relevant contracts, financial assistance policies, or other policies or procedures [~~policies/procedures~~] that verify the change to the hospital's operations or circumstances.

(ii) HHSC will deny a request if it cannot verify that costs not reflected on the as-filed cost report will be incurred for the demonstration year.

(C) Notwithstanding the availability of adjustments impacting the cost and payment data described in this section, no adjustments to the state payment cap will be considered for purposes of Medicaid DSH payment calculations described in §355.8065 of this subchapter.

(6) Reduction to stay within uncompensated-care pool allocation amounts. Prior to processing uncompensated-care payments for any payment period within a waiver demonstration year for any uncompensated-care pool described in subsection (f)(2) of this section, HHSC will determine if such a payment would cause total uncompensated-care payments for the demonstration year for the pool to exceed the allocation amount for the pool and will reduce the maximum uncompensated-care payment amounts providers in the pool are eligible to receive for that period as required to remain within the pool allocation amount.

(A) Calculations in this paragraph will be applied to each of the uncompensated-care pools separately.

(B) HHSC will calculate the following data points.[:]

(i) For each provider, prior period payments to equal prior period uncompensated-care payments for the demonstration year.

(ii) For each provider, a maximum uncompensated-care payment for the payment period to equal the sum of:

(I) the portion of the annual maximum uncompensated-care payment amount calculated for that provider (as described in this section and the sections referenced in subsection (f)(2)(C)[~~(B)~~] of this section) that is attributable to the payment period; and

(II) the difference, if any, between the portions of the annual maximum uncompensated-care payment amounts attributable to prior periods and the prior period payments calculated in clause (i) of this subparagraph.

(iii) The cumulative maximum payment amount to equal the sum of prior period payments from clause (i) of this subparagraph and the maximum uncompensated-care payment for the payment period from clause (ii) of this subparagraph for all members of the pool combined.

(iv) A pool-wide total maximum uncompensated-care payment for the demonstration year to equal the sum of all pool members' annual maximum uncompensated-care payment amounts for the demonstration year from paragraph (2) of this subsection.

(v) A pool-wide ratio calculated as the pool allocation amount from subsection (f)(2) of this section divided by the pool-wide total maximum uncompensated-care payment amount for the demonstration year from clause (iv) of this subparagraph.

(C) If the cumulative maximum payment amount for the pool from subparagraph (B)(iii) of this paragraph is less than the allocation amount for the pool, each provider in the pool is eligible to receive its maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph without any reduction to remain within the pool allocation amount.

(D) If the cumulative maximum payment amount for the pool from subparagraph (B)(iii) of this paragraph is more than the allocation amount for the pool, HHSC will calculate a revised maximum uncompensated-care payment for the payment period for each provider in the pool as follows.[:]

(i) The physician group practice pool, the governmental ambulance provider pool, and the publicly owned dental provider pool. HHSC will calculate a capped payment amount equal to the product of each provider's annual maximum uncompensated-care payment amount for the demonstration year from paragraph (2) of this subsection and the pool-wide ratio calculated in subparagraph (B)(v) of this paragraph.

(ii) The non-state-owned hospital pool.

(I) For rural hospitals, HHSC will:

(-a-) sum the annual maximum uncompensated-care payment amounts from paragraph (2) of this subsection for all rural hospitals in the pool;

(-b-) in demonstration year:

(-1-) nine and ten, set aside for rural hospitals the amount calculated in item (-a-) of this subclause; or

(-2-) eleven and after, set aside for rural hospitals the lesser of the amount calculated in item (-a-) of this subclause or the amount set aside for rural hospitals in demonstration year ten;

(-c-) calculate a ratio to equal the rural hospital set-aside amount from item (-b-) of this subclause divided by the total annual maximum uncompensated-care payment amount for rural hospitals from item (-a-) of this subclause; and

(-d-) calculate a capped payment amount equal to the product of each rural hospital's annual maximum uncompensated-care payment amount for the demonstration year from paragraph (2) of this subsection and the ratio calculated in item (-c-) of this subclause.

(II) For non-rural hospitals, HHSC will:

(-a-) sum the annual maximum uncompensated-care payment amounts from paragraph (2) of this subsection for all non-rural hospitals in the pool;

(-b-) calculate an amount to equal the difference between the pool allocation amount from subsection (f)(2) of this section and the set-aside amount from subclause (I)(-b-) of this clause;

(-c-) calculate a ratio to equal the result from item (-b-) of this subclause divided by the total annual maximum uncompensated-care payment amount for non-rural hospitals from item (-a-) of this subclause; and

(-d-) calculate a capped payment amount equal to the product of each non-rural hospital's annual maximum uncompensated-care payment amount for the demonstration year from paragraph (2) of this subsection and the ratio calculated in item (-c-) of this subclause.

(III) The revised maximum uncompensated-care payment for the payment period equals the lesser of:

(-a-) the maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph; or

(-b-) the difference between the capped payment amount from subclause (I) or (II) of this clause and the prior period payments from subparagraph (B)(i) of this paragraph.

(IV) HHSC will allocate to each non-state-owned hospital the revised maximum uncompensated-care payment amount from subclause (III) of this clause.

(7) Non-state-owned hospital SDA sub-pools. After HHSC completes the calculations described in paragraph (6) of this subsection, HHSC will place each non-state-owned hospital into a sub-pool based on the hospital's geographic location in a designated Medicaid SDA for purposes of the calculations described in subsection (h) of this section.

(8) Prohibition on duplication of costs. Eligible uncompensated-care costs cannot be reported on multiple uncompensated-care applications, including uncompensated-care applications for other programs. Reporting on multiple uncompensated-care applications is a duplication of costs.

(9) Advance payments.

(A) In a demonstration year in which uncompensated-care payments will be delayed pending data submission or for other reasons, HHSC may make advance payments to hospitals that meet the eligibility requirements described in subsection (c)(2) of this section and submitted an acceptable uncompensated-care application for the preceding demonstration year from which HHSC calculated an annual maximum uncompensated-care payment amount for that year.

(B) The amount of the advance payments will:

(i) in demonstration year nine, be based on uninsured charity-care costs reported by the hospital on schedule S-10 of the CMS 2552-10 cost report used for purposes of sizing the UC pool, or on documentation submitted for that purpose by each hospital not required to submit schedule S-10 with its [~~their~~] cost report; and

(ii) in demonstration years ten and after, be a percentage, to be determined by HHSC, of the annual maximum uncompensated-care payment amount calculated by HHSC for the preceding demonstration year.

(C) Advance payments are considered to be prior period payments as described in paragraph (6)(B)(i) of this subsection.

(D) A hospital that did not submit an acceptable uncompensated-care application for the preceding demonstration year is not eligible for an advance payment.

(E) If a partial year uncompensated-care application was used to determine the preceding demonstration year's payments, data from that application may be annualized for use in the computation of an advance payment amount.

(h) Payment methodology.

(1) Notice. Prior to making any payment described in subsection (g) of this section, HHSC will give notice of the following information:

(A) the payment amount for each hospital in a pool or sub-pool for the payment period (based on whether the payment is made quarterly, semi-annually, or annually);

(B) the maximum IGT amount necessary for hospitals in a pool or sub-pool to receive the amounts described in subparagraph (A) of this paragraph; and

(C) the deadline for completing the IGT.

(2) Payment amount. The amount of the payment to hospitals in each pool or sub-pool will be determined based on the amount of funds transferred by the affiliated governmental entities as follows.[:]

(A) If the governmental entities transfer the maximum amount referenced in paragraph (1) of this subsection, the hospitals in the pool or sub-pool will receive the full payment amount calculated for that payment period.

(B) If the governmental entities do not transfer the maximum amount referenced in paragraph (1) of this subsection, each hospital in the pool or sub-pool will receive a portion of its payment amount for that period, based on the hospital's percentage of the total payment amounts for all providers [~~hospitals~~] in the pool or sub-pool.

(3) Final payment opportunity. Within payments described in this section, governmental entities that do not transfer the maximum IGT amount described in paragraph (1) of this subsection during a demonstration year will be allowed to fund the remaining payments to hospitals in the pool or sub-pool at the time of the final payment for that demonstration year. The IGT will be applied in the following order:

(A) to the final payments up to the maximum amount; and

(B) to remaining balances for prior payment periods in the demonstration year.

(i) Reconciliation. HHSC will reconcile actual costs incurred by the hospital for the demonstration year with uncompensated-care payments, if any, made to the hospital for the same period.[:]

(1) If a hospital received payments in excess of its actual costs, the overpaid amount will be recouped from the hospital, as described in subsection (j) of this section.

(2) If a hospital received payments less than its actual costs, and if HHSC has available waiver funding for the demonstration year in which the costs were accrued, the hospital may receive reimbursement for some or all of those actual documented unreimbursed costs.

(3) Each hospital that received an uncompensated-care payment during a demonstration year must cooperate in the reconciliation process by reporting its actual costs and payments for that period on the form provided by HHSC for that purpose, even if the hospital closed or withdrew from participation in the uncompensated-care program. If a hospital fails to cooperate in the reconciliation process, HHSC may recoup the full amount of uncompensated-care payments to the hospital for the period at issue.

(j) Recoupment.

(1) In the event of an overpayment identified by HHSC or a disallowance by CMS of federal financial participation related to a hospital's receipt or use of payments under this section, HHSC may recoup an amount equivalent to the amount of the overpayment or disallowance. The non-federal share of any funds recouped from the hospital will be returned to the governmental entities in proportion to each entity's initial contribution to funding the program for that hospital's SDA in the applicable program year.

(2) Payments under this section may be subject to adjustment for payments made in error, including, without limitation, adjustments under §371.1711 of this title (relating to Recoupment of Overpayments and Debts), 42 CFR Part 455, and Chapter 403 of the Texas Government Code. HHSC may recoup an amount equivalent to any such adjustment.

(3) HHSC may recoup from any current or future Medicaid payments as follows.[:]

(A) HHSC will recoup from the hospital against which any overpayment was made or disallowance was directed.

(B) If the hospital has not paid the full amount of the recoupment or entered into a written agreement with HHSC to do so within 30 days of the hospital's receipt of HHSC's written notice of recoupment, HHSC may withhold any or all future Medicaid payments from the hospital until HHSC has recovered an amount equal to the amount overpaid or disallowed.

§355.8214. Waiver Payments to Physician Group Practices for Uncompensated Charity Care.

(a) Introduction. Beginning October 1, 2019, payments are available under this section to help defray the uncompensated charity-care costs incurred by eligible physician group practices described in subsection (c) of this section. Waiver payments to physician group practices for uncompensated care provided before October 1, 2019, are described in §355.8202 of this division (relating to Waiver Payments to Physician Group Practices for Uncompensated Care). Waiver payments to an eligible physician group practice must be in compliance with the Centers for Medicare & Medicaid Services approved waiver

Program Funding and Mechanics Protocol, HHSC waiver instructions, and this section.

(b) Definitions.

(1) Allocation amount--The amount of funds approved by the Centers for Medicare & Medicaid Services for uncompensated-care payments for the demonstration year that is allocated to the physician group practice uncompensated-care pool, as described in §355.8212 of this division (relating to Waiver Payments to Hospitals for Uncompensated Charity Care). Starting in demonstration year eleven, the physician group practice uncompensated-care pool will be further divided into a state-owned physician group practice pool and a non-state-owned physician group practice pool.

(2) Centers for Medicare & Medicaid Services (CMS)--The federal agency within the United States Department of Health and Human Services responsible for overseeing and directing Medicare and Medicaid, or its successor.

(3) Charity care--Healthcare services provided without expectation of reimbursement to uninsured patients who meet the provider's charity-care policy. The charity-care policy should adhere to the charity-care principles of the Healthcare Financial Management Association Principles and Practices Board Statement 15 (December 2012). Charity care includes full or partial discounts given to uninsured patients who meet the provider's financial assistance policy. Charity care does not include bad debt, courtesy allowances, or discounts given to patients who do not meet the provider's charity-care policy or financial assistance policy.

(4) Demonstration year--The 12-month period beginning October 1 for which the payments calculated under this section are made. Demonstration year one was October 1, 2011, through September 30, 2012.

(5) Governmental entity--A state agency or a political subdivision of the state. A governmental entity includes a hospital authority, hospital district, city, county, or state entity.

(6) HHSC--The Texas Health and Human Services Commission or its designee.

(7) Intergovernmental transfer (IGT)--A transfer of public funds from a governmental entity to HHSC.

(8) Mid-Level Professional--Medical practitioners which include the following professions only:

(A) Certified Registered Nurse Anesthetists;

(B) Nurse Practitioners;

(C) Physician Assistants;

(D) Dentists;

(E) Certified Nurse Midwives;

(F) Clinical Social Workers;

(G) Clinical Psychologists; and

(H) Optometrists.

(9) Non-state-owned physician group--Any physician group not included in the definition of state-owned physician group that qualifies for uncompensated care payments.

(10) [~~(9)~~] Public funds--Funds derived from taxes, assessments, levies, investments, and other public revenues within the sole and unrestricted control of a governmental entity. Public funds do not include gifts, grants, trusts, or donations, the use of which is conditioned on supplying a benefit solely to the donor or grantor of the funds.

(11) [~~(10)~~] Regional Healthcare Partnership (RHP)--A collaboration of interested participants that work collectively to develop and submit to the state a regional plan for health care delivery system reform. Regional Healthcare Partnerships will support coordinated, efficient delivery of quality care and a plan for investments in system transformation that is driven by the needs of local hospitals, communities, and populations.

(12) Service Delivery Area (SDA)--The counties included in any HHSC-defined geographic area as applicable to each Managed Care Organization.

(13) State-owned physician group--An eligible physician group practice that is state-owned or state-operated. Physicians under contract with such a physician group practice are not included. Eligible state-owned or state-operated physician group practices consist of those affiliated with:

(A) University of Texas--Southwestern;

(B) University of Texas--San Antonio;

(C) University of Texas--Tyler;

(D) University of Texas--Houston;

(E) University of Texas Medical Branch--Galveston;

(F) University of Texas--MD Anderson Cancer Center;

(G) University of North Texas;

(H) Texas Tech University--Amarillo;

(I) Texas Tech University--El Paso;

(J) Texas Tech University--Lubbock;

(K) Texas Tech University--Odessa; or

(L) Texas A&M Health Science Center.

(14) [~~(11)~~] Uncompensated-care payments--Payments intended to defray the uncompensated costs of charity care as defined in paragraph (3) of this subsection.

(15) [~~(12)~~] Uncompensated-care physician application--A form prescribed by HHSC to identify uncompensated costs for Medicaid-enrolled providers.

(16) [~~(13)~~] Uninsured patient--An individual who has no health insurance or other source of third-party coverage for services, as defined by CMS. The term includes an individual enrolled in Medicaid who received services that do not meet the definition of medical assistance in section 1905(a) of the Social Security Act (Medicaid services), if such inclusion is specified in the hospital's charity-care policy or financial assistance policy and the patient meets the hospital's policy criteria.

(17) [~~(14)~~] Waiver--The Texas Healthcare Transformation and Quality Improvement Program Medicaid demonstration waiver under §1115 of the Social Security Act.

(c) Eligibility.

(1) A physician group practice is eligible to receive payments under this section if:

(A) it is enrolled as a Medicaid provider in the State of Texas at the beginning of the demonstration year;

(B) for a private physician group practice only, it has met the submission requirements set forth in §355.8212(c)(1)(B)(iii) of this division, only insofar as that clause relates to certifications, and it

files documents with HHSC by the date specified by HHSC, certifying that:

(i) all funds transferred to HHSC as the non-federal share of the waiver payments are public funds; and

(ii) no part of any payment received by the physician group practice under this section will be returned to the governmental entity that transferred to HHSC the non-federal share of the waiver payments;

(C) it has submitted to HHSC an acceptable uncompensated-care physician application for the demonstration year by the deadline specified by HHSC; and

(D) it either:

(i) received a supplemental payment under the Texas Medicaid State Plan for claims adjudicated in one or more months between October 1, 2010, and September 30, 2011; or

(ii) is the successor in a contract to a physician group practice that received a supplemental payment under the Texas Medicaid State Plan for claims adjudicated in one or more months between October 1, 2010, and September 30, 2011.

(2) A physician group practice that fails to submit the required documentation in compliance with this subsection will not receive a payment under this section.

(d) Source of funding.

(1) The non-federal share of funding for payments under this section is limited to and obtained through IGTs from the governmental entities that own or are affiliated with the providers in the physician group practice uncompensated-care pool. Governmental entities that choose to support payments under this section affirm that funds transferred to HHSC meet federal requirements related to the non-federal share of such payments, including §1903(w) of the Social Security Act. Prior to processing uncompensated-care payments for any payment period within a waiver demonstration year, HHSC will survey the governmental entities that provide public funds for the physician group practices pool to determine the amount of funding available to support payments from that pool.

(2) An IGT that is not received by the date specified by HHSC may not be accepted.

(e) Payment frequency. HHSC will distribute waiver payments on a schedule to be determined by HHSC and posted on HHSC's website.

(f) Funding limitations.

(1) For demonstration years nine and ten, payments [~~Payments~~] made under this section are limited by the maximum amount of funds allocated to the physician group practice uncompensated-care pool for the demonstration year as described in §355.8212 of this division. If payments for uncompensated care for the physician group practice uncompensated-care pool attributable to a demonstration year are expected to exceed the amount of funds allocated to that pool by HHSC for that demonstration year, HHSC will reduce payments to providers in the pool as described in subsection (g)(4) of this section. Payments made under this section are limited by the availability of funds identified in subsection (d) of this section. If sufficient funds are not available for all payments for which all physician group practices are eligible, HHSC will reduce payments as described in subsection (h)(2) of this section.

(2) Beginning in demonstration year eleven, payments made under this section are limited by the maximum amount of funds allocated to the non-state-owned physician group practice uncompensated-care pool for the demonstration year as described in §355.8212 of this division. Non-state-owned physicians as defined in subsection (b) of this section, are reimbursed through the non-state-owned physician group practice uncompensated-care pool. If payments for uncompensated care for the non-state-owned physician group practice uncompensated-care pool attributable to a demonstration year are expected to exceed the amount of funds allocated to that pool by HHSC for that demonstration year, HHSC will reduce payments to providers in the non-state-owned pool as described in subsection (g)(4) of this section. Payments made under this section are limited by the availability of funds identified in subsection (d) of this section. If sufficient funds are not available for all payments for which all physician group practices are eligible, HHSC will reduce payments as described in subsection (h)(2) of this section.

(g) Uncompensated-care payment amount.

(1) Uncompensated-care physician application. Payments to eligible physician group practices are based on cost and payment data reported by the physician group practice on an application form prescribed by HHSC.

(A) Cost and payment data reported by the physician group practice in the uncompensated-care physician application is used to:

(i) calculate the annual maximum uncompensated-care payment amount for the applicable demonstration year, as described in paragraph (2) of this subsection; and

(ii) reconcile the actual uncompensated-care costs reported by the physician group practice for a prior period with uncompensated-care waiver payments, if any, made to the practice for the same period. The reconciliation process is more fully described in subsection (j) of this section.

(B) Unless otherwise instructed in the uncompensated-care physician application:

(i) the cost and payment data reported in the uncompensated-care physician application must be consistent with Medicare cost-reporting principles and must comply with the application instructions or other guidance issued by HHSC, and the physician group practice must maintain sufficient documentation to support the reported data or information; and

(ii) the costs associated with an episode of care where a physician group practice is paid under contract must be reduced by any revenues associated with that episode of care prior to inclusion in the uncompensated-care physician application.

(C) If a physician group practice withdraws from participation in the waiver, the practice must submit an uncompensated-care application reporting its actual costs and payments for any period during which the practice received uncompensated-care payments. The uncompensated-care physician application will be used for the purpose described in subparagraph (A)(ii) of this paragraph. If a practice fails to submit the application reporting its actual costs, HHSC will recoup the full amount of uncompensated-care payments to the practice for the period at issue.

(2) Calculation. A physician group practice's annual maximum uncompensated-care payment amount is the sum of the following components:

(A) its unreimbursed charity-care costs, as reported on the uncompensated-care physician application; and

(B) cost and payment adjustments, if any, as described in paragraph (3) of this subsection.

(3) Adjustments. When submitting the uncompensated-care physician application, physician group practices may request that cost and payment data from the reporting period be adjusted to reflect increases or decreases in costs resulting from changes in operations or circumstances.

(A) A physician group practice may request that:

(i) costs not reflected on the financial documents supporting the application, but which would be incurred for the demonstration year, be included when calculating payment amounts; or

(ii) costs reflected on the financial documents supporting the application, but which would not be incurred for the demonstration year, be excluded when calculating payment amounts.

(B) Documentation supporting the request must accompany the application[~~,~~] and provide sufficient information for HHSC to verify the link between the changes to the provider's operations or circumstances and the specified numbers used to calculate the amount of the adjustment.

(i) Such supporting documentation must include:

(I) a detailed description of the specific changes to the provider's operations or circumstances;

(II) verifiable information from the provider's general ledger, financial statements, patient accounting records or other relevant sources that support the numbers used to calculate the adjustment; and

(III) if applicable, a copy of any relevant contracts, financial assistance policies, or other policies or procedures [~~policies/procedures~~] that verify the change to the provider's operations or circumstances.

(ii) HHSC will deny a request if it cannot verify that costs not reflected on the financial documents supporting the application will be incurred for the demonstration year.

(4) Reduction to stay within physician group practice uncompensated-care pool allocation amount. Prior to processing uncompensated-care payments for any payment period within a waiver demonstration year for the physician group practice uncompensated-care pool described in §355.8212 of this division, HHSC will determine if such a payment would cause total uncompensated-care payments for the demonstration year for the pool to exceed the allocation amount for the pool and will reduce the maximum uncompensated-care payment amounts providers in the pool are eligible to receive for that period as required to remain within the pool allocation amount.

(A) Calculations in this paragraph are limited to the physician group practice uncompensated-care pool.

(B) HHSC will calculate the following data points:

(i) for each provider, prior period payments to equal prior period uncompensated-care for the demonstration year;

(ii) for each provider, a maximum uncompensated-care payment for the payment period to equal the sum of:

(I) the portion of the annual maximum uncompensated-care payment amount calculated for that provider (as described in this section) that is attributable to the payment period; and

(II) the difference, if any, between the portions of the annual maximum uncompensated-care payment amounts attributable to prior periods and the prior period payments calculated in clause (i) of this subparagraph;

(iii) the cumulative maximum payment amount to equal the sum of prior period payments from clause (i) of this subparagraph and the maximum uncompensated-care payment for the payment period from clause (ii) of this subparagraph for all members of the pool combined;

(iv) a pool-wide total maximum uncompensated-care payment for the demonstration year to equal the sum of all pool member's annual maximum uncompensated-care payment amounts for the demonstration year from paragraph (2) of this subsection; and

(v) a pool-wide ratio calculated as the pool allocation amount from §355.8212 of this division divided by the pool-wide total maximum uncompensated-care payment amount for the demonstration year from clause (iv) of this subparagraph.

(C) If the cumulative maximum payment amount for the pool from subparagraph (B)(iii) of this paragraph is less than the allocation amount for the pool, each provider is eligible to receive its [~~their~~] maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph without any reduction to remain within the pool allocation amount.

(D) If the cumulative maximum payment amount for the pool from subparagraph (B)(iii) of this paragraph is more than the allocation amount for the pool, HHSC will calculate a revised maximum uncompensated-care payment for the payment period for each provider in the pool. HHSC will calculate a capped payment amount equal to the product of the provider's annual maximum uncompensated-care payment amount for the demonstration year from paragraph (2) of this subsection and the pool-wide ratio calculated in subparagraph (B)(v) of this paragraph. The revised maximum uncompensated-care payment for the payment period equals the lesser of:

(i) the maximum uncompensated-care payment for the payment period from subparagraph (B)(ii) of this paragraph; or

(ii) the difference between the capped payment amount from this subparagraph and the prior period payments from subparagraph (B)(i) of this paragraph.

(E) Once reductions to ensure that uncompensated-care expenditures do not exceed the allocation amount for the demonstration year for the pool are calculated, HHSC will not re-calculate the resulting payments for any provider for the demonstration year, including if the estimates of available non-federal-share funding upon which the reduction calculations were based are different than actual IGT amounts.

(5) Physician group or non-state-owned physician group SDA sub-pools. This section pertains to all physician groups prior to demonstration year eleven and non-state-owned physician groups beginning in demonstration year twelve. After HHSC completes the calculations described in paragraph (4) of this subsection, HHSC will add each physician group or non-state-owned physician group to a sub-pool with the non-state-owned hospitals described in §355.8212 of this division based on the physician group's geographic location in a designated Medicaid SDA for purposes of the calculations described in subsection (h) of this section.

(6) Prohibition on duplication of costs. Eligible uncompensated-care costs cannot be reported on multiple uncompensated-care applications, including uncompensated-care applications for other

programs. Reporting on multiple uncompensated-care applications is a duplication of costs.

(7) Advance payments.

(A) In a demonstration year in which uncompensated-care payments will be delayed pending data submission or for other reasons, HHSC may make advance payments to physician group practices that meet the eligibility requirements described in subsection (c) of this section and submitted an acceptable uncompensated-care physician application for the preceding demonstration year from which HHSC calculated an annual maximum uncompensated-care payment amount for that year.

(B) The amount of the advance payments will:

(i) in demonstration year nine, be based on documentation submitted by the physician group practice on a form designated by HHSC for that purpose; and

(ii) in demonstration years ten and after, be a percentage, to be determined by HHSC, of the annual maximum uncompensated-care payment amount calculated by HHSC for the preceding demonstration year.

(C) Advance payments are considered to be prior period payments as described in paragraph (4)(B)(i) of this subsection.

(D) A physician group practice that did not submit an acceptable uncompensated-care physician application for the preceding demonstration year is not eligible for an advance payment.

(E) If a partial year uncompensated-care physician application was used to determine the preceding demonstration year's payments, data from that application may be annualized for use in computation of an advance payment amount.

~~[(6) Prohibition on duplication of costs. Eligible uncompensated-care costs cannot be reported on multiple uncompensated-care applications, including uncompensated-care applications for other programs. Reporting on multiple uncompensated-care applications is duplication of costs.]~~

(h) Payment methodology.

(1) Prior to making any payment described in subsection (g) of this section, HHSC will give notice of the following information:

(A) the payment amount for each physician group practice in the pool for the payment period (based on whether the payment is made quarterly, semi-annually, or annually);

(B) the maximum IGT amount necessary for the physician group practices to receive the amount described in subparagraph (A) of this paragraph; and

(C) the deadline for completing the IGT.

(2) The amount of the payment to the physician group practices under paragraph (1) of this subsection will be determined based on the amount of funds transferred by the affiliated governmental entities as described as follows.[:]

(A) If the governmental entities transfer the maximum amount of funds described in paragraph (1)(B) of this subsection, the physician group practices will receive the maximum allowable payment amounts for that period.

(B) If the governmental entities do not transfer the maximum amount referenced in paragraph (1)(B) of this subsection, each physician group practice in the pool will receive a portion of its payment amount for that period, based on the physician group practice's percentage of the total payment amounts for all providers [~~physician group practices~~] in the pool or sub-pool.

(i) Reconciliation. Data on the uncompensated-care physician application will be used to reconcile actual costs incurred by the physician group practice for a prior period with uncompensated-care payments, if any, made to the physician group practice for the same period.

(1) If a physician group practice received payments in excess of its actual costs, the overpaid amount will be recouped from the physician group practice, as described in subsection (j) of this section.

(2) If a physician group practice received payments less than its actual costs, and if HHSC has available waiver funding for the period in which the costs were accrued, the physician group practice may receive reimbursement for some or all of those actual documented unreimbursed costs.

(j) Recoupment.

(1) In the event of a disallowance by CMS of federal financial participation related to a physician group practice's receipt or use of payments under this section, HHSC may recoup an amount equivalent to the amount of the overpayment or disallowance. The non-federal share of any funds recouped from the physician group practice will be returned to the entity that owns or is affiliated with the physician group practice.

(2) Payments under this section may be subject to adjustment for payments made in error, including, without limitation, adjustments under §371.1711 of this title (relating to Recoupment of Overpayments and Debts), 42 CFR Part 455, and Chapter 403 of the Texas Government Code. HHSC may recoup an amount equivalent to any such adjustment.

(3) HHSC may recoup from any current or future Medicaid payments as follows.[:]

(A) HHSC will recoup from the physician group practice against which any disallowance was directed or to which an overpayment was made.

(B) If[,] within 30 days of the physician group practice's receipt of HHSC's written notice of recoupment, the physician group practice has not paid the full amount of the recoupment or entered into a written agreement with HHSC to do so, HHSC may withhold any or all future Medicaid payments from the physician group practice until HHSC has recovered an amount equal to the amount overpaid or disallowed.

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, 2022.

TRD-202203335
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (737) 867-7813

♦ ♦ ♦

CHAPTER 377. CHILDREN'S ADVOCACY PROGRAMS

SUBCHAPTER B. STANDARDS OF OPERATION FOR LOCAL COURT-APPOINTED VOLUNTEER ADVOCATE PROGRAMS

1 TAC §377.107

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §377.107, concerning Contract with Statewide Volunteer Advocate Organization.

BACKGROUND AND PURPOSE

The proposal is necessary to comply with Senate Bill (S.B.) 1156, 87th Legislature, Regular Session, 2021, which requires HHSC to remove the requirement for the statewide organization for the volunteer advocate for children program to be designated as a supporting organization under §509(a)(3) of the Internal Revenue Code.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §377.107 removes an outdated reference to §509(a)(3) of the Internal Revenue Code as it relates to the HHSC contract with Texas Court Appointed Special Advocates (CASA), pursuant to SB 1156, 87th Legislature, Regular Session, 2021, as codified in Texas Family Code §264.603(a).

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 not expand, limit, or repeal existing rules;

(7) the proposed rule will not change 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 will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rule does not require any change to current business practices.

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 does not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Michael Roberts, Associate Commissioner for Specialty and Family Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be continuous access to volunteer court advocacy services for children throughout the state.

Trey Wood has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule because the rule does not require any change to current business practices or impose any additional fees or costs.

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 701 W. 51st Street, Austin, Texas 78751; or emailed to HHSRulesCoordinationOffice@hhs.texas.gov.

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 22R027" 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 Texas Family Code §264.603(a).

The amendment affects Texas Government Code §531.0055 and Texas Family Code §264.603.

§377.107. Contract with Statewide Volunteer Advocate Organization.

(a) HHSC contracts with a single statewide volunteer advocate organization that satisfies subsection (b) of this section, to perform the following functions for local volunteer advocate programs:

(1) training;

(2) technical assistance; and

(3) evaluation services for the benefit of the local volunteer advocate programs.

(b) HHSC may contract only with a statewide volunteer advocate organization that:

(1) is exempt from federal income taxation under Internal Revenue Code of 1986 §501(a) and §501(c)(3); and

[~~(2) is designated as a supporting organization under Internal Revenue Code of 1986 §509(a)(3); and~~]

(2) [~~(3)~~] is composed of individuals or groups of individuals who have expertise in the dynamics of child abuse and neglect, and with experience in operating local volunteer advocate programs.

(c) The contract must:

(1) include measurable goals and objectives relating to the number of:

(A) volunteer advocates in the program; and

(B) children receiving services from the program; and

(2) follow practices to ensure compliance with standards referenced in the contract.

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, 2022.

TRD-202203334
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 460-0992

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 12. MULTIFAMILY HOUSING REVENUE BOND RULES

10 TAC §§12.1 - 12.10

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 12, Multifamily Housing Revenue Bond Rules (Bond Rules). The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX GOV'T CODE §2001.0221.

1. Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous readoption making changes to an existing activity, the issuance of Private Activity Bonds (PAB).

2. The proposed repeal does not require a change in work that would require the creation of new employee positions, nor is the proposed repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.

3. The proposed repeal does not require additional future legislative appropriations.

4. The proposed repeal does not result in an increase in fees paid to the Department or in a decrease in fees paid to the Department.

5. The proposed repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.

6. The proposed action will repeal an existing regulation, but is associated with a simultaneous readoption making changes to an existing activity, the issuance of PABs.

7. The proposed repeal will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed repeal will not negatively or positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this proposed repeal and determined that the proposed repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043.

The proposed repeal does not contemplate nor authorize a takings by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the proposed repeal as to its possible effects on local economies and has determined that for the first five years the proposed repeal would be in effect there would be no economic effect on local employment; therefore no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5).

Mr. Wilkinson has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be an updated and more germane rule for administering the issuance of PAB. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4).

Mr. Wilkinson also has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 16, 2022, to October 14, 2022, to receive stakeholder comment on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Jon Galvan, Bond Rule Public Comment, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3963, attn: Jon Galvan, Bond Rule Public Comments, or by email to jonathan.galvan@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time OCTOBER 14, 2022.

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed repealed sections affect no other code, article, or statute.

10 TAC Chapter 12, Multifamily Housing Revenue Bond Rule

§12.1. General.
§12.2. Definitions.
§12.3. Bond Rating and Investment Letter.
§12.4. Pre-Application Process and Evaluation.
§12.5. Pre-Application Threshold Requirements.
§12.6. Pre-Application Scoring Criteria.
§12.7. Full Application Process.
§12.8. Refunding Application Process.
§12.9. Occupancy Requirements.
§12.10. Fees.

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 September 1, 2022.

TRD-202203479
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 1, 2022
For further information, please call: (512) 475-3959

♦ ♦ ♦

10 TAC §§12.1 - 12.10

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 12, Multifamily Housing Revenue Bond Rules (Bond Rule). The purpose of the proposed new section is to provide compliance with Tex. Gov't Code §2306.67022 and to update the rule to make changes to the scoring criteria to reflect the competitive nature of the Private Activity Bond program. Moreover, the changes reflect minor administrative revisions, and to ensure that it is reflective of changes made in the Department's Qualified Allocation Plan where applicable.

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action pursuant to item (9), which excepts rule changes necessary to implement legislation. The proposed rule provides compliance with Tex. Gov't Code §2306.359, which requires the Department to provide for specific scoring criteria and underwriting considerations for its multifamily private activity bond activities.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the proposed new rule would be in effect:

1. The proposed rule does not create or eliminate a government program, but relates to the readoption of this rule which makes changes to an existing activity, the issuance of Private Activity Bonds (PAB).

2. The proposed new rule does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The proposed rule changes do not require additional future legislative appropriations.

4. The proposed rule changes will not result in an increase in fees paid to the Department, but may, under certain circumstances, result in a decrease in fees paid to the Department regarding Tax-Exempt Bond Developments.

5. The proposed rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The proposed rule will not limit, expand or repeal an existing regulation but merely revises a rule.

7. The proposed rule will not increase or decrease the number of individuals subject to the rule's applicability.

8. The proposed rule will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002. The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code §2306.359. Although these rules mostly pertain to the filing of a bond pre-application, some stakeholders have reported that their average cost of filing a full Application is between $50,000 and $60,000, which may vary depending on the specific type of Application, location of the Development Site, and other non-state of Texas funding sources utilized. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

1. The Department has evaluated this rule and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. This rule relates to the procedures in place for entities applying for multifamily PAB. Only those small or micro-businesses that participate in this program are subject to this rule. There are approximately 100 to 150 businesses, which could possibly be considered small or micro-businesses, subject to the proposed rule for which the economic impact of the rule would be a fee of approximately $11,000 which includes the filing fees associated with submitting a bond pre-application.

The Department bases this estimate on the potential number of Applicants and their related parties who may submit applications to TDHCA for PAB (and accompanying housing tax credits). There could be additional costs associated with pre-applications depending on whether the small or micro-businesses outsource how the application materials are compiled. The fee for submitting an Application for PAB layered with LIHTC is based on $30 per unit, and all Applicants are required to propose constructing, at a minimum, 16 Units.

These Application Fee costs are not inclusive of external costs required by the basic business necessities underlying any real estate transaction, from placing earnest money on land, conducting an Environmental Site Assessment, conducting a market study, potentially retaining counsel, hiring an architect and

an engineer to construct basic site designs and elevations, and paying any other related, third-party fees for securing the necessary financing to construct multifamily housing. Nor does this estimate include fees from the Department for Applications that successfully attain an award.

There are approximately 1,300 rural communities potentially subject to the proposed rule for which the economic impact of the rule is projected to be $0. 10 TAC Chapter 12 places no financial burdens on rural communities, as the costs associated with submitting an Application are born entirely by private parties. In an average year the volume of applications for PAB that are located in rural areas is not more than 20% of all PAB applications received. In those cases, a rural community securing a PAB Development will experience an economic benefit, not least among which is the potential increased property tax revenue from a large multifamily Development.

3. The Department has determined that because there are rural PAB awardees, this program helps promote construction activities and long term tax base in rural areas of Texas. Aside from the fees and costs associated with submitting an Application, there is a probable positive economic effect on small or micro-businesses or rural communities that receive PAB awards and successfully use those awards to construct multifamily housing, although the specific impact is not able to be quantified in advance.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed rule does not contemplate or authorize a takings by the Department. Therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule may provide a possible positive economic effect on local employment in association with this rule since PAB Developments, layered with housing tax credits, often involve a total input of, typically at a minimum, $5 million in capital, but often an input of $10 million - $30 million. Such a capital investment has concrete direct, indirect, and induced effects on the local and regional economies and local employment. However, because the exact location of where program funds or developments are directed is not determined in rule, and is driven by real estate demand, there is no way to determine during rulemaking where the positive effects may occur. Furthermore, while the Department knows that any and all impacts are positive, that impact is not able to be quantified for any given community until PABs and LIHTCs are actually awarded to a proposed Development, given the unique characteristics of each proposed multifamily Development and region in which it is being developed.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule…" Considering that significant construction activity is associated with any PAB Development layered with LIHTC and each apartment community significantly increases the property value of the land being developed, there are no probable negative effects of the new rule on particular geographic regions. If anything, positive effects will ensue in those communities where developers receive PAB awards.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the new section is in effect, the public benefit anticipated as a result of the new section will be an updated and more germane rule for administering the issuances of PABs and corresponding allocation of housing tax credits. There is no change to the economic cost to any individuals required to comply with the new section because the same processes described by the rule have already been in place through the rule found at this section being repealed. The average cost of filing a pre-application and application remain unchanged based on these rules changes. The proposed rules do not, on average, result in an increased cost of filing an application as compared to the existing program rules.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments because the same processes described by the rule have already been in place through the rule found at this section being repealed.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held September 16, 2022, to October 14, 2022, to receive stakeholder comment on the new proposed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Jon Galvan, Bond Rule Public Comment, P.O. Box 13941, Austin, Texas 78711-3941, or by fax to (512) 475-3963, attn: Jon Galvan, Bond Rule Public Comments, or by email to jonathan.galvan@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time OCTOBER 14, 2022.

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed new sections affect no other code, article, or statute.

§12.1. General.

(a) Authority. The rules in this chapter apply to the issuance of multifamily housing revenue bonds (Bonds) by the Texas Department of Housing and Community Affairs (Department). The Department is authorized to issue Bonds pursuant to Tex. Gov't Code, Chapter 2306. Notwithstanding anything in this chapter to the contrary, Bonds which are issued to finance the Development of multifamily rental housing are subject to the requirements of the laws of the State of Texas, including but not limited to Tex. Gov't Code, Chapters 1372 and 2306, and federal law pursuant to the requirements of Internal Revenue Code (Code), §142.

(b) General. The purpose of this chapter is to state the Department's requirements for issuing Bonds, the procedures for applying for Bonds and the regulatory and land use restrictions imposed upon Bond financed Developments. The provisions contained in this chapter are separate from the rules relating to the Department's administration of the Housing Tax Credit program. Applicants seeking a Housing Tax Credit Allocation should consult Chapter 11 of this part (relating to the Housing Tax Credit Program Qualified Allocation Plan) for the current program year. In general, the Applicant will be required to satisfy the eligibility and threshold requirements of the Qualified Allocation Plan (QAP) in effect at the time the Certificate of Reservation is issued by the Texas Bond Review Board (TBRB). If the applicable QAP contradicts rules set forth in this chapter, the applicable QAP will take precedence over the rules in this chapter except in an instance of a conflicting statutory requirement, which shall always take precedence. To

the extent applicable to each specific Bond issuance, the Department's conduit multifamily Bond transactions will be processed in accordance with 34 TAC Part 9, Chapter 181, Subchapter A (relating to Bond Review Board Rules) and Tex. Gov't Code, Chapter 1372.

(c) Costs of Issuance. The Applicant shall be responsible for payment of all costs related to the preparation and submission of the pre-application and Application, including but not limited to, costs associated with the publication and posting of required public notices and all costs and expenses associated with the issuance of the Bonds, regardless of whether the Application is ultimately approved or whether Bonds are ultimately issued. At any point during the process, the Applicant is solely responsible for determining whether to proceed with the Application and the Department disclaims any and all responsibility and liability in this regard.

(d) Taxable Bonds. The Department may issue taxable Bonds and the requirements associated with such Bonds, including occupancy requirements, shall be determined by the Department on a case by case basis. Taxable bonds will not be eligible for an allocation of tax credits.

(e) Waivers and Appeals. Requests for any permitted waivers of program rules must be made in accordance with §11.207 of this part (relating to Waiver of Rules). The process for appeals and grounds for appeals may be found under §1.7 of this part (relating to Appeals Process).

§12.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Any capitalized terms not specifically mentioned in this section shall have the meaning as defined in Tex. Gov't Code, Chapter 2306, §§141, 142, and 145 of the Internal Revenue Code, and Chapter 11 of this part (relating to Housing Tax Credit Program Qualified Allocation Plan).

(1) Institutional Buyer--Shall have the meaning prescribed under 17 CFR §230.501(a), but excluding any natural person or any director or executive officer of the Department (17 CFR §230.501(a)(4) - (6)), or as defined by 17 CFR §230.144(a), promulgated under the Securities Act of 1933, as amended.

(2) Persons with Special Needs--Shall have the meaning prescribed under Tex. Gov't Code, §2306.511.

(3) Bond Trustee--A financial institution, usually a trust company or the trust department in a commercial bank, that holds collateral for the benefit of the holders of municipal securities. The Bond Trustee's obligations and responsibilities are set forth in the Indenture.

§12.3. Bond Rating and Investment Letter.

(a) Bond Ratings. All publicly offered Bonds issued by the Department to finance Developments shall have a debt rating the equivalent of at least an "A" rating assigned to long-term obligations by Standard & Poor's Ratings Services, or Moody's Investors Service, Inc. If such rating is based upon credit enhancement provided by an institution other than the Applicant or Development Owner, the form and substance of such credit enhancement shall be subject to approval by the Board, evidenced by a resolution authorizing the issuance of the credit enhanced Bonds.

(b) Investment Letters. Bonds rated less than "A" or Bonds which are unrated must be placed with one or more Institutional Buyers and must be accompanied by an investor letter acceptable to the Department. Subsequent purchasers of such Bonds must also be qualified as Institutional Buyers and must execute and deliver to the Department an investor letter in a form satisfactory to the Department. Bonds rated less than "A" and Bonds which are unrated shall be issued in physical form, in minimum denominations of one hundred thousand dollars ($100,000), and must carry a legend requiring any purchasers of the Bonds to be Institutional Buyers and sign and deliver to the Department an investor letter in a form acceptable to the Department.

§12.4. Pre-Application Process and Evaluation.

(a) Pre-Inducement Questionnaire. Prior to the filing of a pre-application, the Applicant shall submit the Pre-Inducement Questionnaire, in the form prescribed by the Department, so the Department can have a preliminary understanding of the proposed Development plan before a pre-application and corresponding fees are submitted. After reviewing the pre-inducement questionnaire, Department staff will follow-up with the Applicant to discuss the next steps in the process and may schedule a pre-inducement conference call or meeting. Prior to the submission of a pre-application, it is essential that the Department and Applicant communicate regarding the Department's objectives and policies in the development of affordable housing throughout the State using Bond financing. The acceptance of the questionnaire by the Department does not constitute a pre-application or Application and does not bind the Department to any formal action regarding an inducement resolution.

(b) Neighborhood Risk Factors. If the Development Site has any of the characteristics described in §11.101(a)(3)(B) of this part (relating to Neighborhood Risk Factors), the Applicant must disclose the presence of such characteristics to the Department. Disclosure may be done at time of pre-application and handled in connection with the inducement or it can be addressed at the time of Application submission. The Applicant understands that any determination made by staff or the Board at the time of bond inducement regarding Site eligibility based on the documentation presented, is preliminary in nature. Should additional information related to any of the Neighborhood Risk Factors become available while the Tax-Exempt Bond Development Application is under review, or the information by which the original determination was made changes in a way that could affect eligibility, then such information will be re-evaluated and presented to the Board. The Application may be subject to termination should staff conclude that the Development Site has any characteristics found in §11.101(a)(3)(B) of this part (relating to Neighborhood Risk Factors) and the Applicant failed to disclose.

(c) Pre-Application Process.

(1) An Applicant who intends to pursue Bond financing from the Department shall submit a pre-application by the corresponding pre-application submission deadline, as set forth by the Department. The required pre-application fee as described in §12.10 of this chapter (relating to Fees) must be submitted with the pre-application in order for the pre-application to be considered accepted by the Department. Department review at the time of the pre-application is limited and not all issues of eligibility, fulfillment of threshold requirements in connection with the full Application, and documentation submission requirements pursuant to Chapter 11 of this part (relating to Housing Tax Credit Program Qualified Allocation Plan) are reviewed. The Department is not responsible for notifying an Applicant of potential areas of ineligibility or other deficiencies at the time of pre-application. If the Development meets the criteria as described in §12.5 of this chapter (relating to Pre-Application Threshold Requirements), the pre-application will be scored and ranked according to the selection criteria as described in §12.6 of this chapter (relating to Pre-Application Scoring Criteria). The selection criteria, as further described in §12.6 of this chapter, reflects a structure that gives priority consideration to specific criteria as outlined in Tex. Gov't Code, §2306.359, as well as other important criteria.

(2) Tie Breakers. Should two or more pre-applications receive the same score, the Department will utilize the factors in this section, which will be considered in the order they are presented herein,

to determine which pre-application will receive preference in consideration of a Certificate of Reservation:

(A) To the pre-application that was on the waiting list with the TBRB but did not have an active Certificate of Reservation at the time of the TBRB lottery and achieved the maximum number of points under §12.6(12) of this chapter (relating to Waiting List); and

(B) To the pre-application with the highest number of points achieved under §12.6(13) of this chapter (relating to Tax-Exempt Bond 50% Test).

(d) Inducement Resolution. After the pre-applications have been scored and ranked, the pre-application will be presented to the Department's Board for consideration of an inducement resolution declaring the Department's initial intent to issue Bonds with respect to the Development. Approval of the inducement resolution does not guarantee final Board approval of the Bond Application. Department staff may recommend that the Board not approve an inducement resolution for a pre-application. Notwithstanding the foregoing, Department staff may, but is not required to, recommend that an inducement resolution be approved despite the presence of neighborhood risk factors, undesirable site features, or requirements that may necessitate a waiver, that have not fully been evaluated by staff at pre-application. The Applicant recognizes the risk involved in moving forward should this be the case and the Department assumes no responsibility or liability in that regard. Each Development is unique, and therefore, making the final determination to issue Bonds is often dependent on the issues presented at the time the full Application is considered by the Board.

§12.5. Pre-Application Threshold Requirements.

The threshold requirements of a pre-application include the criteria listed in paragraphs (1) - (8) of this section. As the Department reviews the pre-application the assumptions as reflected in Chapter 11, Subchapter D of this part (relating to Underwriting and Loan Policy) will be utilized even if not reflected by the Applicant in the pre-application. The threshold requirements of a pre-application include:

(1) Submission of the required tabs of the Uniform Application as prescribed by the Department in the Multifamily Bond Pre-Application Procedures Manual;

(2) Submission of the completed Bond Pre-Application Supplement in the form prescribed by the Department;

(3) Completed Bond Review Board Residential Rental Attachment for the current program year;

(4) Site Control, evidenced by the documentation required under §11.204(10) of this part (relating to Required Documentation for Application Submission). The Site Control must be valid through the date of both the Board meeting at which the inducement resolution is considered and subsequent submission of the application to the TBRB. For Lottery applications, Site Control must meet the requirements of 34 TAC §190.3(b)(13).

(5) Boundary survey or plat clearly identifying the location and boundaries of the subject Property;

(6) Organizational Chart showing the structure of the Development Owner and of any Developer and Guarantor, providing the names and ownership percentages of all Persons having an ownership interest in the Development Owner, Developer and Guarantor, as applicable, and completed List of Organizations form, as provided in the pre-application. The List of Organizations form must include all Persons identified on the organizational charts, and further identify which of those Persons listed exercise Control of the Development;

(7) Evidence of Entity Registration or Reservation with the Texas Office of the Secretary of State; and

(8) A certification, as provided in the pre-application, that the Applicant met the requirements and deadlines for public notifications as identified in §11.203 of this part (relating to Public Notifications (§2306.6705(9)). In general, notifications should not be older than three months prior to the date of Application submission. Re-notification will be required by Applicants who have submitted a change from pre-application to Application that reflects a total Unit increase of greater than 10% or a 5% increase in density (calculated as Units per acre) as a result of a change in the size of the Development Site. In addition, should the jurisdiction of the official holding any position or role described in §11.203 of this part change between the submission of a pre-application and the submission of an Application, Applicants are required to notify the new entity no later than the Full Application Delivery Date.

§12.6. Pre-Application Scoring Criteria.

This section identifies the scoring criteria used in evaluating and ranking pre-applications. Any scoring items that require supplemental information to substantiate points must be submitted in the pre-application, as further outlined in the Multifamily Bond Pre-Application Procedures Manual. Applicants proposing multiple sites will be required to submit a separate pre-application for each Development Site, unless staff determines that one pre-application is more appropriate based on the specifics of the transaction. Each individual pre-application will be scored on its own merits and the final score will be determined based on an average of all of the individual scores. Ongoing requirements, as selected in the pre-application, will be reflected in the Bond Regulatory and Land Use Restriction Agreement and must be maintained throughout the State Restrictive Period, unless otherwise stated or required in such Agreement.

(1) Income and Rent Levels of the Tenants. Pre-applications may qualify for up to ten (10 points) for this item.

(A) Priority 1 designation includes one of clauses (i) - (iii) of this subparagraph. (10 points)

(i) set aside 50% of Units rent capped at 50% AMGI and the remaining 50% of Units rent capped at 60% AMGI; or

(ii) set aside 15% of Units rent capped at 30% AMGI and the remaining 85% of Units rent capped at 60% AMGI; or

(iii) set aside 100% of Units rent capped at 60% AMGI for Developments located in a census tract with a median income that is higher than the median income of the county, MSA, or PMSA in which the census tract is located.

(B) Priority 2 designation requires the set aside of at least 80% of the Units rent capped at 60% AMGI (7 points).

(C) Priority 3 designation. Includes any qualified residential rental development. Market rate Units can be included under this priority (5 points).

(2) Cost of Development per Square Foot. (1 point) For this item, costs shall be defined as the Building Cost as represented in the Development Cost Schedule, as originally provided in the pre-application. This calculation does not include indirect construction costs or site work. Pre-applications that do not exceed $125 per square foot of Net Rentable Area will receive one (1) point. Rehabilitation Developments will automatically receive one (1) point.

(3) Unit Sizes. (6 points) The Development must meet the minimum requirements identified in this subparagraph to qualify for points. Points for this item will be automatically granted for Applications involving Rehabilitation (excluding Reconstruction).

(A) Five-hundred (500) square feet for an Efficiency Unit;

(B) Six-hundred (600) square feet for a one Bedroom Unit;

(C) Eight-hundred-fifty (850) square feet for a two Bedroom Unit;

(D) One-thousand-fifty (1,050) square feet for a three Bedroom Unit; and

(E) One-thousand, two-hundred-fifty (1,250) square feet for a four Bedroom Unit.

(4) Extended Affordability. A pre-application may qualify for up to three (3) points under this item.

(A) Development Owners that agree to extend the State Restrictive Period for a Development to a total of 40 years (3 points).

(B) Development Owners that agree to extend the State Restrictive Period for a Development to a total of 35 years (2 points).

(5) Unit and Development Construction Features. A pre-application may qualify for nine (9) points, as certified in the pre-application, for providing specific amenity and quality features in every Unit at no extra charge to the tenant. The amenities and corresponding point structure is provided in §11.101(b)(6)(B) of this part (relating to Unit, Development Construction, and Energy and Water Efficiency Features), which includes a minimum number of points that must come from Energy and Water Efficiency Features. Applications involving scattered site Developments must have a specific amenity located within each Unit to count for points. Rehabilitation Developments will start with a base score of (5 points).

(6) Common Amenities. All Developments must provide at least the minimum threshold of points for common amenities based on the total number of Units in the Development as provided in subparagraphs (A) - (F) of this paragraph. An Applicant may choose to exceed the minimum number of points necessary based on Development size; however, the maximum number of points under this item which a Development may be awarded under this section shall not exceed 22 points. The common amenities include those listed in §11.101(b)(5) of this part and must meet the requirements as stated therein. The Owner may change, from time to time, the amenities offered; however, the overall points as selected at Application must remain the same.

(A) Developments with 16 to 40 Units must qualify for (2 points);

(B) Developments with 41 to 76 Units must qualify for (4 points);

(C) Developments with 77 to 99 Units must qualify for (7 points);

(D) Developments with 100 to 149 Units must qualify for (10 points);

(E) Developments with 150 to 199 Units must qualify for (14 points); or

(F) Developments with 200 or more Units must qualify for (18 points).

(7) Resident Supportive Services. A pre-application may qualify for up to ten (10) points for this item. By electing points, the Applicant certifies that the Development will provide supportive services, which are listed in §11.101(b)(7) of this part, appropriate for the residents and that there will be adequate space for the intended services. The Owner may change, from time to time, the services offered; however, the overall points as selected at pre-application must remain the same. Should the QAP in subsequent years provide different services than those listed in §11.101(b)(7)(A) - (E), the Development Owner may be allowed to select services as listed therein upon written consent from the Department and any services selected must be of similar value to the service it is intending to replace. The Development Owner will be required to substantiate such service(s) at the time of compliance monitoring, if requested by staff. The services provided should be those that will directly benefit the Target Population of the Development and be accessible to all. No fees may be charged to the residents for any of the services. Services must be provided on-site or transportation to those off-site services identified on the list must be provided. The same service may not be used for more than one scoring item. These services are intended to be provided by a qualified and reputable provider in the specified industry such that the experience and background of the provider demonstrates sufficient knowledge to be providing the service. In general, on-site leasing staff or property maintenance staff would not be considered a qualified provider. Where applicable, the services must be documented by a written agreement with the provider.

(A) The Development Owner shall provide resident services sufficient to substantiate ten (10) points; or

(B) The Development Owner shall provide resident services sufficient to substantiate eight (8) points.

(8) Underserved Area. An Application may qualify to receive up to two (2) points if the Development Site meets the criteria described in §11.9(c)(8)(A) - (H) of this title. The pre-application must include evidence that the Development Site meets this requirement. Regardless of the varying point options listed under §11.9(c)(8), the number of points attributed to this scoring item shall be two (2) points.

(9) Development Support/Opposition. (Maximum +24 to -24 points) Each letter will receive a maximum of +3 to -3 points and must be received 10 business days prior to the Board's consideration of the pre-application. Letters must clearly state support or opposition to the specific Development. State Representatives or Senators as well as local elected officials must be in office when the pre-application is submitted and represent the district containing the proposed Development Site. Letters of support from State or local elected officials that do not represent the district containing the proposed Development Site will not qualify for points. Neutral letters that do not specifically refer to the Development or do not explicitly state support will receive (zero points). A letter that does not directly express support but expresses it indirectly by inference (i.e., "the local jurisdiction supports the Development and I support the local jurisdiction") counts as a neutral letter except in the case of State elected officials. A letter from a State elected official that does not directly indicate support by the official, but expresses support on behalf of the official's constituents or community (i.e., "My constituents support the Development and I am relaying their support") counts as a support letter.

(A) State Senator and State Representative of the districts whose boundaries include the proposed Development Site;

(B) Mayor of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction);

(C) All elected members of the Governing Body of the municipality (if the Development is within a municipality or its extraterritorial jurisdiction);

(D) Presiding officer of the Governing Body of the county in which the Development Site is located;

(E) All elected members of the Governing Body of the county in which the Development Site is located;

(F) Superintendent of the school district in which the Development Site is located; and

(G) Presiding officer of the board of trustees of the school district in which the Development Site is located.

(10) Preservation Initiative. (3 points) Preservation Developments, including Rehabilitation proposals on Properties which are nearing expiration of an existing affordability requirement within the next two years or for which there has been a rent restriction requirement in the past 10 years may qualify for points under this item. Evidence must be submitted in the pre-application.

(11) Declared Disaster Areas. (7 points) A pre-application may receive points if the Development Site is located in an area declared a disaster area under Tex. Gov't Code §418.014 at the time of submission, or at any time within the two-year period preceding the date of submission.

(12) Waiting List. (5 points) A pre-application that is on the Department's waiting list with the TBRB and does not have an active Certificate of Reservation at the time of the Private Activity Bond Lottery may receive points under this item if participating in the Lottery for the upcoming program year. These points will be added by staff once all of the scores for Lottery applications have been finalized.

(A) For pre-applications that participated in the prior year Private Activity Bond Lottery (5 points); or

(B) For pre-applications that had an Inducement Resolution adoption date of November of the prior calendar year through March of the current calendar year (3 points); or

(C) For pre-applications that had an Inducement Resolution adoption date of April through July of the current calendar year (1 point).

(13) Tax-Exempt Bond 50% Test. (5 points) A pre-application may receive points under this item based on the amount of the Development financed with Tax-Exempt Bond proceeds relative to the amount necessary to meet the 50% Test. The 50% Test is calculated by dividing the Tax-Exempt Bond proceeds by the aggregate basis of the Development and shall be based on such amounts as reflected in the pre-application once staff's review is complete and all Administrative Deficiencies have been resolved. Normal rounding shall apply. Should there be changes to this federal requirement, the percentage ranges noted below shall be modified accordingly by the same range.

(A) The pre-application reflects a 50% Test amount that is greater than or equal to 55.0% and less than 60% (5 points); or

(B) The pre-application reflects a 50% Test amount that is greater than or equal to 60% and less than or equal to 64% (3 points).

(14) Assisting Households with Children. (42(m)(1)(C)(vii)) A pre-application may receive one point under this item if at least 15% of the Units in the Development contain three or more bedrooms. The specific number of three or more bedrooms may change from pre-application to full Application, but the minimum percentage must still be met.

§12.7. Full Application Process.

(a) Application Submission. Once the inducement resolution has been approved by the Board, an Applicant who elects to proceed with submitting a full Application to the Department must submit the complete tax credit Application pursuant to §11.201 of this part (relating to Procedural Requirements for Application Submission). While a Certificate of Reservation is required under §11.201 of this part (relating to Procedural Requirements for Application Submission) prior to submission of the complete tax credit Application, staff may allow the Application to be submitted prior to the issuance of a Certificate of Reservation depending on circumstances associated with the Development Site, structure of the transaction, volume cap environment, or other factors in the Department's sole discretion.

(b) Eligibility Criteria. The Department will evaluate the Application for eligibility and threshold at the time of full Application pursuant to Chapter 11 of this part (relating to Housing Tax Credit Program Qualified Allocation Plan). If there are changes to the Application at any point prior to closing that have an adverse effect on the score and ranking order and that would have resulted in the pre-application being placed below another pre-application in the ranking, the Department may terminate the Application and withdraw the Certificate of Reservation from the Bond Review Board (with the exception of changes to deferred developer's fees and support or opposition points). The Development and the Applicant must satisfy the requirements set forth in Chapter 11 of this part in addition to Tex. Gov't Code, Chapter 1372, the applicable requirements of Tex. Gov't Code Chapter 2306, and the Code. The Applicant will also be required to select a Bond Trustee from the Department's approved list as published on its website.

(c) Bond Documents. Once the Application has been submitted and the Applicant has deposited funds to pay initial costs, the Department's bond counsel shall draft Bond documents.

(d) Public Hearings. The Department will hold a public hearing to receive comments pertaining to the Development and the issuance of the Bonds. A representative of the Applicant or member of the Development Team must be present at the public hearing and will be responsible for conducting a brief presentation on the proposed Development and providing handouts at the hearing that should include at minimum, a description of the Development, maximum rents and income restrictions. If the proposed Development is Rehabilitation, the presentation should include the proposed scope of work that is planned for the Development. The handouts must be submitted to the Department for review at least two days prior to the public hearing. Publication of all notices required for the public hearing shall be at the sole expense of the Applicant, as well as any facility rental fees or required deposits, if applicable.

(e) Approval of the Bonds. Subject to the timely receipt and approval of commitments for financing, an acceptable evaluation for eligibility, financial feasibility, the satisfactory negotiation of Bond documents, and the completion of a public hearing, the Board will consider the approval of the final Bond resolution relating to the issuance, substantially final Bond documents and in the instance of privately placed Bonds, the pricing, terms and interest rate of the Bonds. For Applications that include local funding, Department staff may choose to delay Board consideration of the Bond issuance until such time it has been confirmed that the amount or terms associated with such local funding will not change and remain consistent with what was represented in the Department's underwriting analysis.

(f) Local Permits. Prior to closing on the Bond financing, all necessary approvals, including building permits from local municipalities, counties, or other jurisdictions with authority over the Development Site must have been obtained or evidence that the permits are obtainable subject only to payment of certain fees. In instances where such permits will be not received prior to bond closing, the Department may, on a limited and case-by-case basis allow for the closing to occur, subject to receipt of confirmation, acceptable to the Department, by the lender and/or equity investor that they are comfortable proceeding with closing.

§12.8. Refunding Application Process.

(a) Application Submission. Owners who wish to refund or modify tax-exempt bonds that were previously issued by the Department must submit to the Department a summary of the proposed refunding plan or modifications. To the extent such modifications con-

stitute a re-issuance under state law the Applicant shall then be required to submit a refunding Application in the form prescribed by the Department pursuant to the Bond Refunding Application Procedures Manual.

(b) Bond Documents. Once the Department has received the refunding Application and the Applicant has deposited funds to pay initial costs, the Department's bond counsel will draft the necessary Bond documents.

(c) Public Hearings. Depending on the proposed modifications to existing Bond covenants a public hearing may be required. Such hearing must take place prior to obtaining Board approval and must meet the requirements pursuant to §12.7(d) of this chapter (relating to Full Application Process) regarding the presence of a member of the Development Team and providing a summary of proposed Development changes.

(d) Rule Applicability. Refunding Applications must meet the applicable requirements pursuant to Chapter 11 of this part (relating to Housing Tax Credit Program Qualified Allocation Plan). At the time of the original award the Application would have been subject to eligibility and threshold requirements under the QAP in effect the year the Application was awarded. Therefore, it is anticipated the Refunding Application would not be subject to the site and development requirements and restrictions pursuant to §11.101 of this part (relating to Site and Development Requirements and Restrictions). The circumstances surrounding a refunding Application are unique to each Development; therefore, upon evaluation of the refunding Application, the Department is authorized to utilize its discretion in the applicability of the Department's rules as it deems appropriate.

§12.9. Occupancy Requirements.

(a) Filing and Term of Regulatory Agreement. A Bond Regulatory and Land Use Restriction Agreement will be filed in the property records of the county in which the Development is located for each Development financed from the proceeds of Bonds issued by the Department. Such Regulatory and Land Use Restriction Agreement shall include provisions relating to the Qualified Project Period, the State Restrictive Period, along with points claimed for other provisions that will be required to be monitored throughout the State Restrictive Period, and shall also include provisions relating to Persons with Special Needs. The minimum term of the Regulatory Agreement will be based on the criteria as described in paragraphs (1) - (3) of this subsection, as applicable:

(1) 30 years, or such longer period as elected under §12.6(4) of this chapter (relating to Extended Affordability), from the date the Development Owner takes legal possession of the Development;

(2) The end of the remaining term of the existing federal government assistance pursuant to Tex. Gov't Code, §2306.185; or

(3) The period required by the Code.

(b) Federal Set Aside Requirements.

(1) Developments which are financed from the proceeds of Private Activity Bonds must be restricted under one of the two minimum set-asides as described in subparagraphs (A) and (B) of this paragraph. Regardless of an election that may be made under Section 42 of the Code relating to income averaging, a Development will be required under the Bond Regulatory and Land Use Restriction Agreement to meet one of the two minimum set-asides described in subparagraphs (A) and (B) of this paragraph. Any proposed market rate Units shall be limited to 140% of the area median income and be considered restricted units under the Bond Regulatory and Land Use Restriction Agreement for purposes of using Bond proceeds to construct such Units.

(A) At least 20% of the Units within the Development shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed 50% of the area median income; or

(B) At least 40% of the Units within the Development shall be occupied or held vacant and available for occupancy at all times by persons or families whose income does not exceed 60% of the area median income.

(2) The Development Owner must, at the time of Application, indicate which of the two federal set-asides will apply to the Development and must also designate the selected priority for the Development in accordance with Tex. Gov't Code, §1372.0321. Units intended to satisfy set-aside requirements must be distributed equally throughout the Development, and must include a reasonably proportionate amount of each type of Unit available in the Development.

(3) No tenant qualifying under either of the minimum federal set-asides shall be denied continued occupancy of a Unit in the Development because, after commencement of such occupancy, such tenant's income increases to exceed the qualifying limit. However, should a tenant's income, as of the most recent determination thereof, exceed 140% of the applicable federal set-aside income limit and such tenant constitutes a portion of the set-aside requirement of this section, then such tenant shall only continue to qualify for so long as no Unit of comparable or smaller size is rented to a tenant that does not qualify as a Low-Income Tenant.

§12.10. Fees.

(a) Pre-Application Fees. The Applicant is required to submit, at the time of pre-application, a pre-application fee of $1,000, along with the fees noted on the Schedule of Fees posted on the Department's website specific to the Department's bond counsel and the Texas Bond Review Board (TBRB) pursuant to Tex. Gov't Code, §1372.006(a)). These fees cover the costs of pre-application review by the Department and its bond counsel and filing fees associated with application submission for the Certificate of Reservation to the TBRB.

(b) Application Fees. At the time of Application the Applicant is required to submit a tax credit application fee of $30 per Unit based on the total number of Units and a bond application fee of $20 per Unit based on the total number of Units, unless otherwise modified by a specific program NOFA. Such fees cover the costs associated with Application review and the Department's expenses in connection with providing financing for a Development. For Developments proposed to be structured as a portfolio the bond application fees may be reduced on a case by case basis at the discretion of Department staff.

(c) Closing Fees. The closing fee for Bonds, other than refunding Bonds, is equal to 50 basis points (0.005%) of the issued principal amount of the Bonds, unless otherwise modified by a program NOFA. The Applicant will also be required to pay at closing of the Bonds the first two years of the administration fee equal to 20 basis points (0.002%) of the issued principal amount of the Bonds, with the first year prorated based on the actual closing date, and a Bond compliance fee equal to $25/Unit (excludes market rate Units). Such compliance fee shall be applied to the third year following closing.

(d) Application and Issuance Fees for Refunding Applications. For refunding an Application the application fee will be $10,000 unless the refunding is not required to have a public hearing, in which case the fee will be $5,000. The closing fee for refunding Bonds is equal to 25 basis points (0.0025%) of the issued principal amount of the refunding Bonds. If applicable, administration and compliance fees due at closing may be prorated based on the current billing period of such fees. If additional volume cap is being requested other fees may be required as further described in the Bond Refunding Applications Procedures Man-

ual. Transactions previously issued that involved a financing structure that would constitute a re-issuance under state law, but do not fit under §12.8, will be required to pay a closing fee that shall not exceed 25 basis points (0.0025%) of the re-issued principal amount of the bonds which may be reduced in the sole determination of the Department as commensurate with the review by staff in obtaining Board approval at the time of conversion.

(e) Administration Fee. The annual administration fee is equal to 10 basis points (0.001%) of the outstanding bond amount at the inception of each payment period and is paid as long as the Bonds are outstanding, unless otherwise modified by a specific program NOFA.

(f) Bond Compliance Fee. The Bond compliance monitoring fee is equal to $25/Unit (excludes market rate Units), and is paid for the duration of the State Restrictive Period under the Regulatory Agreement, regardless of whether the Bonds have been paid off and are no longer outstanding. For Developments for which (1) the Department's Bonds are no longer outstanding and (2) new bonds or notes have been issued and delivered, the bond compliance monitoring fee may be reduced on a case by case basis upon a written request to, and at the discretion, of Department staff.

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 September 1, 2022.

TRD-202203480
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 475-3959

♦ ♦ ♦

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.65

The Railroad Commission of Texas (the "Commission") proposes amendments to §3.65, relating to Critical Designation of Natural Gas Infrastructure. The amendments are proposed to simplify the rule language and the process for designating certain natural gas facilities and entities critical during energy emergencies.

Section 3.65 went into effect December 20, 2021. It implemented requirements from House Bill 3648 and Senate Bill 3 (87th Legislature, Regular Session) directing the Commission to collaborate with the Public Utility Commission of Texas (the "PUC") to adopt rules to establish a process to designate certain natural gas facilities and entities associated with providing natural gas in this state as critical customers or critical gas suppliers during energy emergencies. The Commission's process for designating certain facilities critical has been in place for approximately eight months. During that time, the Commission has become aware of points of confusion in current §3.65. Additionally, during the recent comment period for proposed 16 Texas Administrative Code §3.66 (relating to Weather Emergency Preparedness Standards), the Commission received several comments requesting changes to §3.65. The Commission addresses some of those concerns with these proposed amendments.

First, proposed amendments to subsection (a) provide more certainty regarding the definition of "energy emergency." Currently, the definition includes any event that results in firm load shed or has the potential to result in firm load shed required by the reliability coordinator of a power region in Texas. Ninety percent of Texas' power load is managed by the Electric Reliability Council of Texas (ERCOT) according to ERCOT's website. Because firm load shed is associated with an alert from the reliability coordinator, those required to comply with §3.65 and members of the public are made aware when firm load shed occurs. It is the Commission's understanding that firm load shed is associated with an Energy Emergency Alert Level 3 issued by ERCOT. However, there is less certainty regarding an event with "potential to result in firm load shed." Therefore, the Commission proposes amendments to define an event with "potential to result in firm load shed" as when the reliability coordinator of a power region in Texas issues an Energy Emergency Alert Level 1 or 2. More clearly defining when there is a potential for firm load shed will provide operators with more certainty as to when an energy emergency is occurring.

For example, according to ERCOT protocols, an Energy Emergency Alert (EEA) is required when operating reserves drop below 2,300 megawatts (MW) or the system frequency cannot be maintained above certain levels and durations. The three levels of EEA depend on the amount of operating reserves available to meet electric demand. Currently, an EEA 1 is issued when operating reserves drop below 2,300 MW and are not expected to recover within 30 minutes. An EEA 2 is issued when operating reserves are less than 1,750 MW and are not expected to recover within 30 minutes. An EEA 3 is issued when operating reserves cannot be maintained above 1,375 MW. If conditions do not improve, ERCOT orders transmission companies to reduce demand on the system (i.e., firm load shed). Thus, the proposed change defines an energy emergency as an event in which ERCOT has issued an EEA 1 or higher. Additionally, tying the potential for firm load shed to EEAs and not to specific MW thresholds will allow the definition of energy emergency to maintain its accuracy even if ERCOT were to change the MW thresholds for its EEAs in the future.

Section 3.66, adopted concurrently with these proposed amendments to §3.65, contains a related definition. It defines weather emergency as "weather conditions such as freezing temperatures, freezing precipitation, or extreme heat in the facility's county or counties that result in an energy emergency as defined by §3.65 of this title." Comments received on proposed §3.66 noted the lack of certainty in the definition due to its reference to "energy emergency" in §3.65. The proposed amendments to subsection (a) address these concerns.

Second, the Commission proposes amendments to the list of critical gas suppliers in subsection (b)(1). The commission received multiple comments on the original proposal of §3.65 expressing concern that the list of critical gas suppliers encompassed too many facilities such that electric utilities may experience a burden in prioritizing the facilities for load-shed purposes. Similarly, comments on proposed §3.66 requested reducing facilities on the list by excluding more gas wells and oil leases with marginal production. The amendments now proposed to

§3.65(b)(1) exclude gas wells producing an average of 250 Mcf of natural gas per day or less and oil leases producing an average of 500 Mcf of natural gas per day or less.

The Commission has conducted calculations regarding the amount of natural gas provided by critical producers considering different volume thresholds in subsection (b) (i.e, the amount of natural gas available under the current rule versus the amount of natural gas available if facilities producing lower volumes are excluded from the critical gas supplier list in §3.65(b)(1)). The Commission used March 2022 production reports to conduct these calculations. Raising the threshold in §3.65(b)(1) to 250 Mcf/day for gas wells and 500 Mcf/day for oil leases producing casinghead gas leaves 78.4% of the total natural gas produced per day, or approximately 24.5 Bcf/day of natural gas, designated as critical. In other words, those low-producing gas wells and oil leases aggregated together statewide only represent a small portion of the natural gas production. However, they account for a large number of the facilities. This was confirmed after the January critical designation filing earlier this year. By raising the volume thresholds for critical facility designation, the rule focuses on truly critical facilities. It also addresses some of the commenters' concerns that the current volumetric threshold will have the unintended consequences of forcing small operators to stop producing or selling natural gas in Texas, which will have a negative impact on gas supply in the state.

Additionally, gas wells producing less than 250 Mcf of natural gas per day on average are defined as marginal in Natural Resources Code §86.091. The Natural Resources Code does not define marginal production for oil leases. However, the Commission notes that oil leases contain an average of approximately five wells each, and each well produces more oil than gas. Therefore, the Commission believes raising the production threshold to 500 Mcf per day in subsection (b)(1)(B) is appropriate.

The Commission notes that raising the volume thresholds in subsection (b)(1)(A) and (b)(1)(B) does not preclude facilities producing under the thresholds from producing and providing gas for the supply chain during an energy emergency. Removing those wells and leases from the critical gas supplier list merely prevents their power from being prioritized by electric utilities during a load-shed event. However, the facilities may be located on the same meter as another critical facility such that their power remains on and they continue to produce or they may otherwise maintain power, allowing more than 78% of total production to be available.

Third, proposed amendments in subsections (c), (e), and (f) revise requirements triggered by a critical gas supplier's inclusion on the electricity supply chain map produced by the Texas Electricity Supply Chain Security and Mapping Committee. Changes to subsection (c) allow a facility that is not designated a critical gas supplier in subsection (b) an exemption from filing Form CI-D. Proposed amendments to subsection (e) and (f) clarify that if a facility designated critical in subsection (b) is included on the electricity supply chain map, it is not eligible to request an exception from critical designation.

A facility's inclusion on the map is not determined by its critical designation in §3.65. Instead, the facility's inclusion on the map is determined by whether it provides, processes, or transports natural gas for gas-fired electric generation facilities. Now that a first version of the map has been issued, the Commission recognizes that it will be rare for a facility not designated critical to appear on the electricity supply chain map. This result is only possible for gas wells or oil leases not designated critical in subsection (b) (i.e., those gas wells producing an average of 250 mcf per day or less or oil leases producing an average of 500 mcf per day or less according to the proposed amendments to subsection (b)(1) described above). Removing the existing subsection (c)(1) from §3.65 means that if a non-critical facility is included on the electricity supply chain map, then the gas well or oil lease will not be required to file Form CI-D.

Importantly, the Commission notes that removing facilities that produce under the thresholds proposed in §3.65(b)(1) may actually increase the likelihood that those facilities will continue to produce natural gas during a weather emergency as defined in §3.66. Producing facilities are defined as "gas supply chain facilities" in §3.66, and per Senate Bill 3, a gas supply chain facility must be both designated critical by §3.65 and on the electricity supply chain map to be required to comply with §3.66. Operators of low producing facilities, if required to comply with §3.66's preparation standard, may voluntarily shut-in low producing facilities before a weather emergency--or decommission the facilities in their entirety--because the risks associated with complying with §3.66 may exceed the facility's production value. This is particularly true given that Senate Bill 3's penalty ceiling is up to $1,000,000 per violation of §3.66. Excluding the very small subset of low producing wells from the critical designation list removes the threat of penalty, increasing the likelihood that the facilities stay online and produce natural gas during a weather emergency.

Proposed changes to subsection (e) and (f) restate the exception process to affirmatively state which facilities are eligible for an exception rather than stating the facilities that are not eligible for an exception. The Commission believes these changes will reduce confusion experienced during the Form CI-D and CI-X filing processes. The proposed amendments remove the current language in subsection (e) and make current subsection (f) new subsection (e).

Proposed subsection (e) states that a facility designated critical under subsection (b) may request an exception unless the facility is included on the electricity supply chain map. The proposed amendments also clarify the acceptable reasons for requesting an exception. Examples of acceptable reasons include: (A) all of the natural gas produced at the facility is consumed on site; (B) all of the natural gas produced at the facility is consumed outside of this state; (C) the facility does not provide gas for third-party use; or (D) the electric entity providing electricity to the facility has provided notice that the facility's request for critical designation status was rejected, denied, or otherwise disapproved by the electric utility; provided, however, that the electric utility communicated its determination in writing, and the decision was for reasons other than the lack of correct identifying information or other administrative reasons. These reasons are examples which are intended to capture the Commission's goal that facilities contributing natural gas to the supply chain in Texas are not eligible for an exception. Proposed subsection (e)(2)(A) and (e)(2)(C) were included in the original proposal of §3.65. In this proposal, the exceptions are moved from subsection (e)(1) to the list in subsection (e)(2). Proposed subsection (e)(2)(B) adds language consistent with Natural Resources Code §81.073, which states, "The commission shall collaborate with the Public Utility Commission of Texas to adopt rules to establish a process to designate certain natural gas facilities and entities associated with providing natural gas *in this state* as critical customers or critical gas suppliers during energy emergencies" (emphasis added).

The Commission recognizes that hearings are pending at the Commission in which Administrative Law Judges (ALJs) are reviewing whether other reasons are sufficient to allow an exception. A determination by the ALJ will be reviewed by the Commissioners and, if granted, future exception applications demonstrating the same facts may also be approved. The Commission also notes that no changes are proposed regarding the requirement for objective evidence supporting the reasonable basis and justification. An applicant for an exception must provide objective evidence or its exception request will not be considered.

Regarding proposed subsection (e)(2)(D), it is the Commission's understanding that some facilities designated critical customers were denied as critical loads by their electric utilities. This decision is in the electric utility's discretion. However, if a critical facility is denied as a critical load, the proposed amendments allow the facility to request an exception such that it is not required to comply with §3.65. The exception will not be approved if the utility's denial was not communicated in writing or was due to errors made by the critical facility in submitting its critical customer information. Similarly, the exception will not be approved if the denial was based on the utility's administrative reasons, such as the facility's power is already prioritized due to its location on a meter that is already a critical load.

Other proposed amendments merely update internal references due to the proposed removal of subsection (e) and the renaming of subsection (f).

Jared Ware, Director, Critical Infrastructure Division, has determined that for each year of the first five years that the amendments will be in effect, there will be no additional cost to state government as a result of enforcing and administering the amendments as proposed. There is also no fiscal effect on local government. As referenced during the original proposal of §3.65, the Commission anticipates revenue of $150 per operator for an operator's Form CI-X exception application. The proposed amendments allow additional facilities to request an exception, so the Commission may receive increased exception application fees due to the proposed amendments.

Mr. Ware has determined that for each year of the first five years the proposed amendments are in effect the primary public benefit will be establishing a clear process for facilities who are critical natural gas suppliers to be given priority in a load shed event, thus increasing the availability of natural gas for electric power generation in an energy emergency. The public benefit will also be compliance with applicable state law.

Mr. Ware has determined that for each year of the first five years that proposed amendments will be in full effect, persons required to comply as a result of adoption of the proposed amendments will incur minor economic costs of $150 if the operator files a Form CI-X to request an exception from §3.65.

Texas Government Code, §2006.002, relating to Adoption of Rules with Adverse Economic Effect, directs that, as part of the rulemaking process, a state agency prepare an economic impact statement that assesses the potential impact of a proposed rule on rural communities, small businesses, and micro-businesses, and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the rule if the proposed rule will have an adverse economic effect on rural communities, small businesses, or micro-businesses. The proposed amendments will not have an adverse economic effect on rural communities, small businesses, or micro-businesses. Therefore, the regulatory flexibility analysis is not required.

The Commission has also determined that the proposed amendments will not affect a local economy. Therefore, the Commission has not prepared a local employment impact statement pursuant to Texas Government Code §2001.022.

The Commission has determined that the proposed amendments do not meet the statutory definition of a major environmental rule as set forth in Texas Government Code, §2001.0225(a); therefore, a regulatory analysis conducted pursuant to that section is not required.

During the first five years that the amendments would be in effect, the proposed amendments would not: create or eliminate a new government program, create a new regulation, or expand the Commission's existing regulations. The proposed amendments do not require an increase in future legislative appropriations and do not increase or decrease fees required to be paid to the Commission. The proposed amendments do not require the creation of employee positions or the elimination of existing employee positions. The proposed amendments decrease the number of facilities subject to the rule's requirements. Finally, the proposed amendments would not affect the state's economy.

Comments on the proposed amendments may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.texas.gov/general-counsel/rules/comment-form-for-proposed-rulemakings; or by electronic mail to rulescoordinator@rrc.texas.gov. The Commission will accept comments until 5:00 p.m. on Friday, October 7, 2022. The Commission finds that this comment period is reasonable because the proposal and an online comment form will be available on the Commission's website more than two weeks prior to *Texas Register* publication of the proposal, giving interested persons additional time to review, analyze, draft, and submit comments. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Mr. Ware at (512) 463-7336. The status of Commission rulemakings in progress is available at www.rrc.texas.gov/general-counsel/rules/proposed-rules. Once received, all comments are posted on the Commission's website at https://rrc.texas.gov/general-counsel/rules/proposed-rules/. If you submit a comment and do not see the comment posted at this link within three business days of submittal, please call the Office of General Counsel at (512) 463-7149. The Commission has safeguards to prevent emailed comments from getting lost; however, your operating system's or email server's settings may delay or prevent receipt.

The Commission proposes the amendments under Texas Natural Resources Code §81.073, which requires the Commission to adopt rules to establish a process to designate natural gas facilities and entities associated with providing natural gas in this state as critical customers or critical gas suppliers during an energy emergency; and Texas Natural Resources Code, §81.051 and §81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission.

Statutory authority: Natural Resources Code §§81.051, 81.052, and 81.073.

Cross reference to statute: Natural Resources Code Chapter 81.

§3.65. Critical Designation of Natural Gas Infrastructure.

(a) Definitions.

(1) In this section, the term "energy emergency" means any event that results in firm load shed or has the potential to result in firm load shed required by the reliability coordinator of a power region in Texas. An event that has the "potential to result in firm load shed" is when the reliability coordinator of a power region in Texas has issued an Energy Emergency Alert Level 1 or 2.

(2) In this section, the term "critical customer information" means the information required on Commission Form CI-D and any attachments.

(3) In this section, "any volume of gas indicated in Mcf/day" means the average daily production from the well's six most recently filed monthly production reports. Wells without six months of production reports shall average the production from the well's production reports on file with the Commission or use the production volume from the well's initial potential test or deliverability test if the well has not yet filed a production report.

(b) Critical designation criteria. The following facilities are designated critical during an energy emergency:

(1) Critical Gas Supplier. The following facilities are designated a critical gas supplier:

(A) gas wells producing gas in excess of 250 [~~15~~] Mcf/day;

(B) oil leases producing casinghead gas in excess of 500 [~~50~~] Mcf/day;

(C) gas processing plants;

(D) natural gas pipelines and pipeline facilities including associated compressor stations and control centers;

(E) local distribution company pipelines and pipeline facilities including associated compressor stations and control centers;

(F) underground natural gas storage facilities;

(G) natural gas liquids transportation and storage facilities; and

(H) saltwater disposal facilities including saltwater disposal pipelines.

(2) Critical Customer. A critical customer is a critical gas supplier for whom the delivery of electricity from an electric entity is essential to the ability of such gas supplier to operate. A critical customer is required to provide critical customer information pursuant to subsection (f) [~~(g)~~] of this section to the electric entities described in §25.52(h) of this title (relating to Reliability and Continuity of Service) and Texas Utilities Code §38.074(b)(1) so that those electric entities may prioritize the facilities in accordance with Texas Utilities Code §38.074(b)(2) and (b)(3). Priority for load shed [~~load-shed~~] purposes during an energy emergency is described by §25.52(h)(2) of this title and any guidance issued thereunder by the Public Utility Commission.

(c) Request for critical designation if not designated critical in subsection (b) of this section.

[~~(1)~~] A facility that is not designated critical under subsection (b) of this section may write to the Commission to apply to be designated critical if the facility's operation is required in order for another facility designated critical to operate. The applicant shall include objective evidence that the facility's operation is required for another facility designated critical in subsection (b) of this section to operate. If approved, the facility shall submit Form CI-D.

[~~(2) A facility that is not designated critical under subsection (b) of this section but that is included on the electricity supply chain map produced by the Texas Electricity Supply Chain Security and Mapping Committee shall write to the Commission to apply to be designated critical, and after approval, shall submit Form CI-D~~].

(d) Acknowledgment of critical status. Except as provided by subsection (e) [~~(f)~~] of this section, an operator of a facility designated as critical under subsection (b) or (c) of this section shall acknowledge the facility's critical status by filing Form CI-D as provided in this subsection. In the year 2022, the Form CI-D acknowledgment shall be filed bi-annually by January 15, 2022, and either September 1, 2022, or 30 days from the date the map is produced by the Texas Electricity Supply Chain Security and Mapping Committee, whichever is later. Beginning in 2023, the Form CI-D acknowledgment shall be filed bi-annually by March 1 and September 1 of each year.

[~~(e) Facilities not eligible for an exception. Because of their contribution to the natural gas supply chain, the following facilities designated critical under subsection (b) of this section are not eligible for an exception under subsection (f) of this section:~~]

[~~(1) a facility included on the electricity supply chain map produced by the Texas Electricity Supply Chain Security and Mapping Committee;~~]

[~~(2) gas wells or oil leases producing gas or casinghead gas in excess of 250 Mcf/day;~~]

[~~(3) gas processing plants;~~]

[~~(4) natural gas pipelines or pipeline facilities that directly serve local distribution companies or electric generation;~~]

[~~(5) local distribution company pipelines or pipeline facilities;~~]

[~~(6) underground natural gas storage facilities;~~]

[~~(7) natural gas liquids storage and transportation facilities; and~~]

[~~(8) a saltwater disposal facility, including a saltwater disposal pipeline, that supports a facility listed in paragraphs (1) through (7) of this subsection.~~]

(e) [~~(f)~~] Critical designation exception.

(1) A facility listed in subsection (b) of this section that is not included on the electricity supply chain map produced by the Texas Electricity Supply Chain Security and Mapping Committee [~~other than those identified in subsection (e) of this section~~] may apply for an exception. An applicant shall demonstrate with objective evidence a reasonable basis and justification in support of the application[~~, such as all of the gas produced at a facility is for on-site consumption, or the facility does not otherwise provide gas for third-party use~~]. The Director of the Critical Infrastructure Division will administratively approve or deny a request for an exception. If the request is denied, the Division will notify the applicant and the applicant may request a hearing to challenge the denial. The party requesting the hearing shall have the burden of proof.

(2) Examples of a reasonable basis and justification for which an exception may be granted include, but are not limited to, the following:

(A) All of the natural gas produced at the facility is consumed on site;

(B) All of the natural gas produced at the facility is consumed outside of this state;

(C) The facility does not provide gas for third-party use; or

(D) The electric entity providing electricity to the facility has provided notice that the facility's request for critical designation status was rejected, denied, or otherwise disapproved by the electric utility; provided, however, that the electric utility communicated its determination in writing, and the decision was for reasons other than the lack of correct identifying information or other administrative reasons.

(3) [~~(2)~~] An applicant for exception shall submit a Form CI-X exception application that identifies each facility for which an exception is requested. The Form CI-X shall be accompanied by an exception application fee. The amount of the fee is $150 as established in Chapter 81, Texas Natural Resources Code.

(A) In the year 2022, the Form CI-X exception application shall be filed bi-annually by January 15, 2022, and either September 1, 2022, or 30 days from the date the map is produced by the Texas Electricity Supply Chain Security and Mapping Committee, whichever is later. Beginning in 2023, the Form CI-X exception application shall be filed bi-annually by March 1 and September 1 of each year.

(B) Once an operator has an approved Form CI-X on file with the Commission, the operator is not required to pay the $150 exception application fee when the operator updates the facilities identified on its Form CI-X.

(f) [~~(g)~~] Providing critical customer information. A critical customer shall provide the critical customer information to the electric entities described in §25.52 of this title and Texas Utilities Code § 38.074(b)(1) unless the critical customer is granted an exception under subsection (e) [~~(f)~~] of this section. The critical customer information shall be provided in accordance with §25.52 of this title. The operator shall certify on its Form CI-D that it has provided the critical customer information to its electric entity.

(g) [~~(h)~~] Confidentiality of information filed pursuant to this section. A person filing information with the Commission that the person contends is confidential by law shall notify the Commission on the applicable form. If the Commission receives a request under the Texas Public Information Act (PIA), Texas Government Code, Chapter 552, for materials that have been designated confidential, the Commission will notify the filer of the request in accordance with the provisions of the PIA so that the filer can take action with the Office of the Attorney General to oppose release of the materials.

(h) [~~(i)~~] Exceptions not transferable. Exceptions are not transferable upon a change of operatorship. When a facility is transferred, both the transferor operator and the transferee operator shall ensure the transfer is reflected on each operator's Form CI-D or Form CI-X when the applicable form update is submitted in accordance with the bi-annual filing timelines in subsections (d) and (e) [~~(f)~~] of this section. If the facility has an exception under subsection (e) [~~(f)~~] of this section, the exception shall remain in effect until the next bi-annual filing deadline. If the transferee operator seeks to continue the exception beyond that time period, the transferee operator shall indicate the transferred facility on the Form CI-X pursuant to subsection (e) [~~(f)~~] of this section.

(i) [~~(j)~~] Failure to file or provide required information. An operator who fails to comply with this section may be subject to penalties under §3.107 of this title (relating to Penalty Guidelines for Oil and Gas Violations).

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, 2022.

TRD-202203325
Haley Cochran
Rules Attorney, Office of General Counsel
Railroad Commission of Texas
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 475-1295

♦ ♦ ♦

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 114. ORTHOTISTS AND PROSTHETISTS

16 TAC §114.50

The Texas Department of Licensing and Regulation (Department) proposes amendments to an existing rule at 16 Texas Administrative Code (TAC), Chapter 114, §114.50, regarding the Orthotists and Prosthetists program. These proposed changes are referred to as the "proposed rule."

EXPLANATION OF AND JUSTIFICATION FOR THE RULE

The rules under 16 TAC, Chapter 114, implement Texas Occupations Code, Chapter 605, Orthotists and Prosthetists.

The proposed rule permits licensed orthotists and prosthetists to claim continuing education (CE) credit for completing the human trafficking prevention training required by Occupations Code, Chapter 116, and the jurisprudence examination required for initial licensure by Department rules. The proposed rule is necessary to expand the categories of CE credit in the existing Continuing Education rule. The changes are a result of recommendations from the Orthotists and Prosthetists Advisory Board workgroup and staff and were recommended by the full advisory board.

Advisory Board Recommendations

The proposed rule was presented to and discussed by the Orthotists and Prosthetists Advisory Board at its meeting on February 28, 2022. The Advisory Board did not make any changes to the proposed rule. The Advisory Board voted and recommended that the proposed rule be published in the *Texas Register* for public comment.

SECTION-BY-SECTION SUMMARY

The proposed rule amends §114.50, Continuing Education, by adding two new paragraphs in subsection (i) and making conforming edits to the punctuation of that subsection.

New §114.50(i)(8) adds the human trafficking prevention training required by Occupations Code, Chapter 116, to the list of acceptable sources of CE credit. No more than one hour of CE credit may be claimed by a licensee for completion of the human trafficking prevention training during a CE reporting period.

New §114.50(i)(9) adds completion of the jurisprudence examination to the list of acceptable sources of CE credit. Current Department rules in Chapter 114 do not require completion of the jurisprudence examination after initial licensure. The addition of this new paragraph permits a licensee to complete the examination for a one-hour CE credit in a CE reporting period even though the examination is not a requirement for renewal of a license.

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 rule is in effect, enforcing or administering the proposed rule does not have foreseeable implications relating to costs or revenues of state or local governments.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rule will not affect a 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 rule is in effect, the public benefit will be an expansion of options for orthotists and prosthetist license holders to complete CE credit. License holders could also see a small decrease in the overall cost to complete continuing education.

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 rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule.

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

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities as a result of the proposed rule. 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, are not required.

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

The proposed rule does 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 rule. For each year of the first five years the proposed rule will be in effect, the agency has determined the following:

1. The proposed rule does not create or eliminate a government program.

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

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

4. The proposed rule does not require an increase or decrease in fees paid to the agency.

5. The proposed rule does not create a new regulation.

6. The proposed rule expands, limits, or repeals an existing regulation. The proposed rule expands the options available for license holders to earn continuing education credit.

7. The proposed rule does not increase or decrease the number of individuals subject to the rules' applicability.

8. The proposed rule does 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 rule and the proposed rule 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, the proposed rule does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

PUBLIC COMMENTS

Comments on the proposed rule may be submitted electronically on the Department's website at *https://ga.tdlr.texas.gov:1443/form/gcerules*; by facsimile to (512) 475-3032; or by mail to Shamica Mason, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register.*

STATUTORY AUTHORITY

The proposed rule is proposed under Texas Occupations Code, Chapters 51 and 605, 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 rule are those set forth in Texas Occupations Code, Chapters 51 and 605. No other statutes, articles, or codes are affected by the proposed rule.

§114.50. Continuing Education.

(a) - (h) (No change.)

(i) Continuing education undertaken by a licensee shall be acceptable if the licensee attends and participates in an activity in the following categories:

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

(6) instructing or presenting in activities listed in paragraphs (1) - (3). Multiple presentations of the same program or equivalent programs may only be counted once during a continuing education period; [~~and~~]

(7) writing a book or article applicable to the practice of prosthetics or orthotics. Four (4) credits for an article and eight (8) credits for a book will be granted for a publication in the continuing education period in which the book or article was published. Multiple publications of the same article or an equivalent article may only be counted once during a continuing education period. Publications may account for 25% or less of the required credit; [~~.~~]

(8) completing the human trafficking prevention training required under Occupations Code, Chapter 116, and §114.40(c)(6) of this chapter. A maximum of one (1) credit will be granted for completion of the training during a continuing education period; and

(9) completing the jurisprudence examination required by §114.22(b) of this chapter. Only one (1) self-directed study credit will be granted for completion of the examination during a continuing education period.

(j) - (q) (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 September 1, 2022.

TRD-202203469
Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 463-7750

♦ ♦ ♦

TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 61. SCHOOL DISTRICTS
SUBCHAPTER AA. COMMISSIONER'S RULES ON SCHOOL FINANCE

19 TAC §61.1017

The Texas Education Agency (TEA) proposes new §61.1017, concerning maintenance of effort and equity for federal COVID-19 pandemic funds. The proposed new section would define the data sources TEA will use in calculating the increased funding authorized under Texas Education Code (TEC), §48.281, and establish limitations.

BACKGROUND INFORMATION AND JUSTIFICATION: Federal statute and regulations require TEA to ensure that for fiscal year (FY) 2022 (school year 2021-2022) and FY 2023 (school year 2022-2023), high-need local educational agencies (LEAs) do not receive a year-over-year per-pupil reduction in state funding that is greater than the average per-pupil reduction, if applicable, across all LEAs in the state for either fiscal year. In addition, for FY 2022 and FY 2023, highest-poverty LEAs may not receive per-pupil funding lower than the per-pupil amount they received in FY 2019 (school year 2018-2019).

To implement the increase in funding authorized under TEC, §48.281, and comply with federal requirements, proposed new §61.1017 would specify prior year run identification numbers in the Foundation School Program (FSP) Summary of Finance (SOF) calculations. TEA will use (FY 2018-2019 SOF Run Identification (Run ID) District Planning Estimate (DPE) 34151 for funding and average daily attendance (ADA). FY 2019-2020 is not used in the calculations. FY 2020-2021 will use Run ID DPE 33254 for ADA and Run ID DPE 33729 for post-reduction funding. FY 2021-2022, FY 2022-2023, and FY 2023-2024 will use the final settle-up Run IDs for the calculations.

The increased funding requires review from both the Legislative Budget Board and the governor. Federal reporting requires specific calculations at a point in time.

TEC, §48.281, expires September 1, 2025.

FISCAL IMPACT: Mike Meyer, deputy commissioner for finance, has determined that there are no additional costs to state or local government, including school districts and open-enrollment charter schools, required to comply with the proposal beyond what the authorizing statute requires.

LOCAL EMPLOYMENT IMPACT: The proposal has no effect on local economy; therefore, no local employment impact statement is required under Texas Government Code, §2001.022.

SMALL BUSINESS, MICROBUSINESS, AND RURAL COMMUNITY IMPACT: The proposal has no direct adverse economic impact for small businesses, microbusinesses, or rural communities; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

COST INCREASE TO REGULATED PERSONS: The proposal does not impose a cost on regulated persons, another state agency, a special district, or a local government and, therefore, is not subject to Texas Government Code, §2001.0045.

TAKINGS IMPACT ASSESSMENT: The proposal does not impose a burden on private real property and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

GOVERNMENT GROWTH IMPACT: TEA staff prepared a Government Growth Impact Statement assessment for this proposed rulemaking. During the first five years the proposed rulemaking would be in effect, it would create a new regulation to comply with TEC, §48.281, and federal requirements.

The proposed rulemaking would not create or eliminate a government program; would not require the creation of new employee positions or elimination of existing employee positions; would not require an increase or decrease in future legislative appropriations to the agency; would not require an increase or decrease in fees paid to the agency; would not expand, limit, or repeal an existing regulation; would not increase or decrease the number of individuals subject to its applicability; and would not positively or adversely affect the state's economy.

PUBLIC BENEFIT AND COST TO PERSONS: Mr. Meyer has determined that for each year of the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal would be to specify the data sources for prior year calculations in the FSP SOF. There is no anticipated economic cost to persons who are required to comply with the proposal.

DATA AND REPORTING IMPACT: The proposal would have no data and reporting impact.

PRINCIPAL AND CLASSROOM TEACHER PAPERWORK REQUIREMENTS: TEA has determined that the proposal would not require a written report or other paperwork to be completed by a principal or classroom teacher.

PUBLIC COMMENTS: The public comment period on the proposal begins September 16, 2022, and ends October 17, 2022. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on September 16, 2022. A form for submitting public comments is available on the TEA website at https://tea.texas.gov/About_TEA/Laws_and_Rules/Commissioner_Rules_(TAC)/Proposed_Commissioner_of_Education_Rules/.

STATUTORY AUTHORITY. The new section is proposed under Texas Education Code (TEC), §48.004, which specifies that the commissioner of education shall adopt rules that are necessary to implement and administer the Foundation School Program; and TEC, §48.281, which details the calculation of maintenance of effort and equity (MOQ) for federal money related to the COVID-19 pandemic for school districts and open-enrollment charter schools. The funding is necessary to ensure compliance with requirements regarding MOQ under the Coronavirus Response and Relief Supplemental Appropriation Act, Section 317.

CROSS REFERENCE TO STATUTE. The proposed new section implements Texas Education Code, §48.004 and §48.281.

§61.1017. Maintenance of Effort and Equity for Federal Money Related to the COVID-19 Pandemic.

(a) General provisions. This section implements Texas Education Code (TEC), §48.281 (Maintenance of Effort and Equity for Federal Money Related to COVID-19 Pandemic), which provides for increases in funding to school districts and open-enrollment charter schools as necessary to ensure compliance with requirements regarding maintenance of equity under Coronavirus Response and Relief Supplemental Appropriations Act, 2021 (Div. M, Pub. L. No. 116-260, reprinted in note, 20 U.S.C. Section 3401), Section 317; and American Rescue Plan Act of 2021 (Pub. L. No. 117-2, reprinted in note, 20 U.S.C. Section 3401), Section 2001. In accordance with TEC, §48.281, this section defines the data sources that the Texas Education Agency (TEA) will use in calculating the amount of the funding.

(b) Definitions. The following terms have the following meanings when used in this section.

(1) Average daily attendance (ADA)--This term has the meaning defined by TEC, §48.005(a). For the 2020-2021 school year, ADA will include adjustments related to the ADA hold harmless provided for that school year but will exclude any reduction in ADA arising from the application of the Elementary and Secondary School Emergency Relief funding toward the ADA hold harmless.

(2) Foundation School Program (FSP)--The program established under TEC, Chapters 46, 48, and 49, or any successor program of state-appropriated funding for school districts in Texas.

(3) Maintenance and operations (M&O) revenue--The total M&O revenue available to a school district for maintenance and operations under the FSP, including state aid and M&O tax collections net of any required recapture payments. For the 2020-2021 school year, total M&O revenue will include adjustments resulting from the reduction in ADA arising from the application of the Elementary and Secondary School Emergency Relief funding toward the ADA hold harmless.

(4) Summary of Finances (SOF)--The SOF report summarizes the total M&O revenue available to a school district or open-enrollment charter school under the FSP.

(c) Data sources for calculating M&O revenue per ADA for the 2018-2019, 2020-2021, 2021-2022, and 2022-2023 school years.

(1) M&O revenue and ADA for the 2018-2019 school year will use final data from the district planning estimate (DPE) column of SOF Run Identification (Run ID) 34151, subject to the limitation in subsection (d) of this section.

(2) M&O revenue and ADA for the 2020-2021 school year will use final data from the DPE column of SOF Run ID 33729 and 33254, respectively, subject to the limitation in subsection (d) of this section.

(3) M&O revenue and ADA for the 2021-2022 and 2022-2023 school years will use the most current data for each column of the SOF report, subject to the limitation in subsection (d) of this section.

(4) For the 2022-2023 school year only, for purposes of calculating a school district or open-enrollment charter school's 2022-2023 allotment under paragraph (3) of this subsection, M&O revenue for the 2021-2022 school year will also include the allotment under paragraph (3) of this subsection.

(d) Limitations on calculations.

(1) For purposes of calculating an allotment under this section, the prior year M&O revenue and ADA for the 2018-2019 and 2020-2021 school years will not be changed from the SOF Run IDs identified in subsection (c)(1) and (2) of this section.

(2) TEA will stop running calculations for the 2021-2022 school year after June 30, 2023, and the amounts that a school district or open-enrollment charter school would have received for the 2021-2022 school year under TEC, §48.281(a), will not be changed after that date.

(3) TEA will stop running calculations for the 2022-2023 school year after June 30, 2024, and the amounts that a school district or open-enrollment charter school would have received for the 2022-2023 school year under TEC, §48.281(a), will not be changed after that date.

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 September 2, 2022.

TRD-202203484
Cristina De La Fuente-Valadez
Director, Rulemaking
Texas Education Agency
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 475-1497

♦ ♦ ♦

TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES

CHAPTER 260. DEAF BLIND WITH MULTIPLE DISABILITIES (DBMD) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes in the Texas Administrative Code (TAC), Title 26, Part 1, new Chapter 260, Deaf Blind with Multiple Disabilities (DBMD) Program and Community First Choice (CFC), comprised of §§260.5, 260.7, 260.9, 260.51, 260.53, 260.55, 260.57, 260.59, 260.61, 260.63, 260.65, 260.67, 260.69, 260.71, 260.73, 260.75, 260.77, 260.79, 260.81, 260.83, 260.85, 260.87, 260.89, 260.101, 260.103, 260.105, 260.107, 260.109, 260.111, 260.113, 260.151, 260.201, 260.203, 260.205, 260.207, 260.209, 260.211, 260.213, 260.215, 260.217, 260.219, 260.221, 260.223, 260.251, 260.253, 260.255, 260.257, 260.259, 260.261, 260.263, 260.265, 260.267, 260.269, 260.271, 260.301, 260.303, 260.305, 260.307, 260.309, 260.311, 260.313,

260.315, 260.317, 260.319, 260.321, 260.323, 260.325, 260.327, 260.329, 260.331, 260.333, 260.335, 260.337, 260.339, 260.341, 260.343, 260.345, 260.347, 260.349, 260.351, 260.353, 260.355, 260.357, 260.359, 260.401, 260.403, and 260.451.

BACKGROUND AND PURPOSE

The Deaf Blind with Multiple Disabilities (DBMD) Program is a Medicaid waiver program approved by the Centers for Medicare & Medicaid Services (CMS) under §1915(c) of the Social Security Act. This waiver program provides community-based services and supports to eligible individuals as an alternative to services provided in an institutional setting. In the DBMD Program, an individual chooses a program provider who delivers both case management and direct services.

One purpose of the proposed new rules is to move the DBMD Program rules from 40 TAC, Chapter 42, to 26 TAC, Chapter 260. The repeal of 40 TAC, Chapter 42, is proposed elsewhere in this issue of the *Texas Register.*

Another purpose of the proposed new rules is to ensure that the DBMD Program complies with the requirements in Title 42, Code of Federal Regulations (42 CFR), Chapter IV, Subchapter C, Part 441, Subpart G, §441.301(c)(1) - (5). In 2014, CMS amended this regulation to establish new requirements for Home and Community-Based Services (HCBS) Medicaid programs, including requirements for HCBS program settings and person-centered planning. CMS has given states until March 2023 to be in full compliance with the requirements in §441.301(c)(1) - (5). The proposed new rules also ensure compliance with the requirements in 42 CFR, Chapter IV, Subchapter C, Part 441, Subpart K, §441.530, regarding Home and Community-Based Settings, and §441.540 regarding the Person-centered service plan, for Community First Choice (CFC) services because CFC services are available in the DBMD Program.

Additional purposes of the proposed new rules are described below.

A proposed new rule requires program providers to submit a translation of non-English documentation to HHSC. The purpose of the proposed new rule is to help ensure that HHSC's reviews of documentation are efficient.

A proposed new rule provides that HHSC may allow program providers to use one or more of the exceptions specified in the rule while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect. This provision is added to help ensure that providers are able to operate and provide services effectively during a disaster.

SECTION-BY-SECTION SUMMARY

New Subchapter A, Definitions, Description of Services, and Excluded Services

Proposed new §260.5, Definitions, defines terms used in the new chapter. The proposed rule is different from the current rule regarding definitions because the proposed new rule includes definitions of "agency foster home," "enrollment IPP," "hospital," "inpatient chemical dependency treatment facility," "in person or in-person," "institution for mental diseases," "Medicaid HCBS--Medicaid home and community-based services," "mental health facility," "nursing," "person-centered planning process," "renewal IPC," "residential child-care facility," "revised IPC," "Texas Workforce Commission," and "videoconferencing."

Proposed new §260.7, Description of the DBMD Program and CFC Option, describes the DBMD Program, lists the services available to an individual in the DBMD Program, restricts a program provider to providing and billing for habilitation only if the activity provided is transportation, describes community first choice (CFC), and lists the CFC services available to an individual in the DBMD Program.

Proposed new §260.9, Excluded Services, describes services not provided through the DBMD Program.

New Subchapter B, Eligibility, Enrollment, and Review

New Division 1, Eligibility and Maintenance of the DBMD Interest List

Proposed new §260.51, Eligibility Criteria for DBMD Program Services and CFC Services, describes the eligibility criteria for an individual to qualify for DBMD Program services and CFC services.

Proposed new §260.53, DBMD Interest List, describes how HHSC maintains the interest list for individuals interested in receiving services in the DBMD Program. The proposed rule differs from the current rule in how HHSC assigns an interest list date to an individual after the individual's name is removed from the interest list in accordance with subsection (f)(1) - (4) and the individual requests to be placed back on the list. In the current rule, if such an individual makes the request within 90 days after the individual's name was removed from the list, HHSC adds the individual's name to the DBMD interest list using the interest list date that was in effect at the time the individual's name was removed from the list. In the proposed rule, HHSC adds the individual's name to the DBMD interest list in this situation using the interest list date that was in effect at the time the individual's name was removed, only if the request to be placed back on the list is the individual's first request. Further, if the individual's request to be placed back on the list is made more than 90 days after the individual's name was removed from the list and the request is the individual's first request, the proposed rule provides that HHSC adds the individual's name to the interest list using the interest list date that was in effect at the time the individual's name was removed from the list, if HHSC determines that extenuating circumstances exist. If a request to be placed back on an interest list by an individual in these situations is not the individual's first request, the proposed rule provides that the individual's name is added back using the date of the request as the interest list date. The reason for this change is to remove an incentive for an individual to repeatedly decline a written offer of DBMD Program services.

New Division 2, Enrollment Process, Person-Centered Planning, and Requirements for Service Settings

Proposed new §260.55, Written Offer of Enrollment in the DBMD Program, describes the process for offering an individual enrollment and what the individual or legally authorized representative (LAR) must do to accept the offer to enroll into the DBMD Program. The proposed rule also describes the reasons HHSC withdraws an offer of enrollment into the DBMD Program.

Proposed new §260.57, Person-Centered Planning Process, requires an individual's service planning team to ensure the person-centered planning process is led by the individual to the maximum extent possible. The proposed rule requires the service planning team to use the person-centered planning process during enrollment and during renewals and revisions of an individual's individual plan of care (IPC) using the forms listed in

the Deaf Blind with Multiple Disabilities Program Manual. The proposed rule also describes the activities involved in the person-centered planning process.

Proposed new §260.59, Requirements for Service Settings, requires a program provider to ensure that a setting in which an individual receives DBMD Program and CFC services meet certain criteria, including that the setting is based on the individual's preferences, and needs; supports the individual's access to the greater community to the same degree as a person not enrolled in a Medicaid waiver program; ensures the individual's rights of privacy, dignity, and respect; and optimizes an individual's independence in making life choices. In addition, the proposed rule requires a program provider to ensure that a setting in which an individual receives a DBMD Program service or CFC service is not a setting presumed to have the qualities of an institution except that a DBMD Program service or a CFC service may be provided in a setting that is presumed to have the qualities of an institution if CMS determines through a heightened scrutiny review that the setting does not have the qualities of an institution and does have the qualities of home and community-based settings.

Proposed new §260.61, Process for Enrollment of an Individual, describes the process for offering an individual enrollment and enrolling an individual into the DBMD Program. The proposed new rule is different from the current rule regarding the process for enrollment because it includes a requirement for a case manager to provide an oral and written explanation to the individual and LAR or actively involved person about the use of electronic visit verifications as required by 1 TAC Chapter 354, Subchapter O.

Proposed new §260.63, Program Provider Cannot Ensure Individual's Health and Welfare, describes requirements for a program provider and activities performed by HHSC if a program provider chosen by an individual or LAR is not willing to provide DBMD Program services or CFC services to the individual because it cannot ensure the individual's health and welfare.

Proposed new §260.65, Development of an Enrollment IPP, describes the process for the development of an enrollment individual program plan (IPP).

Proposed new §260.67, Development of a Proposed Enrollment IPC, describes the process for the development of an enrollment IPC.

Proposed new §260.69, HHSC's Review of Request for Enrollment, describes HHSC's process for reviewing an IPC.

Proposed new §260.71, CDS Option, requires a case manager to perform specified activities including informing the applicant about the consumer directed services (CDS) option. The proposed rule also provides that if an applicant or individual chooses to receive a service through the CDS option, a program provider must perform specific activities including documenting the choice of a financial management services agency (FMSA). The proposed rule requires the case manager to provide an oral and written explanation of the CDS option using materials provided by HHSC if an individual or LAR chooses to participate in the CDS option.

New Division 3, Review

Proposed new §260.73, Tracking Annual Renewal of an ID/RC Assessment and an IPC, requires a program provider to have written policies and procedures to ensure compliance with proposed §260.77(b)(1) (relating to Renewal and Revision of an IPP and IPC) and that includes a written electronic tracking system that alerts the program provider to activities that must occur for the program provider to timely submit documentation to HHSC.

Proposed new §260.75, Utilization Review of an IPC by HHSC, describes the purpose of a utilization review of an IPC conducted by HHSC, requires a program provider to submit documentation supporting an IPC to HHSC if requested by HHSC and describes the processes that are followed if a review by HHSC results in a determination that a DBMD Program service or CFC service will be terminated, denied, or reduced.

Proposed new §260.77, Renewal and Revision of an IPP and IPC, describes the process for developing a renewal and revised IPP and IPC. The proposed rule is different from the current rule regarding renewal and revision of an IPP and IPC because it does not include the annual requirement for the case manager to 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 Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions Program because CMS requires this signature only at enrollment.

New Division 4, Transfer Between Program Providers

Proposed new §260.79, Coordination of Transfers, describes the process for an individual to transfer to a different program provider or FMSA.

Proposed new §260.81, Personal Leave for Individual Receiving Licensed Assisted Living or Licensed Home Health Assisted Living, allows an individual receiving licensed assisted living or licensed home health assisted living to take personal leave days, and describes how the program provider charges the individual for room and board and how the program provider bills HHSC when such leave is taken.

New Division 5, Denial, Suspension, Reduction, And Termination

Proposed new §260.83, Denial of Request for Enrollment in the DBMD Program or of a DBMD Program Services or a CFC Service, describes the basis and process for HHSC to deny an individual's request for enrollment into the DBMD Program.

Proposed new §260.85, Suspension of DBMD Program Services and CFC Services, describes the basis and process for HHSC to suspend an individual's DBMD Program services or CFC service. The proposed rule is different from the current rule about suspension of services because the proposed rule does not allow a program provider to request HHSC authorization to continue services when an individual is admitted to a facility. In addition, the proposed rule is different from the current rule because the proposed rule does not include a requirement for a case manager to be involved in facility discharge planning and related activities because case management would be suspended during the admission and the program provider cannot bill for case management provided during a suspension.

Proposed new §260.87, Reduction of a DBMD Program Service or a CFC Service, describes the basis and process for HHSC to reduce an individual's DBMD Program service or CFC service.

Proposed new §260.89, Termination of DBMD Program Services and CFC Services with Advance Notice Due to Ineligibility or Leave from the State, describes the basis and process for HHSC to terminate an individual's DBMD Program Services and CFC Services when advance notice of the termination is required be-

cause the individual does not meet eligibility criteria or leaves the state.

Proposed new §260.101, Termination of DBMD Program Services and CFC Services with Advance Notice Due to Non-Compliance with Mandatory Participation Requirements, describes the basis and process for HHSC to terminate an individual's DBMD Program Services and CFC Services when advance notice is required because the individual did not comply with mandatory participation requirements.

Proposed new §260.103, Termination of DBMD Program Services and CFC Services without Advance Notice for Reasons Other Than Behavior Causing Immediate Jeopardy, describes the basis and process for HHSC to terminate an individual's DBMD Program Services and CFC Services when advance notice is not required because of a reason other than behavior causing immediate jeopardy.

Proposed new §260.105, Termination of DBMD Program Services and CFC Services without Advance Notice Due to Behavior Causing Immediate Jeopardy, describes the basis and process for HHSC to terminate an individual's DBMD Program Services and CFC Services when advance notice of the termination is not required because of behavior causing immediate jeopardy.

Proposed new §260.107, Offering Access to Other Services, requires the case manager to inform the individual of alternative services and supports in the community if HHSC terminates the individual's DBMD Program and CFC services.

Proposed new §260.109, Individual Whose DBMD Program Services are Terminated May Request Name be Added to DBMD Interest List, provides that an individual may request that the individual's name be placed on the DBMD interest list in accordance with proposed §260.53(b), relating to DBMD Interest List, if HHSC terminates an individual's DBMD Program services.

New Division 6, Rights and Responsibilities of an Individual

Proposed new §260.111, Individual's Right to a Fair Hearing, provides that an individual is entitled to a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A (relating to Uniform Fair Hearing Rules).

Proposed new §260.113, Mandatory Participation Requirements of an Individual, describes the requirements an individual must comply with while receiving DBMD Program services and CFC services.

New Subchapter C, Compliance with Rules

Proposed new §260.151, Program Provider Compliance with Rules, requires that a program provider comply with certain rules.

New Subchapter D, Additional Program Provider Provisions

Proposed new §260.201, Protection of Individual, requires a program provider to have written policies and procedures about specified topics to protect an individual. The proposed rule prohibits a program provider from using seclusion. The proposed rule requires a program provider to notify HHSC, in writing, of an individual's death. The proposed rule requires a program provider to report critical incidents to HHSC. The proposed rule also requires a program provider to ensure that a program director who receives a copy of an HHSC initial intake report or a final investigative report from an FMSA sends a copy of the report to the individual's case manager.

Proposed new §260.203, Qualification of Program Provider Staff, describes the required qualifications for a program director and service providers.

Proposed new §260.205, Training, describes the training requirements for program directors, case managers, and service providers. The proposed rule is different from the current rule on training because the proposed rule requires a program provider to ensure a case manager completes a comprehensive non-introductory person-centered planning training developed or approved by HHSC within six months after the case manager's date of hire and requires a service provider whose duties include participating as a member of a service planning team to complete HHSC's web-based Introductory Training within six months after assuming this duty.

Proposed new §260.207, Service Delivery, describes certain requirements for program providers regarding service delivery including a limitation on the number of individuals assigned to case managers, a requirement that a case manager have a monthly in-person or telephone contact with an individual, a requirement for a sufficient number of case managers to provide case management, and requirements when providing services to an individual while the individual is staying at a location outside the program provider's contracted service delivery area.

Proposed new §260.209, Documentation of Services Delivered and Recordkeeping, describes the requirements for the documentation of services provided and the documentation that must be included in an individual's record.

Proposed new §260.211, Quality Assurance, requires the program provider to conduct an annual survey of individuals, LARs, and persons actively involved in the individuals' care to determine satisfaction with services provided. In addition, the proposed rule requires a program provider to annually review all final investigative reports from HHSC and critical incident data and identify program process improvements based on the review.

Proposed new §260.213, Service Backup Plans, describes the requirements for the development and revision of a service backup plan for each service identified as critical.

Proposed new §260.215, Protective Devices, describes the requirements regarding the use of a protective device for an individual.

Proposed new §260.217, Restraints, describes requirements regarding the use of restraints.

Proposed new §260.219, Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual, requires a program provider, service provider, staff person, volunteer or controlling person who knows or suspects that an individual is being or has been abused, neglected, or exploited, to report the allegation of abuse, neglect, or exploitation.

Proposed new §260.221, Requirements Related to the Reporting of Abuse Neglect, and Exploitation of an Individual, describes the requirements related to a report and investigation of an allegation of abuse, neglect, or exploitation. In addition, the proposed rule prohibits a program provider from retaliating against 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.

Proposed new §260.223, Requirement for Translation, requires a program provider who submits documentation to HHSC containing information that is not in English, to, at the same time, submit a translation of the information in English.

New Subchapter E, Assistance with Personal Funds Management

Proposed new §260.251, Request for Assistance with Personal Funds Management, describes requirements a program provider must comply with before accepting an individual's personal funds or deposit in a trust fund account. In addition, the proposed rule prohibits a program provider from requiring an individual or LAR to request the program provider's assistance with management of the individual's personal funds.

Proposed new §260.253, Establishing a Trust Fund Account, describes the requirements a program provider must comply with in establishing a trust fund account when assisting an individual with personal funds management.

Proposed new §260.255, Maintaining a Trust Fund Account, describes requirements a program provider must comply with in maintaining an individual's trust fund account.

Proposed new §260.257, Individual's Access to Personal Funds, describes requirements a program provider must comply with when an individual whose personal funds are maintained in a trust fund account requests disbursement of a portion or all of the personal funds.

Proposed new §260.259, Petty Cash Fund, describes program provider requirements related to the maintenance of a petty cash fund.

Proposed new §260.261, Trust Fund Transactions, describes program provider requirements related to the maintenance of a trust fund ledger.

Proposed new §260.263, Recurring Payments, describes program provider requirements related to making recurring payments on behalf of an individual from a trust fund account if the individual or LAR submits a written authorization to the program provider.

Proposed new §260.265, Receipt for Direct Payment to Vendor from Trust Fund Account, describes program provider requirements related to obtaining a receipt from the vendor for an item or service authorized by the individual or LAR.

Proposed new §260.267, Trust Fund Documentation, describes program provider requirements related to trust fund documentation and making it accessible and retrievable for review.

Proposed new §260.269, Trust Fund Refund, requires the program provider to return the balance of the individual's funds to the individual or LAR if the individual or LAR submits a written request for the balance.

Proposed new §260.271, Trust Fund Procedures for Individual Transfer and Termination, describes program provider requirements related to returning trust funds to an individual or LAR when an individual transfers or is terminated from the DBMD Program.

New Subchapter F, Service Descriptions and Requirements

New Division 1, Adaptive Aids

Proposed new §260.301, Authorization Amount and Other Limits for Adaptive Aids, describes the adaptive aids that may be purchased in the DMBD Program, and the maximum amount HHSC will approve for adaptive aids. The proposed rule also requires a program provider to ensure that a purchased adaptive aid is the exclusive property and for the exclusive use of the individual for whom it is purchased; and a leased adaptive aid is for the exclusive use of the individual for whom it is leased.

Proposed new §260.303, Requirements for Authorization to Purchase or Lease and Adaptive Aid, describes the process to request authorization to purchase or lease an adaptive aid.

Proposed new §260.305, Requirements for Bids for an Adaptive Aid, requires a program provider to obtain bids for an adaptive aid that costs $500 or more and describes the process to obtain the bids.

Proposed new §260.307, Time Frames for Providing an Adaptive Aid, describes the required time frames that an individual must receive an adaptive aid from the program provider.

Proposed new §260.309, Cost Effective Delivery of Adaptive Aid, requires the program provider to ensure that, if an adaptive aid is delivered to an individual by a commercial carrier, the most cost-effective carrier is used. The proposed rule prohibits a program provider from using a commercial carrier to provide overnight delivery unless certain circumstances are met.

Proposed new §260.311, Requirements of Program Provider Following Provision of Adaptive Aid, describes the requirements a program provider must comply with after provision of an adaptive aid including that the individual, unpaid caregiver, and service providers are provided with appropriate orientation and training in the proper use of the adaptive aid.

New Division 2, Minor Home Modifications

Proposed new §260.313, Items or Services Purchasable as a Minor Home Modification, describes the minor home modifications that may be purchased in the DMBD Program and also lists examples of modifications that may not be purchased.

Proposed new §260.315, Authorization Limit for Minor Home Modifications and Amount for Repair and Maintenance, describes the maximum amount HHSC approves as payment for minor home modifications. The proposed rule also addresses the process that must be used to request approval for repair and maintenance of a minor home modification.

Proposed new §260.317, Requesting Authorization to Purchase a Minor Home Modification that Costs Less than $1,000, describes the process a program provider must follow to obtain authorization of a minor home modification that costs less than $1,000.

Proposed new §260.319, Requesting Authorization to Purchase a Minor Home Modification that Costs $1,000 or More, describes the process a program provider and the service planning team must follow to obtain authorization of a minor home modification that costs $1,000 or more.

Proposed new §260.321, Specifications for a Minor Home Modification, describes program provider requirements regarding specifications for which HHSC has authorized payment.

Proposed new §260.323, Bid Requirements for a Minor Home Modification, requires a program to obtain bids for a minor home modification that costs $1,000 or more and describes the process to obtain the bids.

Proposed new §260.325, Time Frames for Completion of Minor Home Modification, describes the program provider require-

ments related to the completion of a minor home modification, including required time frames.

Proposed new §260.327, Inspection of a Minor Home Modification, describes program provider requirements related to an inspection of a minor home modification.

Proposed new §260.329, Repair or Replacement of a Minor Home Modification, describes when HHSC will authorize repair or maintenance of a minor home modification, when the program provider must repair or replace a minor home modification.

Proposed new §260.331, Individual's Satisfaction with Minor Home Modification, describes the process for a program provider to determine whether the individual or LAR is satisfied with a minor home modification.

New Division 3, Requirements for Other DBMD Program Services

Proposed new §260.333, Behavioral Support, describes the program provider requirements related to the provision of behavioral support.

Proposed new §260.335, Chore Services, describes program provider requirements related to the provision of chore services.

Proposed new §260.337, Case Management, describes program provider requirements related to the provision of case management.

Proposed new §260.339, Dental Treatment, describes the program provider requirements related to the provision of dental treatment and includes the maximum amount HHSC will approve for an individual's dental treatment.

Proposed new §260.341, Employment Services, describes program provider requirements related to the provision of employment services.

Proposed new §260.343, Day Habilitation, Residential Habilitation, and CFC PAS/HAB, describes program provider requirements related to the provision of day habilitation, residential habilitation, and CFC personal assistance services/habilitation.

Proposed new §260.345, Intervener, describes program provider requirements related to the provision of intervener services.

Proposed new §260.347, Nursing, describes program provider requirements related to the provision of nursing.

Proposed new §260.349, Orientation and Mobility, describes program provider requirements related to the provision of orientation and mobility.

Proposed new §260.351, Residential Services, describes program provider requirements related to the provision of residential services.

Proposed new §260.353, Respite, describes program provider requirements related to the provision of respite.

Proposed new §260.355, Therapies, describes program provider requirements related to the provision of therapies.

New Division 4, Non-Billable Time and Activities

Proposed new §260.357, Non-Billable Time and Activities, provides a list of activities for which a program provider will not be reimbursed by HHSC.

New Division 5, CFC ERS

Proposed new §260.359, CFC ERS, describes program provider requirements related to the provision of Community First Choice emergency response services.

New Subchapter G, Program Provider-Owned Residential Settings

Proposed new §260.401, Residential Agreements, requires a program provider to have a residential agreement with an individual or LAR if the individual is receiving licensed assisted living from the program provider. In addition, the proposed rule describes the required contents of the residential agreement and requires the program provider to give the individual or LAR at least three calendar days to review, request changes, and sign the residential agreement; allows an individual to begin living in a residence in which licensed home health assisted living is provided before a residential agreement is fully executed because of an emergency; and requires a program provider to provide a copy of the residential agreement to the individual or LAR. The proposed rule also describes the requirements for a program provider if an individual or LAR is delinquent in payment of room and board and the program provider wants to evict the individual. Further, the proposed rule describes the criteria that must be met before a program provider proceeds to evict an individual. The proposed rule describes the requirements for a program provider and case manager after an individual is evicted. Also, the proposed rule describes the required actions for a program provider and case manager if the program provider determines that the provision in the residential agreement regarding decoration of the individual's bedroom needs to be modified.

Proposed new §260.403, Requirements for Program Provider-Owned Residential Settings, requires a program provider to ensure that a setting in which licensed assisted living is provided meets certain criteria including that an individual has privacy in the individual's bedroom, a choice of roommates, and that a lock is installed on the individual's bedroom door with no cost to the individual. The proposed rule also describes requirements that must be met if the service planning team determines that a modification to the criteria is needed.

New Subchapter H, Declaration of Disaster

Proposed new §260.451, Exceptions to Certain Requirements During Declaration of Disaster, provides that HHSC may allow program providers to use one or more of the exceptions described in the rule while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect. The rule provides that HHSC notifies program providers if it allows an exception to be used and the date an allowed exception must no longer be used. The proposed rule also defines "disaster area."

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, there may be an additional cost to state government if HHSC approves a request for an individual in a disaster area to exceed the service limits for an adaptive aid or a minor home modification by $15,000. However, due to the varying nature and unknown timeline of a disaster, HHSC lacks sufficient information to provide an estimate of these costs.

Trey Wood has also determined that there may be an additional cost to state government if HHSC denies licensed assisted living until an individual or LAR pays delinquent room or board and it results in a significant amount of written notices from HHSC of

the denial, fair hearing requests, and fair hearings. However, HHSC lacks sufficient information to provide an estimate of these costs, but anticipates there will not be a significant amount of evictions and denials because having a residential agreement in place is expected to promote the payment of room and board.

Trey Wood has also determined that the rules will not have any fiscal implications to 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 a new rule;

(6) the proposed rules will repeal 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 the rules could have an adverse economic effect on small businesses and micro-businesses due to the cost to comply. HHSC does not have the data to estimate the number of small businesses or micro-businesses subject to the rule, however, currently HHSC has a total of 64 DBMD program providers. No rural communities contract to provide DBMD services.

HHSC did not consider any alternative methods that would achieve the purpose of the proposed new rules while minimizing the adverse impact on small businesses or micro-businesses because the rules requiring a program provider to have a residential agreement with each individual receiving licensed assisted living from the program provider, and to install a lock on an individual's bedroom door if there is not one, are necessary for the DBMD Program to comply with federal law and for HHSC to receive federal funds. HHSC lacks regulatory flexibility in implementing the federal program.

HHSC did not consider any alternative methods for the proposed rule requiring a program provider to submit a translation of information in English if the program provider submits documentation to HHSC containing information that is not in English, because there is no alternative method that would achieve the purpose of ensuring that HHSC's reviews of the documentation submitted are efficient.

HHSC did not consider any alternative methods for the proposed rule requiring certain service providers to complete HHSC's web-based Introductory Training on the person-centered planning process because the training is based on a federal regulation. HHSC has no regulatory flexibility in achieving the goals of the federal program.

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 receive a source of federal funds or comply with federal law.

PUBLIC BENEFIT AND COSTS

Stephanie Stephens, State Medicaid Director, has determined that for each year of the first five years the rules are in effect, individuals will benefit from the implementation of federal regulations that help ensure an individual receives services that are person-centered, promote the autonomy of the individual, and help to ensure that DBMD Program services and CFC services are provided in a setting that is integrated in the greater community.

Trey Wood has also 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 because program providers will develop and implement a residential agreement with each individual who receives licensed assisted living. Further, program providers may incur court costs to evict an individual who fails to pay room and board and for attorney's fees arising out of any dispute relating to the residential agreement.

In addition, DBMD program providers may also incur a cost to purchase and install a lock on a bedroom door for an individual receiving licensed assisted living, if the door does not currently have a lock; and to submit a translation of information in English if the program provider submits documentation to HHSC containing information that is not in English. However, HHSC lacks sufficient information to provide an estimate of these costs.

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 HEARING

A public hearing to receive comments on this proposal will be held via GoToWebinar on September 26, 2022, at 1:00 p.m. (central time). The link to register for the webinar meeting is https://attendee.gotowebinar.com/register/5797564706801514763.

Persons requiring further information, special assistance, or accommodations should contact Kayatta Thomas at (737) 256-8490.

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 701 W. 51st Street, Austin, Texas 78751; or emailed to *HHSRulesCoordinationOffice@hhs.texas.gov.*

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 21R134" in the subject line.

SUBCHAPTER A. DEFINITIONS, DESCRIPTION OF SERVICES, AND EXCLUDED SERVICES

26 TAC §§260.5, 260.7, 260.9

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§261.5. 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--A service in the Deaf Blind with Multiple Disabilities (DBMD) Program that:

(A) 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

(B) meets one of the following criteria:

(i) is an item included in the list of adaptive aids in the Deaf Blind with Multiple Disabilities Program Manual; or

(ii) is the repair or maintenance of an item on the list of adaptive aids in the Deaf Blind with Multiple Disabilities Program Manual 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 an adaptive behavior screening assessment.

(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) Agency foster home--This term has the meaning set forth in Texas Human Resources Code §42.002.

(9) Alarm call--A signal transmitted from an individual's Community First Choice (CFC) Emergency Response Services (ERS) equipment to the CFC ERS response center indicating that the individual needs immediate assistance.

(10) ALF--Assisted living facility. A facility licensed in accordance with Texas Health and Safety Code Chapter 247.

(11) Alleged perpetrator--A person alleged to have committed an act of abuse, neglect, or exploitation of an individual.

(12) Audiology--A DBMD Program service that provides assessment and treatment by a licensed audiologist and includes training and consultation with an individual's family members or other support providers.

(13) Auxiliary aid--A service or device that enables an individual with impaired sensory, manual, or speaking skills to participate in the person-centered planning process. An auxiliary aid includes interpreter services, transcription services, and a text telephone.

(14) Behavior support plan--A comprehensive, individualized written plan based on a current functional behavior assessment that includes specific outcomes and behavioral techniques designed to teach or increase adaptive skills and decrease or eliminate target behaviors.

(15) 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.

(16) Behavioral support--A DBMD Program service that provides specialized interventions to assist an individual in increasing adaptive behaviors and replacing or modifying behaviors that prevent or interfere with the individual's inclusion in the community and consists of the following activities:

(A) conducting a functional behavior assessment;

(B) developing an individualized behavior support plan;

(C) training and consulting 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 evaluating the effectiveness of the behavior support plan;

(E) modifying, as necessary, the behavior support plan based on monitoring and evaluating the plan's effectiveness; and

(F) counseling 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.

(17) 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).

(18) Calendar day--Any day, including weekends and holidays.

(19) Case management--The DBMD Program service described in §260.337 of this chapter (relating to Case Management).

(20) Case manager--A service provider of case management.

(21) CDS option--Consumer directed services option. A service delivery option defined in 40 TAC §41.103 (relating to Definitions).

(22) CFC--Community First Choice.

(23) CFC ERS--CFC emergency response services. A CFC service that provides 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.

(24) 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.

(25) CFC FMS--CFC financial management services. A CFC service provided to an individual who receives only CFC PAS/HAB through the CDS option.

(26) CFC PAS/HAB--CFC personal assistance services/habilitation. A CFC service:

(A) that consists of:

(i) personal assistance services, which 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, which 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, including:

(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.

(27) CFC support consultation--A CFC service that provides support consultation to an individual who receives only CFC PAS/HAB through the CDS option.

(28) CFC support management--A CFC service that provides training on how to select, manage, and dismiss an unlicensed service provider of CFC PAS/HAB.

(29) CFR--Code of Federal Regulations.

(30) 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.

(31) Chore services--A DBMD Program service, other than CFC PAS/HAB household chores, needed to maintain a clean, sanitary, and safe environment in an individual's home and consists of heavy household chores, such as washing floors, windows, and walls, securing loose rugs and tiles, and moving heavy items or furniture.

(32) CMS--The Centers for Medicare & Medicaid Services. CMS is the agency within the United States Department of Health and Human Services that administers the Medicare and Medicaid programs.

(33) Competitive employment--Employment that pays an individual at least minimum wage if the individual is not self-employed.

(34) Contract--A provisional contract that the Texas Health and Human Services Commission enters into in accordance with 40 TAC §49.208 (relating to Provisional Contract Application Approval) that has a term of no more than three years, not including any extension agreed to in accordance with 40 TAC §49.208(e) or a standard contract that HHSC enters into in accordance with 40 TAC §49.209 (relating to Standard Contract) that has a term of no more than five years, not including any extension agreed to in accordance with 40 TAC §49.209(d).

(35) 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.

(36) Day Activity and Health Services Program--This term has the meaning set forth in Texas Human Resource Code §103.003.

(37) DBMD Program--The Deaf Blind with Multiple Disabilities Program.

(38) 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.

(39) Denial--An action taken by HHSC that:

(A) rejects an individual's request for enrollment into the DBMD Program;

(B) disallows a DBMD Program service or a CFC service requested on an individual plan of care (IPC) that was authorized on the prior IPC; or

(C) disallows 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.

(40) Dental treatment--A DBMD Program service that:

(A) consists of the following:

(i) emergency dental treatments, which are 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 treatments, which are examinations, x-rays, cleanings, sealants, oral prophylaxes, and topical fluoride applications;

(iii) therapeutic dental treatments, which include fillings, scaling, extractions, crowns, and 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 treatments, which are 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 Labiolingual 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.

(41) 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; and

(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.

(42) DFPS--Department of Family and Protective Services.

(43) Dietary services--A DBMD Program service that provides nutrition services, as defined in Texas Occupations Code §701.002.

(44) Employment assistance--A DBMD Program service that provides assistance to an individual to help the individual locate competitive employment in the community to the same degree of access as individuals not receiving DBMD Program services.

(45) Enrollment Individual Plan of Care (IPC)--The first IPC for an individual developed before the individual's enrollment into the DBMD Program.

(46) Enrollment Individual Program Plan (IPP)--The first IPP for an individual developed before the individual's enrollment into the DBMD Program in accordance with §260.65 of this chapter (relating to Development of an Enrollment IPP).

(47) 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.

(48) FMS--Financial management services. A DBMD Program service that is defined in 40 TAC §41.103 and provided to an individual participating in the CDS option.

(49) FMSA--Financial management services agency. An entity, as defined in 40 TAC §41.103, that provides FMS.

(50) Former military member--A person who served in the United States Army, Navy, Air Force, Marine Corps, Coast Guard, or Space Force:

(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.

(51) 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.

(52) 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.

(53) Good cause--As determined by HHSC, A reason outside the control of a CFC ERS provider that is an acceptable reason for the CFC ERS provider's failure to comply.

(54) HCSSA--Home and community support services agency. An entity required to be licensed under Texas Health and Safety Code (THSC) Chapter 142.

(55) Health-related tasks--Specific tasks related to the needs of an individual that can be delegated or assigned by a licensed healthcare professional under state law to be performed by a service provider of CFC PAS/HAB. These include:

(A) tasks delegated by a registered nurse (RN);

(B) health maintenance activities, as defined in 22 TAC §225.4 (relating to Definitions), that may not require delegation; and

(C) activities assigned to a service provider of CFC PAS/HAB by a licensed physical therapist, occupational therapist, or speech-language pathologist.

(56) HHSC--The Texas Health and Human Services Commission.

(57) Hospital--A public or private institution that is licensed or is exempt from licensure in accordance with THSC Chapters 13, 241, 261, or 552.

(58) 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.

(59) ICF/IID--Intermediate care facility for individuals with an intellectual disability or related conditions. A facility that is licensed or exempt from licensure in accordance with THSC Chapter 252.

(60) 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.

(61) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. An HHSC form used to determine the LOC for an individual.

(62) Impairment to independent functioning--An adaptive behavior level of II, III, or IV.

(63) Individual--A person seeking to enroll or who is enrolled in the DBMD Program.

(64) Individual transportation plan--A written plan developed by an individual's service planning team and documented on the HHSC Individual Transportation Plan form. The form is used to document how transportation as a residential habilitation activity will be delivered to support an individual's desired goals and outcomes for transportation as identified in the IPP.

(65) Inpatient chemical dependency treatment facility--A facility licensed in accordance with THSC Chapter 464.

(66) In person or in-person--Within the physical presence of another person. In person or in-person does not include using videoconferencing or a telephone.

(67) Institution for mental diseases--Has the meaning set forth in 42 CFR §435.1010.

(68) Institutional services--Medicaid-funded services provided in a nursing facility or in an ICF/IID.

(69) Intellectual disability--Consistent with THSC §591.003, significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.

(70) 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.

(71) IPC--Individual plan of care. A written plan developed by an individual's service planning team and documented on the HHSC Individual Plan of Care form. An IPC:

(A) documents:

(i) the type and amount of each DBMD Program service and each CFC service, except for CFC support management, to be provided to the individual during an IPC year; and

(ii) if an individual will receive CFC support management; and

(B) is authorized by HHSC.

(72) 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 the enrollment IPC, as described in §260.67(a)(1)(F) of this chapter (relating to Development of a Proposed Enrollment IPC), through the last calendar day of the 11th month after the month in which enrollment occurred; and

(B) for a renewal IPC, a 12-month period of time starting on the effective date of a renewal IPC as described in §260.77(a)(1) of this chapter (relating to Renewal and Revision of an IPP and IPC).

(73) IPP--Individual program plan. A written plan that includes the information described in §260.65(b) of this chapter (relating to Development of an Enrollment IPP) and documented on an HHSC Individual Program Plan form.

(74) 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.

(75) Licensed assisted living--A DBMD Program service provided by a program provider in an ALF that is owned by the program provider.

(76) Licensed home health assisted living--A DBMD Program service provided by a program provider licensed as a HCSSA, in a residence for no more than three individuals. The residence must be owned or leased by at least one of the residents and must not be owned or leased by a program provider.

(77) Licensed vocational nursing--A DBMD Program service that provides vocational nursing, as defined in Texas Occupations Code §301.002.

(78) LOC--Level of care. A determination given to an individual as part of the eligibility determination process based on data submitted on the ID/RC Assessment.

(79) LVN--Licensed vocational nurse. A person licensed to provide vocational nursing in accordance with Texas Occupations Code Chapter 301.

(80) Managed care organization--This term has the meaning set forth in Texas Government Code §536.001.

(81) 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.

(82) 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.

(83) 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.

(84) Medicaid HCBS--Medicaid home and community-based services. Medicaid services provided to an individual in an individual's home and community, rather than in a facility.

(85) Mental health facility--A facility licensed in accordance with THSC Chapter 577.

(86) MESAV--Medicaid Eligibility Service Authorization Verification. The automated system that contains information regarding an individual's Medicaid eligibility and service authorizations.

(87) 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.

(88) Military member--A member of the United States military serving in the Army, Navy, Air Force, Marine Corps, Coast Guard, or Space Force 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.

(89) Minor home modifications--A DBMD Program service that:

(A) makes a physical adaptation to an individual's residence that:

(i) is necessary to address the individual's specific needs; and

(ii) enables the individual to function with greater independence in the individual's residence or to control his or her environment; and

(B) meets one of the following criteria:

(i) is included on the list of minor home modifications in the Deaf Blind with Multiple Disabilities Program Manual; or

(ii) is the repair or maintenance of a minor home modification purchased through the DBMD Program that:

(I) is needed after one year has elapsed from the date the minor home modification is complete;

(II) is needed for a reason other than the minor home modification was intentionally damaged, as described in §260.329(c) of this chapter (relating to Repair or Replacement of a Minor Home Modification); and

(III) is not covered by a warranty.

(90) Natural supports--Unpaid persons, including family members, volunteers, neighbors, and friends, who assist and sustain an individual.

(91) 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.

(92) Nursing--One or more of the following DBMD Program services:

(A) licensed vocational nursing;

(B) registered nursing;

(C) specialized licensed vocational nursing; and

(D) specialized registered nursing.

(93) Nursing facility--A facility that is licensed or exempt from licensure in accordance with the THSC Chapter 242.

(94) Occupational therapy--A DBMD Program service that provides occupational therapy, as described in Texas Occupations Code §454.006.

(95) Orientation and mobility--A DBMD Program 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.

(96) PAS/HAB plan--Personal Assistance Services (PAS)/Habilitation Plan. A written plan developed by an individual's service planning team and documented on the HHSC Personal Assistance Services (PAS)/Habilitation Plan form that describes the type and frequency of CFC PAS/HAB activities to be performed by a service provider.

(97) Person--A corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, natural person, or any other legal entity that can function legally, sue or be sued, and make decisions through agents.

(98) Personal funds--The funds that belong to an individual, including earned income, social security benefits, gifts, and inheritances.

(99) Person-centered planning process--The process described in §260.57 of this chapter (relating to Person-Centered Planning Process).

(100) 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.

(101) 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.

(102) 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.

(103) Physical therapy--A DBMD program service that provides physical therapy, as defined in Texas Occupations Code §453.001.

(104) Physician--Consistent with §558.2 of this title (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 an individual, and orders home health or hospice services for the individual in accordance with 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).

(105) Program provider--A person that has a contract with HHSC to provide DBMD Program services, excluding an FMSA.

(106) 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.

(107) Public emergency personnel--Personnel of a sheriff's department, police department, emergency medical service, or fire department.

(108) 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.

(109) Registered nursing--A DBMD Program service that provides professional nursing, as defined in Texas Occupations Code §301.002.

(110) Related condition--As defined in 42 CFR §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.

(111) 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 Deaf Blind with Multiple Disabilities Program Manual.

(112) Renewal IPC--An IPC developed in accordance with §260.77 of this chapter.

(113) Residential child-care facility--The term has the meaning set forth in Texas Human Resources Code §42.002.

(114) Respite--A DBMD Program service described in §260.353 of this chapter (relating to Respite).

(115) Responder--A person designated to respond to an alarm call activated by an individual.

(116) Restraint--Any of the following:

(A) a physical restraint;

(B) a mechanical restraint; or

(C) a chemical restraint.

(117) 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.

(118) Revised IPC--An enrollment IPC or a renewal IPC that is revised during an IPC period in accordance with §260.77 of this chapter to add a new DBMD Program service or CFC service or change the amount of an existing service.

(119) RN--Registered nurse. A person licensed to provide professional nursing in accordance with Texas Occupations Code Chapter 301.

(120) Seclusion--A restrictive intervention that is the involuntary placement of an individual alone in an area from which the individual is prevented from leaving.

(121) Service backup plan--A written plan developed and revised by an individual's service planning team in accordance with §260.213 of this chapter (relating to Service Backup Plans) to ensure continuity of critical program services if service delivery is interrupted.

(122) Service planning team--A team consisting of:

(A) the individual;

(B) if applicable, the individual's LAR or an actively involved person;

(C) the individual's case manager;

(D) one of the following persons who is not the case manager:

(i) the program director; or

(ii) an RN designated by the program provider;

(E) other persons whose inclusion is requested by the individual, LAR, or actively involved person, including a managed care organization service coordinator, a family member, a friend, and a teacher; and

(F) 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.

(123) Service provider--A person who is an employee or contractor of a program provider who provides a DBMD Program service or a CFC service directly to an individual.

(124) 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.

(125) Sexual activity--An activity that is sexual in nature, including kissing, hugging, stroking, or fondling with sexual intent.

(126) 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.

(127) 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.

(128) Specialized licensed vocational nursing--A DBMD Program service that provides licensed vocational nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(129) Specialized registered nursing--A DBMD Program service that provides registered nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(130) Speech-language pathology--A DBMD Program service that provides speech-language pathology as defined in Texas Occupations Code §401.001.

(131) SSA--Social Security Administration.

(132) SSI--Supplemental Security Income.

(133) Staff person--A full-time or part-time employee of a program provider, other than a service provider.

(134) 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.

(135) Support consultation--A DBMD Program service that is defined in 40 TAC §41.103 and may be provided an individual who chooses to participate in the CDS option.

(136) Supported employment--A DBMD Program service that provides assistance 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.

(137) 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.

(138) TAC--Texas Administrative Code. A compilation of state agency rules published by the Texas State Secretary of State in accordance with Texas Government Code Chapter 2002, Subchapter C.

(139) TAS--Transition Assistance Services. A DBMD Program service provided in accordance with Chapter 272 of this title (relating to Transition Assistance Services) to an individual who is receiving institutional services and is eligible for and enrolling into the DBMD Program.

(140) Texas Workforce Commission--The state agency established under Texas Labor Code Chapter 301.

(141) THSC--Texas Health and Safety Code. Texas statutes relating to health and safety.

(142) TMHP--Texas Medicaid & Healthcare Partnership. The Texas Medicaid program claims administrator.

(143) Transfer--The movement of an individual from a DBMD Program provider or a FMSA to a different DBMD Program provider or FMSA.

(144) Trust fund account--An account at a financial institution that contains an individual's personal funds and is under the program provider's control.

(145) 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.

(146) Videoconferencing--An interactive, two-way audio and video communication:

(A) used to conduct a meeting between two or more persons who are in different locations; and

(B) that conforms to the privacy requirements under the Health Insurance Portability and Accountability Act.

(147) Volunteer--A person who works for a program provider without compensation, other than reimbursement for actual expenses.

§260.7. Description of the DBMD Program and CFC.

(a) The DBMD Program is a Medicaid waiver program approved by CMS and operated by HHSC pursuant to §1915(c) of the Social Security Act. It provides community-based services and supports to an eligible individual as an alternative to the ICF/IID Program. DBMD Program services are intended to:

(1) enhance the individual's integration into the community;

(2) maintain or improve the individual's independent functioning, and

(3) prevent the individual's admission to an institution.

(b) HHSC limits the enrollment in the DBMD Program to the number of individuals approved by CMS and funded by the State of Texas.

(c) The DBMD Program offers the following services approved by CMS:

(1) adaptive aids;

(2) residential assistance, provided as:

(A) licensed assisted living; or

(B) licensed home health assisted living;

(3) behavioral support;

(4) case management;

(5) chore services;

(6) day habilitation;

(7) dental treatment;

(8) dietary services;

(9) employment assistance;

(10) intervener services;

(11) minor home modifications;

(12) nursing;

(13) occupational therapy;

(14) orientation and mobility;

(15) physical therapy;

(16) residential habilitation;

(17) respite, provided as:

(A) in-home respite; or

(B) out-of-home respite;

(18) speech-language pathology;

(19) audiology;

(20) supported employment;

(21) TAS; and

(22) if the individual's IPC includes at least one DBMD Program service to be delivered through the CDS option:

(A) FMS; and

(B) support consultation.

(d) A program provider may only provide and bill for residential habilitation if the activity provided is transportation, as described in §260.343(b)(1)(A)(ii)(I) of this chapter (relating to Day Habilitation, Residential Habilitation, and CFC PAS/HAB).

(e) CFC is a state plan option governed by CFR, Title 42, Part 441, Subpart K, regarding Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice) that provides the following services to an individual:

(1) CFC PAS/HAB;

(2) CFC ERS; and

(3) CFC support management for an individual receiving CFC PAS/HAB.

(f) A program provider with a contract enrollment date on or after September 1, 2009, must serve all counties within an HHSC region.

(g) A program provider with a contract enrollment date before September 1, 2009, may continue to serve only the counties specified in its contract. If such a program provider chooses to provide services in additional counties, the program provider does not have to serve all the counties within the HHSC region.

§260.9. Excluded Services.

The DBMD Program does not provide:

(1) room and board, except when out-of-home respite is provided in an outdoor camp accredited by the American Camping Association;

(2) special education and related services defined in 20 United States Code §1401 that otherwise are available to the individual through a state or local educational agency;

(3) vocational rehabilitation services that otherwise are available to the individual through a program funded under 29 United States Code Chapter 16, Subchapter I; or

(4) a service not described in the DBMD Program waiver application approved by CMS and available on the HHSC website or this chapter.

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 31, 2022.

TRD-202203376
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER B. ELIGIBILITY, ENROLLMENT, AND REVIEW

DIVISION 1. ELIGIBILITY AND MAINTENANCE OF THE DBMD INTEREST LIST

26 TAC §260.51, §260.53

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.51. 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 available on the HHSC website;

(2) the individual is determined by HHSC to meet the LOC VIII criteria described in §261.239 of this title (relating to ICF/MR Level of Care VIII Criteria);

(3) the individual, as documented on the 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 *Deaf Blind with Multiple Disabilities Program Manual*;

(6) the individual does not reside in:

(A) an ICF/IID;

(B) a nursing facility;

(C) an ALF, unless it provides licensed assisted living in the DBMD Program;

(D) a residential child-care facility unless it is an agency foster home;

(E) a hospital;

(F) a mental health facility;

(G) an inpatient chemical dependency treatment facility;

(H) a residential facility operated by the Texas Workforce Commission;

(I) a residential facility operated by the Texas Juvenile Justice Department;

(J) a jail; or

(K) a 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 a monthly monitoring by a case manager; 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).

§260.53. DBMD Interest List.

(a) HHSC maintains an interest list that contains the names of individuals interested in receiving DBMD Program services.

(b) A person may request an applicant's name be added to the DBMD interest list by:

(1) calling HHSC's toll-free number; or

(2) submitting a written request to HHSC.

(c) If a request is made in accordance with subsection (b) of this section for an individual who resides in Texas, HHSC adds the individual's name to the DBMD interest list:

(1) if the individual resides in Texas; and

(2) using the date HHSC receives the request as the DBMD interest list date.

(d) For an individual determined diagnostically or functionally ineligible during the enrollment process for the Community Living Assistance and Support Services (CLASS) Program, Home and Community-based Services (HCS) Program, Texas Home Living (TxHmL) Program, or Medically Dependent Children Program (MDCP):

(1) if the individual's name is not on the DBMD interest list, at the request of the individual or LAR, HHSC adds the individual's name to the DBMD interest list using the individual's interest list date for the program for which the individual was determined ineligible as the DBMD interest list date;

(2) if the individual's name is on the DBMD interest list and the individual's interest list date for the program for which the individual was determined ineligible is earlier than the individual's DBMD interest list date, at the request of the individual or LAR, HHSC changes the individual's DBMD interest list date to the individual's interest list date for the program for which the individual was determined ineligible; or

(3) if the individual's name is on the DBMD interest list and the individual's DBMD interest list date is earlier than the individual's interest list date for the program for which the individual was determined ineligible, HHSC does not change the individual's DBMD interest list date.

(e) This subsection applies to an individual who was enrolled in MDCP and, because the individual did not meet the level of care criteria for medical necessity for nursing facility care or did not meet the age requirement of being under 21 years of age, was determined ineligible for MDCP after November 30, 2019.

(1) At the request of the individual or LAR, HHSC adds the individual's name to the DBMD interest list:

(A) using the MDCP interest list date as the DBMD interest list date, if the individual's name is not on the DBMD interest list but it was previously on the DBMD interest list; or

(B) using the date HHSC receives the request as the DBMD interest list date, if the individual's name is not on the DBMD interest list and it never has been on the DBMD interest list.

(2) At the request of the individual or LAR, HHSC changes the DBMD interest list date to the MDCP interest list date if the individual's MDCP interest list date is earlier than the individual's DBMD interest list date.

(f) HHSC removes an individual's name from the DBMD interest list if:

(1) the individual or LAR requests, in writing, that the individual's name be removed from the DBMD interest list;

(2) the individual moves out of Texas, unless the individual is a military family member living outside of Texas:

(A) while the military member is on active duty; or

(B) for less than one year after the former military member's active duty ends;

(3) the individual or LAR declines an offer of enrollment in the DBMD Program or, as described in §260.55(e) of this subchapter (relating to Written Offer of Enrollment in the DBMD Program), HHSC withdraws an offer of enrollment in the DBMD Program, unless the individual is a military family member living outside of Texas:

(A) while the military member is on active duty; or

(B) for less than one year after the former military member's active duty ends;

(4) the individual is a military family member living outside of Texas for more than one year after the former military member's active duty ends;

(5) the individual is deceased; or

(6) HHSC has denied the individual enrollment in the DBMD Program and the individual or LAR:

(A) has had an opportunity to exercise the individual's right to appeal the decision in accordance with §260.111 of this subchapter (relating to Individual's Right to a Fair Hearing), and

(B) either:

(i) did not appeal the decision; or

(ii) appealed and did not prevail.

(g) If HHSC removes an individual's name from the DBMD interest list in accordance with subsection (f)(1) - (4) of this section, HHSC receives an oral or written request from a person to add the individual's name to the DBMD interest list within 90 calendar days after the name was removed, and the request is the individual's first request, HHSC:

(1) adds the individual's name to the DBMD interest list using the DBMD interest list date that was in effect at the time the individual's name was removed from the DBMD interest list; and

(2) notifies the individual or LAR, in writing, that the individual's name has been added to the DBMD interest list in accordance with paragraph (1) of this subsection.

(h) If HHSC removes an individual's name from the DBMD interest list in accordance with subsection (f)(1) - (4) of this section, HHSC receives an oral or written request from a person to add the individual's name to the DBMD interest list more than 90 calendar days after the name was removed, and the request is the individual's first request, HHSC:

(1) adds the individual's name to the DBMD interest list using as the DBMD interest list date:

(A) the date HHSC receives the oral or written request; or

(B) because of extenuating circumstances as determined by HHSC the DBMD interest list date that was in effect at the time the individual's name was removed from the DBMD interest list; and

(2) notifies the individual or LAR, in writing, that the individual's name has been added to the DBMD interest list in accordance with paragraph (1) of this subsection.

(i) If HHSC removes an individual's name from the DBMD interest list in accordance with subsection (f)(6) of this section, HHSC receives an oral or written request from a person to add the individual's name to the DBMD interest list, and the request is not the individual's first request:

(1) HHSC adds the individual's name to the DBMD interest list using the date HHSC receives the oral or written request as the DBMD interest list date; and

(2) HHSC notifies the individual or LAR, in writing, that the individual's name has been added to the DBMD interest list in accordance with paragraph (1) of this subsection.

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 31, 2022.

TRD-202203377
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 2. ENROLLMENT PROCESS, PERSON-CENTERED PLANNING, AND REQUIREMENTS FOR SERVICE SETTINGS

26 TAC §§260.55, 260.57, 260.59, 260.61, 260.63, 260.65, 260.67, 260.69, 260.71

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.55. Written Offer of Enrollment in the DBMD Program.

(a) HHSC sends a written offer of enrollment in the DBMD Program to:

(1) the individual whose DBMD interest list request date, assigned in accordance with §260.53 of this subchapter (relating to DBMD Interest List), is earliest, unless the individual is a military family member living outside of Texas; or

(2) an individual who is residing in a nursing facility and requesting enrollment in the DBMD Program.

(b) HHSC encloses with the written offer:

(1) a list of DBMD program providers;

(2) a Documentation of Provider Choice form;

(3) in accordance with 1 TAC §351.15 (relating to Information Regarding Community-based Services), a document explaining other currently available community-based long-term support options that might be appropriate to the individual's needs; and

(4) an HHSC DBMD Applicant Acknowledgement form.

(c) An individual or LAR accepts the offer of enrollment in the DBMD Program by:

(1) selecting a program provider from the enclosed list;

(2) documenting the selection of a program provider on the HHSC Documentation of Provider Choice form; and

(3) ensuring the completed HHSC Documentation of Provider Choice form and HHSC DBMD Applicant Acknowledgement form are submitted to HHSC and postmarked or faxed no later than 60 calendar days after the date on the offer letter.

(d) If HHSC receives the completed HHSC Documentation of Provider Choice form and HHSC DBMD Applicant Acknowledgement form, as described in subsection (c)(3) of this section, HHSC uses the HHSC Documentation of Provider Choice form to notify the program provider of the individual's or LAR's selection of a program provider.

(e) HHSC withdraws an offer of enrollment in the DBMD Program made to an individual if:

(1) the completed HHSC Documentation of Provider Choice form and HHSC DBMD Applicant Acknowledgement form are postmarked or faxed more than 60 calendar days after the date on the offer letter;

(2) the individual or LAR does not complete the enrollment process as described in §260.61 of this division (relating to Process for Enrollment of an Individual);

(3) the individual was offered enrollment in the DBMD Program because the individual was residing in a nursing facility but was discharged from the nursing facility before the effective date of the enrollment IPC; or

(4) the individual has moved out of the state of Texas.

§260.57. Person-Centered Planning Process.

(a) Person-centered planning is a process that empowers an individual to plan the individual's services and supports to achieve desired outcomes.

(b) A program provider must ensure the person-centered planning process is led by an individual to the maximum extent possible. An individual's LAR has a participatory role, as needed and defined by the individual, unless State law confers decision-making authority to the LAR.

(c) The person-centered planning process must be used to develop an IPP, a PAS/HAB plan, an enrollment IPC, a renewal IPC, a revised IPC, a service backup plan, and an individual transportation plan.

(d) The person-centered planning process must:

(1) include people chosen by an individual, or LAR;

(2) provide the information and support the individual needs to lead the planning process and make informed choices and decisions;

(3) occur at a time and location convenient to the individual and LAR;

(4) consider the individual's cultural preferences;

(5) provide information in plain language to the individual and in a manner that is accessible to the individual:

(A) through the provision of auxiliary aids and services at no cost to the individual in accordance with the Americans with Disabilities Act and section 504 of the Rehabilitation Act, if the individual requires such aids or services to communicate; and

(B) through the provision of language services at no cost to the individual, including oral interpretation and written translations, if the individual has limited English proficiency;

(6) use strategies for solving conflict or disagreement within the person-centered planning process;

(7) provide information to the individual or LAR to allow the individual or LAR to make informed decisions, including decisions about DBMD Program and CFC services, the settings in which the individual receives a DBMD Program service or a CFC service, and service providers; and

(8) inform the individual or LAR that the individual or LAR may request revisions to an IPP, a PAS/HAB plan, an enrollment IPC, a renewal IPC, a revised IPC, a service backup plan, or an individual transportation plan at any time by communicating the request to the program provider.

§260.59. Requirements for Service Settings.

(a) A program provider must ensure that a setting in which an individual receives a DBMD Program service or a CFC service:

(1) is based on the individual's strengths, preferences, and needs as documented in the individual's IPP;

(2) is integrated in and supports the individual's access to the greater community to the same degree as a person not enrolled in a Medicaid waiver program, including opportunities for the individual:

(A) to seek employment and work in a competitive integrated setting;

(B) engage in community life; and

(C) control personal resources;

(3) ensures the individual's rights of privacy, dignity and respect, and freedom from coercion and restraint; and

(4) optimizes, not regiments, individual initiative, autonomy, and independence in making life choices, including choices regarding daily activities, physical environment, and with whom to interact.

(b) Except as provided in subsection (c) of this section, a program provider must ensure that DBMD Program services and CFC services are not provided in a setting that is presumed to have the qualities of an institution. A setting is presumed to have the qualities of an institution if the setting:

(1) is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment;

(2) is located in a building on the grounds of, or immediately adjacent to, a public institution; or

(3) has the effect of isolating individuals from the broader community of persons not receiving Medicaid HCBS.

(c) A program provider may provide a DBMD Program service or a CFC service to an individual in a setting that is presumed to have the qualities of an institution as described in subsection (b) of this section, if CMS determines through a heightened scrutiny review that the setting:

(1) does not have the qualities of an institution; and

(2) does have the qualities of home and community-based settings.

§260.61. Process for Enrollment of an Individual.

(a) After HHSC notifies a program provider, as described in §260.55(d) of this division (relating to Written Offer of Enrollment in the DBMD Program), that an individual selected the program provider, the program provider must assign a case manager to the individual.

(b) A program provider must ensure that the assigned case manager contacts the individual or LAR by telephone, videoconferencing, or in person in the individual's residence, as soon as possible, but no later than five business days after the program provider receives the HHSC notification. During this 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 Deaf Blind with Multiple Disabilities Program Manual available on the HHSC website; and

(4) schedule an initial in-person visit to be held in the individual's residence with the individual and LAR or actively involved person at a time convenient to the individual and LAR and no later than 30 calendar days after the program provider receives the HHSC notification.

(c) During an initial in-person visit in an individual's residence at a time convenient to the individual and LAR, a case manager:

(1) must provide an oral and written explanation to the individual or LAR:

(A) of the DBMD Program services described in §260.7(c) of this chapter (relating to Description of the DBMD Program and CFC), including TAS if the individual is receiving institutional services;

(B) of the CFC services described in §260.7(e) of this chapter;

(C) of the individual's rights and responsibilities:

(i) as described in §260.111 of this subchapter (relating to Individual's Right to a Fair Hearing); and

(ii) as described in §260.113 of this subchapter (relating to Mandatory Participation Requirements of an Individual);

(D) the process by which the individual, LAR, or actively involved person may file a complaint regarding a program provider as required by 40 TAC §49.309 (relating to Complaint Process);

(E) that the HHSC Complaint and Incident Intake toll-free telephone number at 1-800-458-9858 may be used to file a complaint regarding the program provider;

(F) of the CDS option described in §260.71 of this division (relating to CDS Option);

(G) of voter registration, if the individual is 18 years of age or older;

(H) of how to contact the program provider, the case manager, and the RN;

(I) that while the individual is staying at a location outside the contracted service delivery area but within the state of Texas for a period of no more than 60 consecutive days, the individual and LAR or actively involved person may request that the program provider provide:

(i) transportation as a residential habilitation activity, as described in §260.343(b)(1)(A)(ii)(I) of this chapter (relating to Day Habilitation, Residential Habilitation, and CFC PAS/HAB);

(ii) case management;

(iii) nursing;

(iv) out-of-home respite in a camp described in §260.353 of this chapter (relating to Respite);

(v) adaptive aids;

(vi) intervener services; or

(vii) CFC PAS/HAB;

(J) of the use of electronic visit verification, as required by 1 TAC Chapter 354, Subchapter O; and

(K) that the individual, LAR, or actively involved person may report an allegation of abuse, neglect, or exploitation to DFPS by calling the toll-free telephone number at 1-800-252-5400;

(2) must educate the individual, LAR, and actively involved person about protecting the individual from abuse, neglect, and exploitation;

(3) must use the HHSC Understanding Program Eligibility - CLASS/DBMD form to provide an oral and written explanation to the individual or LAR, and obtain the individual's or LAR's signature and date on the form, to acknowledge understanding of:

(A) the eligibility requirements for:

(i) DBMD Program services, as described in §260.51(a) of this subchapter (relating to Eligibility Criteria for DBMD Program Services and CFC Services);

(ii) CFC services for individuals who do not receive MAO Medicaid, as described in §260.51(b) of this subchapter; and

(iii) CFC services for individuals who receive MAO Medicaid, as described in §260.51(c) of this subchapter;

(B) the reasons DBMD Program services and CFC services may be suspended, as described in §260.85 of this chapter (relating to Suspension of DBMD Program Services and CFC Services); and

(C) the reasons DBMD Program services and CFC services may be terminated as described in §§260.89, 260.101, 260.103, and 260.105 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 for Reasons Other Than Behavior Causing Immediate Jeopardy, and Termination of DBMD Program Services and CFC Services Without Advance Notice Due to Behavior Causing Immediate Jeopardy);

(4) must complete an ID/RC Assessment;

(5) must give the individual or LAR the HHSC Verification of Freedom of Choice form to document the individual's or LAR's choice regarding the DBMD Program or the ICF/IID Program;

(6) may complete an adaptive behavior screening assessment or ensure an appropriate professional described in the assessment instructions completes the adaptive behavior screening assessment;

(7) may complete a Related Conditions Eligibility Screening Instrument or ensure an RN completes a Related Conditions Eligibility Screening Instrument; and

(8) may ensure an RN completes a nursing assessment using the HHSC CLASS/DBMD Nursing Assessment form.

(d) If an assessment described in subsection (c)(6) - (8) of this section is not completed during the initial in-person visit in the individual's residence, a case manager must ensure that the assessment is completed in person as soon as possible but no later than 10 business days after the date of the initial in-person visit.

(e) If an individual is Medicaid eligible, is receiving institutional services, and anticipates needing TAS, a 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;

(3) the individual's proposed enrollment IPC will not include licensed assisted living or licensed home health assisted living; and

(4) the individual anticipates needing TAS.

(f) If a 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 HHSC Transition Assistance Services (TAS) Assessment and Authorization form in accordance with the form's instructions, which includes:

(A) identifying the items and services as described in §272.5(e) of this title (relating to Service Description) that the individual needs;

(B) estimating the monetary amount for the items and services identified on the form, which must be within the service limit described in §272.5(d) of this title; and

(C) documenting the individual's or LAR's choice of TAS provider;

(3) submit the completed form to HHSC for authorization;

(4) if HHSC authorizes the form, send the form to the TAS provider chosen by the individual or LAR; and

(5) include TAS and the monetary amount authorized by HHSC on the individual's proposed enrollment IPC.

(g) Before an individual enrolls in the DBMD Program, a case manager must inform the individual or LAR that the individual may reside in the individual's own home or family home or may receive a DBMD residential service described in §260.351 of this chapter (relating to Residential Services).

(h) A program provider must:

(1) gather and maintain the information necessary to process an individual's request for enrollment in the DBMD Program using forms prescribed by HHSC in the Deaf Blind with Multiple Disabilities Program Manual;

(2) assist an 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 as soon as possible, but no later than 30 calendar days after the case manager's initial in-person visit in the individual's residence;

(3) document in an 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.

(i) If an individual or LAR does not submit a completed Medicaid application to HHSC as described in subsection (h)(2)(B) of this section as a result of problems or barriers documented in accordance with subsection (h)(3) of this section, but is making progress in collecting the documentation necessary to complete the application, the program provider:

(1) may extend, in 30-calendar day increments, the time frame in which the application must be submitted to HHSC, except as provided in paragraph (2) of this subsection;

(2) must 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 in-person visit in the individual's residence;

(3) must ensure that the case manager documents the rationale for each extension in the individual's record; and

(4) must notify a DBMD program specialist, in writing, if the individual or LAR:

(A) does not submit a completed Medicaid application to HHSC no later than 365 calendar days after the date of the case manager's initial in-person visit in the individual's residence; or

(B) does not cooperate with the case manager in completing the enrollment process described in this section.

(j) A program provider must ensure that:

(1) the related conditions documented on the ID/RC Assessment for the individual are on the HHSC Approved Diagnostic Codes for Persons with Related Conditions list contained in the Deaf Blind with Multiple Disabilities 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 as required by §260.339 of this chapter (related to Dental Treatment).

(k) Not more than 10 business days after a program provider receives a signed and dated ID/RC Assessment from a physician establishing that an individual meets the requirements described in §260.51(a)(2) and (3) of this subchapter, the case manager must:

(1) convene a service planning team meeting; and

(2) ensure that the individual's service planning team:

(A) reviews the HHSC CLASS/DBMD Nursing Assessment form completed by an RN;

(B) reviews Addendum E of the HHSC CLASS/DBMD Nursing Assessment form, Recommendations/Coordination of Care, to address any information included in Addendum E to ensure the individual's needs are met;

(C) documents on the HHSC CLASS/DBMD Coordination of Care form how the information in Addendum E was addressed;

(D) reviews the completed ID/RC assessment signed and dated by a physician;

(E) reviews the adaptive behavior screening assessment;

(F) reviews the HHSC Related Conditions Eligibility Screening Instrument form;

(G) reviews the completed HHSC Prior Authorization for Dental Services form, if required by §260.339 of this chapter;

(H) completes an enrollment IPP in accordance with §260.65 of this division (relating to Development of an Enrollment IPP);

(I) completes a proposed enrollment IPC in accordance with §260.67 of this division (relating to Development of a Proposed Enrollment IPC); and

(J) if the enrollment IPP and the proposed enrollment IPC include:

(i) transportation provided as a residential habilitation activity or as an adaptive aid, develops an individual transportation plan; or

(ii) nursing, intervener services, or CFC PAS/HAB, develops a service backup plan if required by §260.213 of this chapter (relating to Service Backup Plans).

(l) As soon as possible but no later than 10 business days after an individual's service planning team completes an individual's enrollment IPP and proposed enrollment IPC, as described in subsection (k)(2) of this section, the case manager must:

(1) submit the following documents, completed according to form instructions, to HHSC for review:

(A) the proposed enrollment IPC;

(B) the ID/RC Assessment signed by a physician;

(C) the enrollment IPP;

(D) the PAS/HAB plan;

(E) the adaptive behavior screening assessment;

(F) the HHSC Related Conditions Eligibility Screening Instrument form;

(G) the HHSC DBMD Summary of Services Delivered form that documents pre-assessment services, with supporting documentation;

(H) the HHSC Verification of Freedom of Choice form;

(I) the HHSC Non-Waiver Services form;

(J) the HHSC Documentation of Provider Choice form;

(K) the HHSC CLASS/DBMD Nursing Assessment form;

(L) the HHSC Prior Authorization for Dental Services form, if required by §260.339 of this chapter;

(M) the HHSC Rationale for Adaptive Aids, Medical Supplies, and Minor Home Modifications form, if required by:

(i) §260.303 of this chapter (relating to Requirements For Authorization to Purchase or Lease an Adaptive Aid);

(ii) §260.317 of this chapter (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs Less than $1,000); or

(iii) §260.319 of this chapter (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs $1,000 or More);

(N) the HHSC Provider Agency Model Service Backup Plan form, if required by §260.213 of this chapter;

(O) the HHSC Specialized Nursing Certification form, if required by §260.347 of this chapter (relating to Nursing);

(P) copies of letters of denial from non-waiver resources, if any;

(Q) the HHSC Transition Assistance Services (TAS) Assessment and Authorization form, if required by subsection (f)(2) of this section; and

(R) the individual transportation plan, if required by subsection (k)(2)(J)(i) of this section; and

(2) 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 individual transportation plan to the FMSA.

(m) No later than five business days after receiving a written notice from HHSC approving or denying an 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) A program provider must not provide a DBMD Program service or CFC service to an individual before HHSC notifies the program provider, in accordance with §260.69(d)(1) of this division (relating to HHSC's Review of Request for Enrollment), that the individual's request for enrollment into the DBMD Program has been approved. If a program provider provides a DBMD Program service or CFC service to an individual before the effective date of the individual's enrollment IPC authorized 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 §260.69(d)(2) of this subchapter (relating to HHSC's Review of Request for Enrollment).

§260.63. Program Provider Cannot Ensure Individual's Health and Welfare.

(a) HHSC requests an individual or LAR to choose a different program provider if the program provider chosen by the individual or LAR informs HHSC, in writing, that it cannot ensure the individual's health and welfare and is not willing to provide DBMD Program services or CFC services to the individual.

(1) The program provider must include in the written notification to HHSC:

(A) a description of the specific reasons the program provider cannot ensure the individual's health and welfare; and

(B) a statement that the program provider is not willing to provide DBMD Program services or CFC services to the individual.

(2) HHSC notifies the individual or LAR, in writing, that the program provider is not willing to provide DBMD Program services or CFC services to the individual because the program provider cannot ensure the individual's health and welfare. HHSC includes with the notice a list of program providers.

(b) If an individual is unable to find a program provider willing to serve the individual, HHSC:

(1) denies enrollment in the DBMD Program as described in §260.83(a)(2) of this subchapter (relating to Denial of Request for Enrollment in the DBMD Program or of a DBMD Program Service or a CFC Service); and

(2) if requested by the individual or LAR, adds the individual's name to the DBMD interest list as described in §260.53(c) of this subchapter (relating to DBMD Interest List).

§260.65. Development of an Enrollment IPP.

(a) To develop an enrollment IPP, a case manager must convene an in-person meeting with the service planning team in which the service planning team completes the individual's enrollment IPP for each DBMD Program service and CFC service, other than CFC support management, identified on the individual's proposed enrollment IPC.

(b) A case manager must ensure an enrollment IPP:

(1) identifies whether an individual will reside in the individual's own home or family home or in a DBMD residential setting described in §260.351 of this chapter (relating to Residential Services);

(2) includes justification for each service and the total units indicated for each service;

(3) describes:

(A) the outcomes to be achieved through each service; and

(B) the action and methods to be used to achieve the outcomes for each service;

(4) describes individualized goals for each service that:

(A) are outcome-based;

(B) are measurable; and

(C) have a start date and projected completion date; and

(5) includes:

(A) a description of the individual's strengths, preferences, and needs as identified by the individual, LAR, or both;

(B) a description of the services and supports the individual needs to continue living in a community-based setting, as identified through the HHSC CLASS/DBMD Nursing Assessment form, ID/RC Assessment, HHSC Related Conditions Eligibility Screening Instrument form, and adaptive behavior screening assessment;

(C) a description of the individual's current natural supports and non-waiver and non-CFC services that will be or are available;

(D) documentation that the frequency and amount of each service included in the IPP and IPC, do not replace existing natural supports or non-waiver and non-CFC resources for which the individual may be eligible;

(E) if the IPC includes CFC PAS/HAB, whether the individual would like to receive CFC support management;

(F) that the individual needs a service backup plan for nursing, intervener services, or CFC PAS/HAB, if the service planning team determined the service is critical to the individual's health and safety; and

(G) that the case manager is responsible for monitoring the individuals service plan.

(c) A case manager must:

(1) ensure that an enrollment IPP is signed and dated by each member of the service planning team; and

(2) maintain the enrollment IPP in the individual's record.

§260.67. Development of a Proposed Enrollment IPC.

(a) A program provider must ensure that an individual's case manager convenes an in-person meeting with the service planning team in which the service planning team:

(1) develops a proposed enrollment IPC that:

(A) documents the type of each DBMD Program service and CFC service, other than CFC support management, to be provided by the program provider;

(B) documents the number of units or annual cost for each service;

(C) if the individual will receive a service through the CDS option, documents:

(i) the name of the individual's FMSA; and

(ii) the type and number of units for each service to be provided through the CDS option;

(D) documents whether the individual will receive CFC support management;

(E) documents whether the individual needs a service backup plan for nursing, intervener services, or CFC PAS/HAB critical to the individual's health and safety;

(F) documents an effective date of the IPC that:

(i) is at least 10 business days after the case manager submits the proposed enrollment IPC to HHSC as described in §260.61(m)(1) of this division (relating to Process for Enrollment of an Individual); and

(ii) does not overlap with the end date of another Medicaid waiver program or another HHSC-operated program described in the Deaf Blind with Multiple Disabilities Program Manual, other than the Day Activity and Health Services Program, in which the individual may have been enrolled; and

(G) does not exceed the service limits described in:

(i) Subchapter F, Divisions 1 - 3, of this chapter (relating to Service Descriptions and Requirements) if the enrollment IPC includes adaptive aids, minor home modifications, dental treatment, and respite;

(ii) Subchapter F, Division 5, of this chapter (relating to CFC ERS) if the enrollment IPC includes CFC ERS; or

(iii) §272.5(d) of this title (relating to Service Description), if the enrollment IPC includes TAS;

(2) if the proposed enrollment IPC includes transportation as a residential habilitation activity or as an adaptive aid, develops an individual transportation plan;

(3) if the proposed enrollment IPC includes TAS, completes the HHSC Transition Assistance Services (TAS) Assessment and Authorization form; and

(4) identifies the individual's non-waiver resources using the HHSC Non-Waiver Services form.

(b) A program provider must ensure that a DBMD Program service and CFC service, other than CFC support management, on a proposed enrollment IPC:

(1) are necessary to protect the individual's health and welfare in the community;

(2) address at least one of the individual's related conditions or the additional disability that impairs independent functioning;

(3) supplements rather than replaces the individual's natural supports and other non-waiver services and supports for which the individual is eligible;

(4) prevents the individual's admission to an institution;

(5) are the most appropriate type and amount of DBMD Program services and CFC services to meet the individual's needs; and

(6) are cost effective.

(c) A program provider must:

(1) ensure that a proposed enrollment IPC is signed and dated by each member of the service planning team;

(2) submit a request for enrollment to HHSC as described in §260.61(l)(1) of this division (relating to Process for Enrollment of an Individual); and

(3) maintain in the individual's record the proposed enrollment IPC submitted to HHSC with the request for enrollment.

(d) A program provider must maintain the following in the individual's record and provide a copy to HHSC upon request:

(1) current data obtained from standardized evaluations and formal assessments related to the LOC VIII criteria and to support the individual's diagnoses, in accordance with §260.51(a)(2) and (3) of this subchapter (relating to Eligibility Criteria for DBMD Program Services and CFC Services);

(2) documentation, including assessments of the individual, that support the DBMD Program services and CFC services recommended on the proposed enrollment IPC; and

(3) documentation that DBMD Program services or CFC services recommended on the proposed enrollment IPC are not available from another source.

§260.69. HHSC's Review of Request for Enrollment.

(a) HHSC reviews a request for enrollment submitted by a case manager in accordance with §260.61(l)(1) of this division (relating to Process for Enrollment of an Individual) to determine if:

(1) the individual meets the requirements described in §260.51(a)(2) and (3) of this subchapter (relating to Eligibility Criteria for DBMD Program Services and CFC Services);

(2) the proposed enrollment IPC has a cost at or below the amount in §260.51(a)(4) of this subchapter;

(3) the goals and outcomes documented in the enrollment IPP for each DBMD Program service and CFC service, except for CFC support management, meet the criteria described in §260.65(b)(3) and (4) of this division (relating to Development of an Enrollment IPP);

(4) the DBMD Program services and CFC services, except for CFC support management, specified in the proposed enrollment IPC meet the requirements described in §260.67(a)(1) and (b) of this division (relating to Development of a Proposed Enrollment IPC);

(5) the individual is Medicaid-eligible due to receipt of Supplemental Security Income cash benefits or is determined by HHSC to be financially eligible for Medicaid; and

(6) the individual meets the requirement described in §260.51(a)(5) of this subchapter.

(b) To support the information in a proposed enrollment IPC and IPP, HHSC may request from a case manager a copy of the information described in §260.67(d) of this division.

(c) If HHSC requests the information described in subsection (b) of this section, a case manager must submit the information to HHSC no later than 10 calendar days after the date of the request.

(d) If HHSC determines that the individual's request for enrollment meets the requirements described in subsection (a) of this section:

(1) HHSC notifies the program provider, in writing, that the individual's request for enrollment into the DBMD Program is approved; and

(2) within 10 business days after receiving the written notice, the case manager must:

(A) provide to the individual or LAR a copy of the enrollment IPC, the IPP, and if required by §260.213 of this chapter (relating to Service Backup Plans), a service backup plan; and

(B) if the individual will receive a service through the CDS option, send the FMSA a copy of the enrollment IPC, the IPP, and if required by §260.61(k)(2)(J)(i) of this subchapter, the individual transportation plan.

(e) HHSC notifies the individual's program provider, in writing, that the individual's request for enrollment is denied if the request for enrollment does not meet the requirements described in subsection (a) of this section.

(f) If HHSC notifies a program provider that an individual's request for enrollment is denied, the program provider must send the individual or LAR written notice of the denial in accordance with §260.83(a) of this subchapter (relating to Denial of Request for Enrollment in the DBMD Program or of a DBMD Program Service or a CFC Service).

(g) If HHSC determines a DBMD Program service or CFC service specified in the proposed enrollment IPC does not meet the requirements described in §260.67(a)(1) and (b) of this division, HHSC:

(1) denies the service;

(2) modifies and approves the IPC;

(3) approves the individual's request for enrollment with the modified IPC; and

(4) notifies the program provider, in writing, of the action taken.

(h) If HHSC notifies a program provider of the denial of a DBMD Program service or CFC service and of the modification of the proposed enrollment IPC in accordance with subsection (g) of this section, the program provider must:

(1) implement the modified enrollment IPC; and

(2) send the individual or LAR written notice of the denial of a DBMD Program service or a CFC service in accordance with §260.83(b) of this subchapter.

(i) If HHSC approves an individual's request for enrollment, a program provider must:

(1) electronically access MESAV to determine if the information on an enrollment IPC is consistent with the information in MESAV;

(2) if the information on the enrollment IPC or modified enrollment IPC is inconsistent with the information in MESAV, notify HHSC of the inconsistency; and

(3) implement the enrollment IPC or modified enrollment IPC no later than seven calendar days after the effective date of the IPC.

(j) HHSC may approve the effective date of an IPC as requested on the proposed enrollment IPC or may modify the effective date.

(k) HHSC's determination that an individual meets the requirements described in §260.51(a)(2) and (3) of this subchapter and approval of the proposed enrollment IPC is valid for the IPC period of the enrollment IPC.

§260.71. CDS Option.

(a) A program provider must ensure an individual's case manager informs the individual or LAR:

(1) of the CDS option in accordance with 40 TAC Chapter 41, Subchapter D (relating to Enrollment, Transfer, Suspension, and Termination);

(2) of the DBMD Program services and the CFC services that may be provided through the CDS option, as described in 40 TAC §41.108 (relating to Services Available Through the CDS Option); and

(3) that the individual may elect to have one or more of those services provided through the CDS option.

(b) If an individual or LAR chooses to participate in the CDS option, the case manager must:

(1) provide the individual or LAR with an oral and written explanation of the CDS option using materials provided by HHSC, including the required CDS forms described in 40 TAC Chapter 41 (relating to Consumer Directed Services Option);

(2) provide the individual or LAR with the name and contact information of each FMSA providing services in the county where the individual lives;

(3) document the individual's or LAR's choice of FMSA in accordance with HHSC's instructions;

(4) document each service to be provided through the CDS option on the IPC;

(5) if the only service to be provided through the CDS option is CFC PAS/HAB, include on the IPC:

(A) CFC FMS instead of FMS; and

(B) if the individual will receive support consultation, CFC support consultation instead of support consultation; and

(6) complete the required forms as described in 40 TAC Chapter 41.

(c) For services to be provided through the CDS option, an individual or LAR and the FMSA must comply with 40 TAC Chapter 41.

(d) A program provider must provide a service included on the IPC that the individual or LAR has elected not to have provided through the CDS option.

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 31, 2022.

TRD-202203378
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 3. REVIEW

26 TAC §§260.73, 260.75, 260.77

STATUTORY AUTHORITY

The new sections 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

Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.73. Tracking Annual Renewal of an ID/RC Assessment and an IPC.

(a) A program provider must have and implement written policies and procedures to ensure compliance with §260.77(b)(1) of this division (relating to Renewal and Revision of an IPP and IPC).

(b) A program provider's written policies and procedures must include a written or electronic tracking system that alerts the program provider to activities that must occur for the program provider to timely submit documentation to HHSC as required by §260.77(b)(2) of this division.

§260.75. Utilization Review of an IPC by HHSC.

(a) HHSC conducts a utilization review of an IPC to determine if:

(1) the cost of the IPC meets the criteria described in §260.51(a)(4) of this subchapter (relating to Eligibility Criteria for DBMD Program Services and CFC Services); and

(2) the DBMD Program services and CFC services specified in the IPC meet the requirements described in §260.67(a)(1) and (b) of this subchapter (relating to Development of a Proposed Enrollment IPC).

(b) If requested by HHSC, a program provider must submit documentation supporting an IPC to HHSC no later than 10 business days after the date of HHSC's request.

(c) If HHSC determines that an IPC does not meet the criteria described in §260.51(a)(4) of this subchapter, HHSC notifies the program provider of such determination and sends written notice to the individual or LAR that the individual's DBMD Program services and CFC services are proposed for termination and includes in the notice the individual's right to request a fair hearing in accordance with §260.111 of this subchapter (relating to Individual's Right to a Fair Hearing).

(d) If HHSC determines that an IPC meets the criteria described in §260.51(a)(4) of this subchapter but one or more DBMD Program services or CFC services specified in the IPC do not meet the requirements described in §260.67(a)(1) and (b) of this subchapter, HHSC:

(1) denies or reduces the service, as appropriate;

(2) modifies and approves the IPC; and

(3) notifies the program provider, in writing, of the action taken.

(e) If HHSC notifies a program provider of the denial or reduction of a DBMD Program service or CFC service, and of the modification of the IPC in accordance with subsection (d) of this section, the program provider must send the individual or LAR written notice and provide services in accordance with:

(1) §260.83(b)(2) and (3) of this subchapter (relating to Denial of Request for Enrollment in the DBMD Program or of a DBMD Program Service or a CFC Service); or

(2) §260.87(b) and (c) of this subchapter (relating to Reduction of a DBMD Program Service or a CFC Service).

§260.77. Renewal and Revision of an IPP and IPC.

(a) Case manager's review.

(1) Beginning the effective date of an individual's IPC, as determined in accordance with §260.69(j) of this subchapter (relating to HHSC's Review of Request for Enrollment), a case manager must, in accordance with the schedule in the *Deaf Blind with Multiple Disabilities Program Manual, meet with the individual.* and LAR in person at a time convenient to the individual and LAR in the individual's home, or if requested by the individual or LAR, in another location to:

(A) review whether the DBMD Program services and CFC services are being provided in accordance with the IPC and IPP;

(B) review the individual's progress toward achieving the goals and outcomes described in the IPP for each service listed on the individual's IPC;

(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 nursing, intervener services, 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 the individual has a service backup plan for nursing, intervener services, or CFC PAS/HAB, discuss with the individual or LAR:

(i) whether the service backup plan, if implemented, was effective;

(ii) whether the service backup plan needs to be revised; and

(iii) whether the service backup plan needs to be discontinued because the service is no longer critical to the individual's health and safety.

(2) A case manager must:

(A) document the results of a meeting described in paragraph (1) of this subsection in the individual's record using the HHSC IPP Service Review form or a form the program provider develops that includes the information on the HHSC form;

(B) document on the HHSC IPP Service Review form or a form the program provider developed:

(i) if nursing, intervener services, or CFC PAS/HAB has become critical to the individual's health and safety, and the individual does not have a service backup plan for the service, that the individual now needs a service backup plan for nursing, intervener services, or CFC PAS/HAB; and

(ii) if the individual has a service backup plan for nursing, intervener services, or CFC PAS/HAB, document on the IPP review form that:

(I) the service planning team did not revise the service backup plan because it was effective;

(II) the service planning team revised the service backup plan to address any problems or concerns regarding implementation of the service backup plan; or

(III) the service planning team discontinued the service backup plan because the service is no longer critical to the individual's health and safety;

(C) ensure the individual or LAR signs and dates the IPP review form; and

(D) provide a copy of the completed HHSC IPP Service Review form or a form the program provider developed to the individual or LAR within 10 business days after the date of the meeting described in paragraph (1) of this subsection.

(3) A case manager, no later than five business days after the date of a meeting described in paragraph (1) of this subsection, must convene a service planning team meeting:

(A) if the case manager:

(i) identifies needed changes in the individual's services; or

(ii) determines that nursing, intervener services, 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;

(B) if the individual or LAR requests a revision of the IPP or IPC; or

(C) if the service planning team determines that any of the requirements in §260.403(a)(1) - (6) of this chapter (relating to Requirements for Program Provider-Owned Residential Settings) must be modified.

(4) During a service planning team meeting described in paragraph (3) of this subsection, using the person-centered planning process, a case manager must:

(A) develop a revised IPP that meets the requirements described in §260.65 of this subchapter (relating to Development of an Enrollment IPP);

(B) develop a proposed revised IPC that meets the requirements described in §260.67(a)(1) and (b) of this subchapter (relating to Development of a Proposed Enrollment IPC); and

(C) if:

(i) the proposed revised IPC includes transportation provided as a residential habilitation activity or as an adaptive aid, develop an individual transportation plan; and

(ii) the proposed revised IPC includes nursing, intervener services, or CFC PAS/HAB services, ensure compliance with §260.213 of this chapter (relating to Service Backup Plans).

(5) A case manager must:

(A) ensure the revised IPP and proposed revised IPC is signed and dated by each member of the service planning team; and

(B) no later than 10 business days after the date of the service planning team meeting, submit to HHSC:

(i) a copy of the signed and dated proposed revised IPC;

(ii) a copy of the signed and dated revision IPP;

(iii) an individual transportation plan, if required by paragraph (4)(C)(i) of this subsection;

(iv) an HHSC Rationale for Adaptive Aids, Medical Supplies, and Minor Home Modifications form, if required by §260.303 of this chapter (relating to Requirements for Authorization to Purchase or Lease an Adaptive Aid), §260.317 of this chapter (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs Less than $1,000), or §260.319 of this chapter (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs $1,000 or More);

(v) an HHSC Specifications for Minor Home Modifications form, if required by §260.321 of this chapter (relating to Specifications for a Minor Home Modification);

(vi) an HHSC Prior Authorization for Dental Services form, if required by §260.339 of this chapter (relating to Dental Treatment); and

(vii) an HHSC Specialized Nursing Certification form, if required by §260.347 of this chapter (relating to Nursing).

(b) Annual review by the service planning team.

(1) No more than 90 calendar days before the end of an individual's IPC period:

(A) the case manager must complete an ID/RC Assessment;

(B) an RN must complete an annual nursing assessment of the individual using the HHSC CLASS/DBMD Nursing Assessment form;

(C) an RN or the case manager must complete a Related Conditions Eligibility Screening Instrument;

(D) the case manager or an appropriate professional described in the assessment instructions must complete an adaptive behavior screening assessment:

(i) if at least five years have passed after the date of the most current assessment; or

(ii) if significant changes have occurred in the individual's functioning;

(E) the case manager must convene an in-person meeting of the service planning team to:

(i) review the HHSC CLASS/DBMD Nursing Assessment form completed by the RN;

(ii) address any information included in Addendum E of the HHSC CLASS/DBMD Nursing Assessment form, Recommendations/Coordination of Care, to ensure the individual's needs are met;

(iii) document on the HHSC CLASS/DBMD Coordination of Care form how the information in Addendum E of the HHSC CLASS/DBMD Nursing Assessment form was addressed;

(iv) develop a renewal IPP that meets the requirements in §260.65 of this subchapter;

(v) develop a proposed renewal IPC that meets the requirements described in §260.67(a)(1) and (b) of this subchapter;

(vi) develop the following if the proposed renewal IPC:

(I) includes transportation provided as a residential habilitation activity or as an adaptive aid, develop an individual transportation plan; or

(II) includes nursing, intervener services, or CFC PAS/HAB, develop a service backup plan or a service backup

plan revision if required by §260.213 of this chapter (relating to Service Backup Plans); and

(vii) ensure the renewal IPP and proposed renewal IPC is signed and dated by each member of the service planning team; and

(F) the case manager must:

(i) provide an oral and written explanation of the topics described in §260.61(c)(1) - (3) 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 an HHSC 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 HHSC Documentation of Provider Choice form, coordinate the individual's transfer in accordance with §260.79 of this subchapter (relating to Coordination of Transfers);

(vi) orally explain that the individual or LAR may request the provision of transportation provided as a residential habilitation activity, case management, nursing, out-of-home respite in a camp, adaptive aids, intervener services, or CFC PAS/HAB while the individual is staying at a location outside the contracted service delivery area but within the state of Texas for a period of no more than 60 consecutive days; and

(vii) have documentation that the activities required under clauses (i) - (vi) of this subparagraph were performed.

(2) A case manager must, no later than 10 business days after the date of the service planning team meeting described in paragraph (1)(E) of this subsection, but at least 30 calendar days before the end of the current IPC period, submit to HHSC:

(A) the signed and dated proposed renewal IPC;

(B) the signed and dated renewal IPP;

(C) the PAS/HAB plan;

(D) the renewal ID/RC Assessment;

(E) the results of an adaptive behavior screening assessment, if completed as described in paragraph (1)(D) of this subsection;

(F) the HHSC Related Conditions Eligibility Screening Instrument form;

(G) the HHSC Non-Waiver Services form;

(H) the HHSC Documentation of Provider Choice form;

(I) the HHSC CLASS/DBMD Nursing Assessment form;

(J) an individual transportation plan, if required by subsection (a)(4)(C)(i) of this section; and

(K) the documentation described in subsection (a)(5)(B) 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) as soon as possible, but no later than five business days after providing the service, convene a service planning team meeting at a time and location convenient to the individual or LAR to:

(A) develop a revised IPP that:

(i) meets the requirements described in §260.65 of this subchapter; and

(ii) includes documentation of how the requested service addressed the emergency; and

(B) develop a proposed revised IPC that meets the requirements described in §260.67(a)(1) and (b) of this chapter;

(2) if the revised IPP and proposed revised IPC includes nursing, intervener services, or CFC PAS/HAB, develop a service backup plan of service backup plan revision, if required by §260.213 of this chapter;

(3) ensure the revised IPP and proposed revised IPC is signed and dated by each member of the service planning team; and

(4) no later than 10 business days after the service planning meeting described in paragraph (1) of this subsection, submit to HHSC:

(A) a copy of the signed and dated proposed revised IPC;

(B) a copy of the signed and dated revision IPP; and

(C) the documentation described in subsection (a)(5)(B) 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 case manager must:

(1) as soon as possible but no later than five business days after becoming aware that changes to the individual's services may be necessary, convene a service planning team meeting at a time and location convenient to the individual or LAR to review and, if determined necessary, develop:

(A) a revised IPP that meets the requirements described in §260.65 of this chapter; and

(B) a proposed revised IPC that meets the requirements described in §260.67(a)(1) and (b) of this subchapter;

(2) if the revised IPP and proposed revised IPC:

(A) include transportation provided as a residential habilitation activity or as an adaptive aid, develop an individual transportation plan; or

(B) include nursing, intervener services, or CFC PAS/HAB services, ensure compliance with §260.213 of this chapter;

(3) ensure the revised IPP and proposed revised IPC are signed and dated by each member of the service planning team; and

(4) no later than 10 business days after the date of the service planning meeting described in paragraph (1) of this subsection, submit to HHSC:

(A) a copy of the signed and dated proposed revised IPC;

(B) a copy of the signed and dated revised IPP;

(C) an individual transportation plan, if required by paragraph (2)(A) of this subsection; and

(D) the documentation described in subsection (a)(5)(B) 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)(1)(A) - (E) of this section to determine whether an individual meets the LOC VIII and additional criteria required by §260.51(a)(2) and (3) of this subchapter (relating to Eligibility Criteria for DBMD Program Services and CFC Services).

(2) HHSC may request current data obtained from standardized evaluations and formal assessments related to an individual's LOC VIII. If HHSC makes such a request, the case manager must submit the information to HHSC no later than 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. If HHSC determines that an individual meets the LOC VIII, the LOC VIII is 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 expires before HHSC determines whether the individual meets the LOC VIII, as described in paragraphs (1) - (3) of this subsection:

(A) a program provider must continue to provide services to the individual until HHSC approves 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 an individual meets the LOC VIII, 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)(2)(E) - (G) of this section.

(f) HHSC's review of a proposed revised IPC or a proposed renewal IPC.

(1) HHSC reviews a proposed revised IPC or a proposed renewal IPC to determine if the proposed IPC meets:

(A) the requirement described in §260.51(a)(4) of this subchapter; and

(B) the requirements described in §260.67(a)(1) and (b) of this subchapter.

(2) At HHSC's request, a case manager must submit additional documentation supporting a revised IPC or a proposed renewal IPC no later than 10 calendar days after the date of the request.

(3) If HHSC determines that a proposed revised IPC or a proposed renewal IPC meets the requirements:

(A) HHSC notifies the program provider, in writing, of its determination; and

(B) no later than 10 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 §260.213 of this chapter, any new or revised service backup plan; and

(ii) if the individual will receive a service through the CDS option, send the FMSA a copy of the renewal IPC, the renewal IPP, and if required by this section, the individual transportation plan.

(g) If an individual's IPC period expires before HHSC approves a renewal IPC:

(1) a program provider must continue to provide services to the individual until HHSC approves the renewal IPC to ensure continuity of care and prevent the individual's health and welfare from being jeopardized; and

(2) if HHSC approves 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)(2) 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 revised IPC or a renewal IPC is consistent with the information in MESAV; and

(2) if the information on the revised 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, denied, or reduced based on HHSC's review of a revised IPC or a renewal IPC is described in §260.75(c) - (e) of this division (relating to Utilization Review of an IPC by HHSC).

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 31, 2022.

TRD-202203379
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

DIVISION 4. TRANSFER BETWEEN PROGRAM PROVIDERS

26 TAC §260.79, §260.81

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.79. Coordination of Transfers.

(a) After receiving written notice from an individual or LAR of the individual's intention to transfer to another program provider, a program provider must:

(1) document in the individual's record the date the transfer request was received;

(2) coordinate transfer arrangements, including designating an effective date for transfer that is at least 14 calendar days after the date of the transfer request documented in the individual's record, with:

(A) the individual or LAR; and

(B) the receiving program provider;

(3) review and complete the Service Delivery Transfer Worksheet with the individual or LAR and the receiving program provider; and

(4) arrange with the receiving program provider to transfer the individual's personal funds, if applicable.

(b) Before the effective date of the transfer, the current program provider must submit the completed Service Delivery Transfer Worksheet to HHSC and the receiving program provider.

(c) The receiving program provider must ensure:

(1) that delivery of the individual's services is not disrupted as a result of the transfer;

(2) that a case manager meets with the individual or LAR in person within 14 calendar days after the effective date of transfer to review the Service Delivery Transfer Worksheet; and

(3) if necessary, that the case manager convenes a service planning team meeting to review and revise the IPC in accordance with the appropriate subsection of §260.77 of this subchapter (relating to Renewal and Revision of an IPP and IPC).

(d) HHSC does not authorize a change in an individual's IPC period upon the individual's transfer from one program provider to another program provider.

(e) If the individual is participating in the CDS option and intends to transfer to another FMSA, the transferring and receiving FMSAs must also follow the process described in 40 TAC §41.403 (relating to Transfer Process).

§260.81. Personal Leave for Individual Receiving Licensed Assisted Living or Licensed Home Health Assisted Living.

(a) An individual receiving licensed assisted living or licensed home health assisted living may take personal leave days.

(b) The program provider:

(1) may charge the individual or LAR for room and board for each personal leave day taken;

(2) may bill HHSC for the daily rate for licensed assisted living facility or a licensed home health assisted living for personal leave days taken by the individual during a calendar year within the limit specified in the *Deaf Blind with Multiple Disabilities Program Manual*; and

(3) must not bill the individual for the licensed assisted living or licensed home health assisted living daily rate for personal leave days.

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 31, 2022.

TRD-202203380
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 5. DENIAL, SUSPENSION, REDUCTION, AND TERMINATION

26 TAC §§260.83, 260.85, 260.87, 260.89, 260.101, 26.103, 260.105, 260.107, 260.109

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.83. Denial of Request for Enrollment in the DBMD Program or of a DBMD Program Service or a CFC Service.

(a) Denial of an Individual's Request for Enrollment.

(1) HHSC denies an individual's request for enrollment in the DBMD Program if:

(A) the individual does not meet the eligibility criteria described in §260.51(a) of this subchapter (relating to Eligibility Criteria for DBMD Program Services and CFC Services);

(B) the individual or LAR fails to submit a completed Medicaid application to HHSC within one calendar year after the date of the case manager's initial in-person visit in the individual's residence; or

(C) the individual cannot obtain services from at least one program provider.

(2) HHSC sends a written notice of denial for enrollment in the DBMD Program to the program provider that the program provider, upon receipt, must send to the individual or LAR, copying the FMSA if applicable.

(3) If the individual or LAR requests a fair hearing, the program provider is not required to provide services to the individual while the appeal is pending.

(b) Denial of a DBMD Program service or a CFC Service.

(1) HHSC denies a DBMD Program service or a CFC service requested on the individual's IPC if HHSC determines, following utilization review conducted as described in §260.75 of this subchapter (relating to Utilization Review of an IPC by HHSC), that the service does not meet the requirements described in §260.67(a)(1) and (b) of this subchapter (relating to Development of a Proposed Enrollment IPC).

(2) HHSC sends a written notice with the effective date of the denial to the program provider that the program provider, upon receipt but no later than 12 calendar days before the effective date of

denial, must send to the individual or LAR, copying the FMSA, if applicable.

(3) If the service denied by HHSC is requested:

(A) on an enrollment IPC submitted by the program provider in accordance with §260.61 of this subchapter (relating to Process for Enrollment of an Individual) and the individual or LAR requests a fair hearing, the program provider is not required to provide the service while the appeal is pending; or

(B) on a revision or renewal IPC submitted by the program provider in accordance with §260.77 of this subchapter (relating to Renewal and Revision of an IPP and IPC) and the individual or LAR requests a fair hearing before the effective date of denial specified in the written notice, the program provider:

(i) is not required to provide the service while the appeal is pending if the service was not authorized by HHSC on the prior IPC; or

(ii) must provide the service at the previously approved amount or level while the appeal is pending if the service was authorized by HHSC on the prior IPC.

§260.85. Suspension of DBMD Program Services and CFC Services.

(a) Except as described in §260.81 of this subchapter (relating to Personal Leave for Individual Receiving Licensed Assisted Living or Licensed Home Health Assisted Living) or if the individual receives out-of-home respite, HHSC suspends an individual's DBMD Program services and CFC services if the individual:

(1) is admitted to one of the following facilities:

(A) an ICF/IID;

(B) a nursing facility;

(C) an ALF that does not provide licensed assisted living in the DBMD Program;

(D) a residential child-care facility unless it is an agency foster home;

(E) a hospital;

(F) a mental health facility;

(G) an inpatient chemical dependency treatment facility;

(H) a facility operated by the Texas Workforce Commission;

(I) a residential facility operated by the Texas Juvenile Justice Department; or

(J) a jail or prison; or

(2) leaves the state.

(b) HHSC suspends services during the time that an individual is admitted to the facility or that the individual spends outside the state but is limited to 180 consecutive calendar days unless HHSC approves an extension in accordance with subsection (g) of this section.

(c) Within two business days after a program provider becomes aware that an individual has been admitted to a facility or has left the state as described in subsection (a) of this section, the program provider must submit a written request that HHSC suspend the individual's services.

(d) If HHSC suspends an individual's services, HHSC sends a written notice to the program provider that includes the effective date of the suspension and the individual's right to request a fair hearing as described in §260.111 of this subchapter (relating to Individual's Right to a Fair Hearing).

(e) Within two business days after a program provider receives a notice described in subsection (d) of this section, the program provider must send the notice to the individual or LAR and, if applicable, the FMSA.

(f) If an individual or LAR requests a fair hearing, the program provider is not required to provide services to the individual while the appeal is pending.

(g) HHSC may approve one or more 30-calendar-day extensions of a suspension if extenuating circumstances exist and the individual anticipates resuming participation in the DBMD Program during the extension.

(h) To request an extension described in subsection (g) of this section, a program provider must:

(1) submit the request, in writing, to HHSC; and

(2) include documentation of the extenuating circumstances.

(i) During the time HHSC suspends an individual's services, as described in subsection (b) of this section, the individual is not considered to be residing in a facility listed in subsection (a)(1) of this section or out of the state.

§260.87. Reduction of a DBMD Program Service or a CFC Service.

(a) HHSC reduces an individual's DBMD Program services or CFC services if, during review of an individual's IPC conducted as described in §260.75 of this subchapter (relating to Utilization Review of an IPC by HHSC), HHSC determines that the amount or level of a service on the individual's IPC does not meet the requirements described in §260.67(a)(1) and (b) of this subchapter (relating to Development of a Proposed Enrollment IPC).

(b) HHSC sends a written notice with the effective date of the reduction to the program provider that the program provider, upon receipt but no later than 12 calendar days before the effective date of reduction, must send to the individual or LAR, copying the FMSA if applicable.

(c) If an individual or LAR requests a fair hearing before the effective date of the reduction specified in the written notice, the program provider must provide the DBMD Program service or the CFC service at the amount or level approved by HHSC on the prior IPC while the appeal is pending.

§260.89. Termination of DBMD Program Services and CFC Services With Advance Notice Due to Ineligibility or Leave from the State.

(a) Except as provided in subsection (c) of this section, HHSC terminates:

(1) an individual's DBMD Program services if the individual does not meet the eligibility criteria described in §260.51(a) of this subchapter (relating to Eligibility Criteria for DBMD Program Services and CFC Services);

(2) an individual's CFC services if the individual does not meet the eligibility criteria described in §260.51(b) or (c) of this subchapter; and

(3) an individual's DBMD Program services and CFC services if:

(A) the individual is admitted to one of the facilities listed in §260.85(a) of this subchapter (relating to Suspension of DBMD Program Services and CFC Services) for more than 180

consecutive calendar days or beyond an extension of the individual's suspension that HHSC approved in accordance with §260.85(g) of this subchapter; or

(B) the individual leaves the State of Texas for more than 180 consecutive calendar days and HHSC has not extended the individual's suspension in accordance with §260.85(g) of this subchapter.

(b) Within two business days after becoming aware that a situation described in subsection (a) of this section exists, the program provider must request, in writing, that HHSC terminate DBMD Program services and CFC services, or DBMD Program services, or CFC services for the individual.

(1) The program provider must include supporting documentation with the request to terminate services.

(2) If the reason for the requested termination of services is that the program provider is not willing to provide DBMD Program services or CFC services to the individual, the program provider must document the following in the individual's record:

(A) the specific reasons the program provider is not willing to provide DBMD Program services or CFC services to the individual; and

(B) efforts made to locate another DBMD program provider willing to provide DBMD Program services and CFC services to the individual and the results of those efforts.

(c) HHSC may, under extenuating circumstances, temporarily continue DBMD Program services and CFC services if an individual is determined by HHSC not to be financially eligible for Medicaid.

(d) HHSC sends a written notice with the effective date of the termination to the program provider that the program provider, upon receipt but no later than 12 calendar days before the effective date of the termination, must send to the individual or LAR, copying the FMSA, if applicable.

(e) If the individual or LAR requests a fair hearing before the effective date of the termination specified in the written notice, the program provider must continue to provide services to the individual while the appeal is pending.

§260.101. Termination of DBMD Program Services and CFC Services with Advance Notice Due to Non-compliance with Mandatory Participation Requirements.

(a) HHSC may terminate an individual's DBMD Program services and CFC services if the individual refuses to comply with a mandatory participation requirement described in §260.113 of this subchapter (relating to Mandatory Participation Requirements of an Individual).

(b) If a program provider becomes aware that an individual has not complied with a mandatory participation requirement, the program provider must immediately attempt to resolve the situation including facilitating at least one in-person meeting with the individual or LAR.

(c) If attempts to resolve the situation fail, the program provider must request, in writing, that HHSC terminate DBMD Program services and CFC services for the individual. Within two business days after concluding that the situation cannot be resolved, the program provider must send the written request with written supporting documentation to HHSC. The program provider must include in the written documentation a description of:

(1) the situation that resulted in the request to terminate DBMD Program services and CFC services; and

(2) the attempts by the program provider to resolve the situation, including in-person meetings with the individual or LAR.

(d) HHSC sends a written notice with the effective date of the termination to the program provider that the program provider, upon receipt but no later than 12 calendar days before the effective date of termination, must send to the individual or LAR, copying the FMSA if applicable.

(e) If the individual or LAR requests a fair hearing before the effective date of the termination specified in the written notice, the program provider must continue to provide services to the individual while the appeal is pending.

§260.103. Termination of DBMD Program Services and CFC Services without Advance Notice for Reasons Other Than Behavior Causing Immediate Jeopardy.

(a) HHSC terminates an individual's DBMD Program services and CFC services if any of the following situations exist:

(1) the program provider has factual information confirming the death of the individual;

(2) the program provider receives a clear written statement signed by the individual that:

(A) the individual no longer wishes to receive DBMD Program services and CFC services; or

(B) gives information that requires termination of services and indicates that the individual understands that this must be the result of supplying that information;

(3) the individual's whereabouts are unknown, and the post office returns program provider mail directed to the individual or LAR indicating no forwarding address; or

(4) the program provider establishes the fact that the individual has been accepted for Medicaid services by another state.

(b) Within two business days after becoming aware that a situation described in subsection (a) of this section exists, the program provider must request, in writing, that HHSC terminate DBMD Program services and CFC services for the individual. The program provider must submit supporting documentation with the request.

(c) HHSC sends a written notice with the effective date of the termination to the program provider that the program provider, upon receipt, must send to the individual or LAR, copying the FMSA, if applicable.

(d) If the individual or LAR requests a fair hearing, the program provider is not required to provide services to the individual while the appeal is pending.

§260.105. Termination of DBMD Program Services and CFC Services without Advance Notice Due to Behavior Causing Immediate Jeopardy.

(a) HHSC may terminate an individual's:

(1) DBMD Program services and CFC services if an individual or a person in the individual's residence exhibits behavior that places the health and safety of the program provider's service provider in immediate jeopardy; or

(2) DBMD Program services if an individual receiving licensed assisted living or licensed home health assisted living exhibits behavior that places the health and safety of another individual residing in the same residence or a service provider in immediate jeopardy.

(b) If a program provider becomes aware that a situation described in subsection (a)of this section exists, the program provider must:

(1) immediately file a report with the appropriate law enforcement agency and, if appropriate, make an immediate referral to DFPS;

(2) within one business day after the program provider becomes aware of the situation, notify HHSC by fax, mail, or IDD Operations Portal of the situation; and

(3) if feasible, attempt to resolve the situation.

(c) If after making attempts to resolve the situation, as required by subsection (b)(3) of this section, a program provider determines that the situation cannot be resolved, the program provider must:

(1) request, in writing, that HHSC terminates an individual's:

(A) DBMD Program services and CFC services in accordance with subsection (a)(1) of this section; or

(B) DBMD Program services in accordance with (a)(2) of this section;

(2) submit the written request to HHSC within two business days after the program provider notifies HHSC in accordance with subsection (b)(2) of this section; and

(3) include with the written request:

(A) a description of the situation that resulted in the request to terminate the individual's services;

(B) a description of the program provider's attempts to resolve the situation or an explanation of why the attempt was not feasible; and

(C) if available, a copy of any report issued by a law enforcement agency or DFPS regarding the situation.

(d) HHSC notifies the individual's program provider, in writing, of whether it authorizes the termination of DBMD Program services and CFC services.

(e) Upon receipt of written notice from HHSC authorizing the termination of DBMD Program services and CFC services, the program provider must, no later than the date of the termination of services, send written notice to the individual or LAR of such termination, copying the FMSA, if applicable. The program provider must include in the notice the individual's right to request a fair hearing in accordance with §260.111 of this subchapter (relating to Individual's Right to a Fair Hearing).

§260.107. Offering Access to Other Services.

If HHSC terminates an individual's DBMD Program services and CFC services, the program provider must ensure that the case manager informs the individual of:

(1) alternative long-term services and supports in the community, including CFC services through a managed care organization; and

(2) institutional services.

§260.109. Individual Whose DBMD Program Services are Terminated May Request Name be Added to DBMD Interest List.

If HHSC terminates an individual's DBMD Program services, the individual or LAR may request the individual's name be placed on the DBMD interest list in accordance with §260.53(b) of this subchapter (relating to DBMD Interest List).

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 31, 2022.

TRD-202203381
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 6. RIGHTS AND RESPONSIBILITIES OF AN INDIVIDUAL

26 TAC §260.111, §260.113

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.111. Individual's Right to a Fair Hearing.

An individual is entitled to a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A, (relating to Uniform Fair Hearing Rules), if:

(1) the individual's request for eligibility for the DBMD Program is denied or is not acted upon with reasonable promptness; or

(2) the individual's DBMD Program services or CFC services have been denied, suspended, reduced, or terminated by HHSC.

§260.113. Mandatory Participation Requirements of an Individual.

An individual or LAR must comply with the following mandatory participation requirements:

(1) completing and submitting an application for Medicaid financial eligibility to HHSC in accordance with §260.61(h)(2) of this subchapter (relating to Process for Enrollment of an Individual) or within another time frame permitted by §260.61(i) of this subchapter if the individual does not have Medicaid financial eligibility;

(2) participating on the service planning team to:

(A) develop an enrollment IPP, as described in §260.65 of this chapter (relating to Development of an Enrollment IPP);

(B) develop a proposed enrollment IPC, as described in §260.67 of this subchapter (relating to Development of a Proposed Enrollment IPC); and

(C) review and revise the IPP and IPC, as described in §260.77 of this subchapter (relating to Renewal and Revision of an IPP and IPC);

(3) reviewing, agreeing to, signing, and dating an IPP and IPC;

(4) utilizing natural supports and other non-waiver and non-CFC services and supports for which the individual may be eligible before accessing DBMD Program services and CFC services;

(5) cooperating with the program provider in the delivery of DBMD Program services and CFC services listed on the individual's IPC, including:

(A) working with the program provider to schedule meetings;

(B) attending a scheduled meeting with the case manager or a service provider;

(C) being available to receive DBMD Program services and CFC services;

(D) notifying the program provider in advance if the individual or LAR is unable to keep an appointment or is unavailable to receive services in the individual's residence; and

(E) admitting program provider representatives to the individual's residence for a scheduled meeting or to receive DBMD Program services and CFC services;

(6) cooperating with the program provider's service providers to ensure progress toward achieving the goals and outcomes described in the IPP;

(7) if found by HHSC to be financially eligible for DBMD Program services based on the special institutional income limit, paying the required co-payment in a timely manner;

(8) notifying the program provider if the individual receives notice from HHSC of a change in the status of the individual's financial eligibility for Medicaid;

(9) not engaging in criminal behavior in the presence of a service provider or, if the individual receives licensed assisted living or licensed home health assisted living, another individual residing in the same residence;

(10) not permitting a person present in the individual's residence to engage in criminal behavior in the presence of a service provider or, if the individual receives licensed assisted living or licensed home health assisted living, another individual residing in the same residence;

(11) not acting in a manner that is threatening to the health and safety of a service provider or, if the individual receives licensed assisted living or licensed home health assisted living, another individual residing in the same residence;

(12) not permitting a person present in the individual's residence to act in a manner that is threatening to the health and safety of the case manager or a service provider or, if the individual receives licensed assisted living or licensed home health assisted living, of another individual residing in the same residence;

(13) not exhibiting behavior or permitting a person present in the individual's residence to exhibit behavior that places the health and safety of a service provider in immediate jeopardy;

(14) not initiating or participating in fraudulent health care practices;

(15) not engaging in behavior that endangers the individual's health or safety;

(16) not permitting a person present in the individual's residence to engage in behavior that endangers the individual's health or safety; and

(17) paying room and board on time if the individual receives licensed assisted living.

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 31, 2022.

TRD-202203382
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER C. COMPLIANCE WITH RULES

26 TAC §260.151

STATUTORY AUTHORITY

The new section 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.151. Program Provider Compliance with Rules.

A program provider must comply with:

(1) this chapter;

(2) Chapter 558 of this title (relating to Licensing Standards for Home and Community Support Services Agencies);

(3) if providing licensed assisted living, Chapter 553 of this title (relating to Licensing Standards for Assisted Living Facilities);

(4) 40 TAC Chapter 41 (relating to Consumer Directed Services Option);

(5) 40 TAC Chapter 49 (relating to Contracting for Community Services); and

(6) 1 TAC Chapter 354, Subchapter O (relating to Electronic Visit Verification).

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 31, 2022.

TRD-202203383
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER D. ADDITIONAL PROGRAM PROVIDER PROVISIONS

26 TAC §§260.201, 260.203, 260.205, 260.207, 265.209, 260.211, 260.213, 260.215, 260.217, 260.219, 260.221, 260.223

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.201. Protection of Individual.

(a) A 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 complete the HHSC Notification Regarding a Death in HCS, TxHmL, DBMD Programs form to 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 *Deaf Blind with Multiple Disabilities Program Manual.* must report critical incidents to HHSC using the HHSC 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 40 TAC §41.702 (relating to Requirements Related to HHSC Investigations When an Alleged Perpetrator is a Service Provider) or 40 TAC §41.703 (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.

§260.203. Qualifications of Program Provider Staff.

(a) A program provider must employ a program director who is responsible for the program provider's day-to-day operations. The program director must:

(1) have a minimum of one year of paid experience in community programs planning and providing direct services to individuals with deafness, blindness, or multiple disabilities and have a master's degree in a health and human services related field;

(2) have a minimum of two years of paid experience in community programs planning and providing direct services to individuals with deafness, blindness, or multiple disabilities, and have a bachelor's degree in a health and human services related field; or

(3) have been a program director for the DBMD Program provider on or before June 15, 2010.

(b) A program provider must ensure that a case manager:

(1) has:

(A) a bachelor's degree in a health and human services related field and a minimum of two years of experience in the delivery of direct services to individuals with disabilities;

(B) an associate degree in a health and human services related field and a minimum of four years of experience providing direct services to individuals with disabilities; or

(C) a high school diploma or certificate recognized by a state as the equivalent of a high school diploma and a minimum of six years of experience providing direct services to individuals with disabilities; and

(2) either:

(A) is fluent in the individual's preferred communication methods (American sign language, tactile symbols, communication boards, pictures, or gestures); or

(B) within six months after being assigned to an individual, becomes fluent in the individual's communication methods.

(c) For purposes of subsection (d) of this section and consistent with Texas Government Code §531.0973, "deafblind-related course work" means educational courses designed to improve a person's:

(1) knowledge of deafblindness and its effect on learning;

(2) knowledge of the role of intervention and ability to facilitate the intervention process;

(3) knowledge of areas of communication relevant to deafblindness, including methods, adaptations, and use of assistive technology, and ability to facilitate the development and use of communication skills for a person with deafblindness;

(4) knowledge of the effect that deafblindness has on a person's psychological, social, and emotional development and ability to facilitate the emotional well-being of a person with deafblindness;

(5) knowledge of and issues related to sensory systems and ability to facilitate the use of the senses;

(6) knowledge of motor skills, movement, orientation, and mobility strategies and ability to facilitate orientation and mobility skills;

(7) knowledge of the effect that additional disabilities have on a person with deafblindness and the ability to provide appropriate support; or

(8) professionalism and knowledge of ethical issues relevant to the role of an intervener.

(d) A program provider must ensure that:

(1) an intervener:

(A) is at least 18 years of age;

(B) is not:

(i) the spouse of the individual to whom the intervener is assigned; or

(ii) if the individual is under 18 years of age, a parent of the individual to whom the intervener is assigned;

(C) holds a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma;

(D) has at least two years of experience working with individuals with developmental disabilities; and

(E) has the ability to proficiently communicate in the functional language of the individual to whom the intervener is assigned;

(2) an intervener I:

(A) meets the requirements for an intervener described in paragraph (1) of this subsection;

(B) has at least six months of experience working with persons who have deafblindness or function as persons with deafblindness;

(C) completed at least eight semester credit hours in deafblind-related course work at a college or university accredited by:

(i) a state agency recognized by the United States Department of Education; or

(ii) a non-governmental entity recognized by the United States Department of Education; and

(D) has completed a practicum that is at least one semester credit hour in deafblind-related course work at a college or university accredited by:

(i) a state agency recognized by the United States Department of Education; or

(ii) a non-governmental entity recognized by the United States Department of Education;

(3) an intervener II:

(A) meets the requirements for an intervener I described in paragraph (2) of this subsection;

(B) has at least nine months of experience working with persons who have deafblindness or function as persons with deafblindness; and

(C) has completed at least an additional 10 semester credit hours in deafblind-related course work at a college or university accredited by:

(i) a state agency recognized by the United States Department of Education; or

(ii) a non-governmental entity recognized by the United States Department of Education; and:

(4) an intervener III:

(A) meets the requirements for an intervener II described in paragraph (3)(A) of this subsection;

(B) has at least one year of experience working with persons with deafblindness or function as persons with deafblindness; and

(C) holds an associate degree or bachelor's degree in a course of study with a focus on deafblind-related course work from a college or university accredited by:

(i) a state agency recognized by the United States Department of Education; or

(ii) a non-governmental entity recognized by the United States Department of Education.

(e) A program provider must ensure that a service provider who interacts directly with an individual is able to communicate with the individual.

(f) A program provider must ensure that a service provider of a therapy described in §260.355(a) of this chapter (relating to Therapies) is licensed by the State of Texas as described in §260.355(b) of this chapter.

(g) A program provider must ensure that a service provider of employment assistance or a service provider of supported employment:

(1) is at least 18 years of age;

(2) is not:

(A) the spouse of the individual; or

(B) a parent of the individual if the individual is under 18 years of age; and

(3) has:

(A) a bachelor's degree in rehabilitation, business, marketing, or a related human services field with six months of paid or unpaid experience providing services to people with disabilities;

(B) an associate degree in rehabilitation, business, marketing, or a related human services field with one year of paid or unpaid experience providing services to people with disabilities; or

(C) a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma, with two years of paid or unpaid experience providing services to people with disabilities.

(h) Documentation of the experience required by subsection (g) of this section must include:

(1) for paid experience, a written statement from a person who paid for the service or supervised the provision of the service; and

(2) for unpaid experience, a written statement from a person who has personal knowledge of the experience.

(i) A program provider must ensure that dental treatment is provided by a person licensed to practice dentistry or dental hygiene in accordance with Texas Occupations Code Chapter 256.

(j) A program provider must ensure that a service provider not required to meet the other education or experience requirements described in this section:

(1) is 18 years of age or older;

(2) has:

(A) a high school diploma;

(B) a certificate recognized by a state as the equivalent of a high school diploma; or

(C) the following:

(i) documentation of a proficiency evaluation of experience and competence to perform job tasks including an ability to provide the required services needed by the individual as demonstrated through a written competency-based assessment; and

(ii) at least three personal references from persons not related by blood that evidence the person's ability to provide a safe and healthy environment for the individual; and

(3) except for a service provider of chore services, either:

(A) is fluent in the communication method preferred by the individual to whom the service provider is assigned, including

American sign language, tactile symbols, communication boards, pictures, and gestures; or

(B) has the ability to become fluent in the communication methods used by an individual within three months after being assigned to the individual.

(k) A program provider must ensure that:

(1) a vehicle in which a service provider transports an individual has a valid Vehicle Identification Certificate of Inspection, in accordance with state law; and

(2) a service provider who transports an individual in a vehicle has:

(A) a current Texas driver's license; and

(B) vehicle liability insurance, in accordance with state law.

(l) A service provider:

(1) must not be a parent of the individual to whom the service provider is providing any service, if the individual is under 18 years of age;

(2) must not be the spouse of the individual to whom the service provider is providing any service;

(3) must not be a relative or guardian of the individual to whom the service provider is providing an adaptive aid; and

(4) must not be a relative or guardian of the individual to whom the service provider is providing any of the following services, if the individual is 18 years of age or older:

(A) assisted living;

(B) case management;

(C) behavioral support;

(D) dental treatment;

(E) dietary services;

(F) FMS, if the individual is participating in the CDS option;

(G) occupational therapy;

(H) orientation and mobility;

(I) physical therapy;

(J) speech and language pathology;

(K) audiology; and

(L) support consultation, if the individual is participating in the CDS option.

(m) A service provider of CFC PAS/HAB must:

(1) have:

(A) a high school diploma;

(B) a certificate recognized by a state as the equivalent of a high school diploma; or

(C) both of the following:

(i) a successfully completed written competency-based assessment demonstrating the service provider's ability to perform CFC PAS/HAB tasks, including an ability to perform CFC PAS/HAB tasks required for the individual to whom the service provider will provide CFC PAS/HAB; and

(ii) at least three written personal references from persons not related by blood that evidence the service provider's ability to provide a safe and healthy environment for the individual; and

(2) meet any other qualifications requested by the individual or LAR based on the individual's needs and preferences.

(n) The program provider must maintain documentation in a service provider's employment, contract, or personal service agreement file that the service provider meets the requirements of this section.

§260.205. 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 §260.7 of this chapter (relating to Description of the DBMD 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 §260.219 of this subchapter (relating to Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual); and

(C) are provided with the instructions, in writing, described in subparagraph (B) of this paragraph;

(2) conduct the activities described in paragraph (1) 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 and choking prevention training. A program provider must ensure training on cardiopulmonary resuscitation 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, transportation provided as a residential habilitation activity, respite, supported employment, and CFC PAS/HAB have current certification in:

(A) cardiopulmonary resuscitation; and

(B) 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) 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, transportation provided as a residential habilitation activity, 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 admission to an institution;

(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 services, licensed assisted living, licensed home health assisted living, case management, day habilitation, employment assistance, nursing, specialized nursing, transportation provided as a residential habilitation activity, 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, transportation provided as a residential habilitation activity, respite, or supported employment, within 90 calendar days after assuming job duties, complete the DBMD Program Service Provider Training 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, transportation provided as a residential habilitation activity, 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 actively involved person, 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 planning training.

(1) A program provider must ensure that:

(A) a case manager completes a comprehensive non-introductory person-centered planning training developed or approved by HHSC within six months after the case manager's date of hire; and

(B) a service provider whose duties include participating as a member of a service planning team completes HHSC's web-based Introductory Training within six months after assuming this duty.

(2) A program provider must maintain documentation that includes:

(A) for the training described in paragraph (1)(A) of this subsection:

(i) the name of the case manager who received the training;

(ii) the date the training was conducted; and

(iii) the name of the person or organization that conducted the training; and

(B) for the training described in paragraph (1)(B) of this subsection:

(i) the name of the service provider who completed the training; and

(ii) the date the service provider completed 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 §260.215(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 §260.217(d)(3) of this subchapter (relating to Restraints).

§260.207. Service Delivery.

(a) A program provider must ensure that:

(1) a full-time case manager is assigned to provide case management services to no more than 30 individuals or other persons receiving services through another Medicaid waiver at one time;

(2) a part-time case manager is assigned to provide case management services to no more than 15 individuals or other persons receiving services through another Medicaid waiver at one time; and

(3) for a month in which a case manager does not meet with an individual or LAR as required by §260.77(a) of this chapter (relating to Renewal and Revision of an IPP and IPC), the case manager has an in-person or telephone contact with the individual, LAR, primary caregiver, or actively involved person, to provide case management.

(b) In determining the number of individuals or other persons receiving services through another Medicaid waiver at one time to whom a case manager will be assigned, a program provider must take into consideration:

(1) the intensity of needs of each individual or person;

(2) the frequency and duration of contacts the case manager will need to make with the individual or person; and

(3) the amount of travel time involved in making such contacts.

(c) A program provider must have:

(1) a sufficient number of case managers available at all times to ensure the provision of case management services; and

(2) a written process that ensures a case manager can readily become familiar with an individual to whom the case manager is not ordinarily assigned but to whom the case manager may be required to provide case management services.

(d) A program provider must have written policies and procedures that ensure backup service providers are or can readily become familiar with individuals to whom they are not ordinarily assigned but to whom they may be required to deliver services.

(e) A program provider must provide each DBMD Program service and CFC service authorized in an individual's IPC in accordance with:

(1) the individual's current IPC;

(2) the individual's current IPP; and

(3) the requirements in this chapter.

(f) A program provider must ensure a copy of an individual's IPP is distributed or made available to each service provider who provides a service on the IPP.

(g) A program provider must:

(1) provide or ensure the provision of each DBMD Program service listed in §260.7(c) of this chapter (relating to Description of the DBMD Program and CFC);

(2) provide the assisted living service as either licensed assisted living or licensed home health assisted living in accordance with §260.351 of this chapter (relating to Residential Services);

(3) provide or ensure the provision of each CFC service listed in §260.7(e) of this chapter; and

(4) ensure that CFC support management is provided to an individual or LAR as described in the *Deaf Blind with Multiple Disabilities Program Manual* if:

(A) the individual is receiving CFC PAS/HAB; and

(B) the individual or LAR requests to receive CFC support management.

(h) A program provider must offer an individual choices and opportunities for accessing and participating in community activities, including employment opportunities and experiences available to peers without disabilities, and provide supports necessary for an individual to

participate in those activities consistent with an individual's or LAR's choice and the individual's IPC and IPP.

(i) A program provider may accept or decline the request of an individual or LAR for the provision of transportation provided as a residential habilitation activity, nursing, out-of-home respite in a camp, case management, adaptive aids, intervener services, or CFC PAS/HAB to the individual while the individual is staying at a location outside the program provider's contracted service delivery area but within the state of Texas.

(j) If a program provider accepts the request of an individual or LAR, as described in subsection (i) of this section, the program provider:

(1) may provide transportation provided as a residential habilitation activity, nursing, out-of-home respite in a camp, adaptive aids, intervener services, CFC PAS/HAB, and case management services at the requested location;

(2) must document in the service delivery log:

(A) that the individual is receiving services outside the program provider's contracted service delivery area;

(B) the location where the individual is receiving the services;

(C) the estimated length of time the individual is expected to be outside the program provider's contracted service delivery area; and

(D) contact information for the individual or LAR;

(3) must, if the individual receives services outside the program provider's contracted service delivery area for 30 consecutive days, inform the individual or LAR, on or before the 35th day, that:

(A) to ensure the continued provision of the services, the individual must do one of the following before the 61st day:

(i) transfer to a program provider that has a contracted service delivery area that includes the area in which the individual is receiving the services; or

(ii) return to the program provider's contracted service delivery area; and

(B) if the individual receives services outside the program provider's contracted service delivery area during a period of 60 consecutive days, the individual must return to the contracted service delivery area and receive services in that area before the program provider may accept another request from the individual or LAR for the provision of the services outside the program provider's contracted service delivery area; and

(4) must, if the individual or LAR expresses a desire for the individual to transfer to a program provider that has a contracted service delivery area that includes the area in which the individual is receiving services:

(A) give the individual and LAR the HHSC Documentation of Provider Choice form for the contracted service delivery area in which the individual is receiving the services;

(B) have the individual or LAR select a program provider and designate that selection on the HHSC Documentation of Provider Choice form; and

(C) coordinate the individual's transfer in accordance with §260.79 of this chapter (relating to Coordination of Transfers).

(k) If the program provider declines the request of an individual or LAR, as described in subsection (i) of this section, the program provider must:

(1) inform the individual or LAR orally or in writing:

(A) of the reasons for declining the request; and

(B) that the individual may request a service planning team meeting to discuss the reasons for declining the request; and

(2) document the discussion and the final outcome if the service planning team meeting is held.

(l) If a program provider or case manager is unable to meet a time frame specified in this chapter, it must be for a reason not directly caused by the program provider or case manager, or for a reason beyond the program provider's or case manager's control, such as a man-made or natural disaster. The program provider or case manager must document the program provider's or case manager's efforts to meet a time frame and maintain the documentation in the individual's record. The documentation must include:

(1) the reason the time frame could not be met, which must be beyond the program provider's or case manager's control; and

(2) a description of the program provider's or case manager's ongoing efforts to meet a time frame.

§260.209. 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, CFC support management, licensed assisted living, licensed home health assisted living, and a service that is documented through an electronic visit verification system, as listed in 1 TAC §354.4005(b) (relating to Applicability), a service provider completes an HHSC DBMD Summary of Services Delivered form to document:

(1) the type of service provided;

(2) the date and the time the service begins and ends;

(3) the type of contact (phone or in-person);

(4) the name of the person with whom the contact occurred;

(5) 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

(6) the signature and title of the service provider.

(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:

(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 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) a copy of the current adaptive behavior screening assessment;

(6) a copy of the current Related Conditions Eligibility Screening Instrument;

(7) the documentation required by subsection (a) 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 §260.77(a)(1)(E) of this chapter (relating to Renewal and Revision of an IPP and IPC);

(B) the IPP reviews for the current IPC period prepared by a case manager in accordance with §260.77(a)(2) of this chapter; and

(C) if the IPP includes day habilitation, transportation provided as a residential habilitation activity, 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 service provider of day habilitation, transportation provided as a residential habilitation activity, or CFC PAS/HAB;

(ii) the ability to actively participate in ADLs and IADLs 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 setting in which the individual receives day habilitation, transportation provided as a residential habilitation activity, or CFC PAS/HAB;

(11) the individual's HHSC Verification of Freedom of Choice form completed at enrollment documenting the individual's or LAR's choice of the DBMD Program over the ICF/IID Program;

(12) the individual's current HHSC Documentation of Provider Choice form documenting the individual's or LAR's choice of a program provider;

(13) if required by §260.213 of this subchapter (relating to Service Backup Plans), any new or revised HHSC Provider Agency Model Service Backup Plan form for nursing, intervener services, or CFC/PAS HAB for the current IPC period;

(14) if the IPC includes transportation provided 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 §260.215 of this subchapter (relating to Protective Devices); and

(16) if a restraint is used, the documentation required by §260.217 of this subchapter (relating to Restraints).

§260.211. Quality Assurance.

(a) A program provider must conduct an annual survey of individuals, LARs, and actively involved person to determine satisfaction with services.

(b) At least annually, a program provider must:

(1) 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; and

(2) evaluate critical incident data reported in accordance with §260.201(d) of this subchapter (relating to Protection of Individual), compare the program provider's use of restraint to aggregate data provided by HHSC on HHSC's website, and identify program process improvements that help prevent the occurrence of critical incidents and improve service delivery.

§260.213. Service Backup Plans.

(a) If an individual's IPC includes nursing, intervener services, or CFC/PAS HAB, a case manager must ensure that the service planning team determines if an individual needs a service backup plan or a service backup plan revision during:

(1) the process of enrollment described in §260.61 of this chapter (relating to Process for Enrollment of an Individual);

(2) each of the reviews described in §260.77 of this chapter (relating to Renewal and Revision of an IPP and IPC); and

(3) an individual's transfer from one program provider to another.

(b) If the service planning team determines that an individual needs a service backup plan for nursing, intervener services, or CFC PAS/HAB services critical to the individual's health and safety, the case manager must document on the individual's IPP and IPC which services require a service backup plan.

(c) If a service that requires a service backup plan will be provided by a program provider, a case manager must:

(1) develop, with input from the service planning team, the service backup plan for each service identified as critical using the HHSC Provider Agency Model Service Backup Plan form; and

(2) ensure that:

(A) the service backup plan addresses emergencies, including when the failure of a service provider to appear as scheduled presents a risk to an individual's health and welfare; and

(B) if the action in the service backup plan identifies a natural support, that a person providing the natural support receives pertinent information about the individual's needs and is able to protect the individual's health and safety.

(d) If a service backup plan is implemented in accordance with subsection (c) of this section, the service planning team must revise the service backup plan to address any problems or concerns from the individual, case manager, service provider, or a person providing the natural support regarding implementation of the service backup plan.

§260.215. Protective Devices.

(a) A protective device is a restrictive intervention that a program provider may use in accordance with this section.

(b) A program provider must not use a protective device to modify or control an individual's behavior, for disciplinary purposes, for convenience, or as a substitute for an effective, less restrictive method.

(c) Before a program provider uses a protective device, the program provider must:

(1) have an RN conduct an assessment of the individual's needs;

(2) consider less restrictive methods that, if effective, would accomplish the purpose of the protective device;

(3) document in the individual's record the reasons why less restrictive methods would not be effective;

(4) obtain and retain in the individual's record written consent of the individual or LAR to use a protective device;

(5) provide oral and written notification to the individual or LAR of the right at any time to withdraw consent for the use of the protective device;

(6) have an RN, with input from the individual, the individual's LAR, the individual's service planning team, and other professional personnel, develop a written service plan, which may be part of the individual's plan of care as defined in §558.2 of this title (relating to Definitions), signed by a physician, that describes:

(A) the type of device and the circumstances under which it may be used;

(B) how to use the protective device and any contraindications specific to the individual;

(C) how and when to document the use of the protective device;

(D) how to monitor the protective device; and

(E) when and whom the program staff must notify of the use of a protective device;

(7) ensure the service planning team reviews and approves the written service plan;

(8) ensure that each service provider who will use a protective device has been trained in the proper use of the protective device; and

(9) ensure the training is documented in the service provider's record.

(d) A program provider that uses a protective device must:

(1) document in the individual's record any use of the protective device in accordance with the written service plan;

(2) ensure that an RN, with input from the individual's service planning team and other professional personnel, at least annually, and when the individual's needs change:

(A) evaluates and documents in the individual's record the effects of the protective device on the individual's health and welfare; and

(B) reviews the use of a protective device to determine its effectiveness and the need to continue the protective device; and

(3) ensure that an RN, in accordance with subsection (c)(6) of this section, revises the service plan when the individual's service planning team and physician determine that a protective device is not effective or needed.

§260.217. Restraints.

(a) A restraint is a restrictive intervention that a program provider may use in accordance with this section.

(b) A program provider providing licensed assisted living must comply with §553.267(a)(3)(A) and (D) of this title (relating to Rights).

(c) A program provider must ensure that a six-bed ICF/IID providing respite complies with §551.42(e)(4) of this title (relating to Standards for a Facility).

(d) A program provider providing licensed home health assisted living:

(1) must not use restraints:

(A) for disciplinary purposes, retaliation, coercion, or retribution;

(B) for the convenience of a service provider or other persons; or

(C) as a substitute for an effective, less restrictive method;

(2) may use a restraint only:

(A) if the use is authorized, in writing, by a physician and specifies:

(i) the circumstances under which the restraint may be used; and

(ii) the duration for which the restraint may be used; or

(B) if the use is necessary in a behavioral emergency to protect an individual or others from injury;

(3) except in a behavioral emergency, must ensure:

(A) that a service provider who uses a restraint has been trained in the use of the restraint:

(i) before using the restraint;

(ii) annually; and

(iii) when the individual's needs change; and

(B) that the training is documented in the service provider's record;

(4) must not use a restraint under any circumstance if it:

(A) obstructs the individual's airway, including a procedure that places anything in, on, or over the individual's mouth or nose;

(B) impairs the individual's breathing by putting pressure on the individual's torso;

(C) interferes with the individual's ability to communicate; or

(D) places the individual in a prone or supine position;

(5) must ensure that if a physical restraint is used in a behavioral emergency:

(A) it must be a restraint in which the individual's limbs are held close to the body to limit or prevent movement and that does not violate the provisions of paragraph (4) of this subsection;

(B) that as soon as possible but no later than one hour after the use of the restraint, the service provider notifies an RN of the restraint;

(C) that after the RN is notified of the use of the restraint, the service provider documents the RN's instructions to the service provider;

(D) that medical services are obtained for the individual as necessary;

(E) the program provider:

(i) with the individual's consent, makes an appointment with a physician no later than the end of the first business day after the use of restraint and document in the individual's record that the appointment was made; or

(ii) if the individual refuses to see a physician, documents the refusal in the individual's record; and

(F) that as soon as possible but no later than 24 hours after the use of restraint, the program provider notifies one of the following persons, if there is such a person, that the individual has been restrained:

(i) the individual's LAR; or

(ii) an actively involved person with the individual's care, unless the release of this information would violate other law;

(6) that uses a restraint must document in an individual's record:

(A) the use of the restraint;

(B) time and date the restraint was used;

(C) name of person administering the restraint;

(D) type of restraint and duration used; and

(E) if used in a behavioral emergency:

(i) events preceding the use of the restraint;

(ii) actions taken after the use of the restraint; and

(iii) types of intervention attempted before the use of the restraint; and

(7) in order to decrease the frequency of the use of restraint, and to minimize the risk of harm to an individual, must ensure that a service provider is aware of and adheres to the findings of the nursing assessment required in §260.61(c)(8) of this chapter (relating to Process for Enrollment of an Individual) or in §260.77(b)(1)(B) of this chapter (relating to Renewal and Revision of an IPP and IPC) for each individual.

§260.219. 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 report 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 Chapter 553 of this title (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.

§260.221. Requirements Related to the Reporting of Abuse, Neglect, and Exploitation of an Individual.

(a) If a report required by §260.219 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 §260.219 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.

§260.223. Requirement for Translation.

If a program provider submits documentation to HHSC containing information that is not in English, the program provider must, at the same time, submit a translation of the information in English.

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 31, 2022.

TRD-202203384
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER E. ASSISTANCE WITH PERSONAL FUNDS MANAGEMENT

26 TAC §§260.251, 260.253, 260.255, 260.257, 260.259, 260.261, 260.263, 260.265, 260.267, 260.269, 260.271

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.251. Request for Assistance with Personal Funds Management.

(a) If a program provider offers assistance with personal funds management, the program provider must have written authorization from an individual or LAR before accepting an individual's personal funds for deposit in a trust fund account. The program provider must:

(1) ensure the written authorization is signed and dated by the individual or LAR;

(2) provide the individual or LAR with a copy of the original written authorization; and

(3) maintain the original of the written authorization in the individual's record.

(b) Before the program provider accepts an individual's personal funds for deposit in a trust fund account, the program provider must inform the individual or LAR, orally and in writing, of:

(1) the individual's rights and responsibilities regarding personal funds management; and

(2) the program provider's responsibilities for providing assistance with managing the individual's personal funds in a trust fund account as described in this subchapter.

(c) The program provider must not require an individual or LAR to request the program provider's assistance with management of the individual's personal funds.

§260.253. Establishing a Trust Fund Account.

(a) A program provider that assists an individual with personal funds management must:

(1) establish a trust fund account;

(2) identify the trust fund account in accordance with the financial institution's requirements for trustee accounts;

(3) ensure the trust fund account is insured under federal or state law;

(4) deposit the individual's personal funds in the trust fund account; and

(5) ensure an individual's personal funds are not commingled with the program provider's funds in the trust fund account.

(b) The program provider must maintain a trust fund account as:

(1) a pooled checking account containing the personal funds of two or more individuals for whom the program provider manages personal funds;

(2) a checking account containing the personal funds of one individual with a financial institution chosen by the program provider and approved, in writing, by the individual or LAR; or

(3) a checking account containing the personal funds of one individual with a financial institution chosen by the individual or LAR.

(c) A program provider that maintains a trust fund account as a pooled checking account must establish an individual checking account as described in subsection (b)(2) or (3) of this section if an individual or LAR requests, in writing, that the individual's personal funds not be maintained in the pooled checking account described in subsection (b)(1) of this section.

§260.255. Maintaining a Trust Fund Account.

(a) When managing a trust fund account, a program provider must:

(1) maintain documentation of an individual's personal funds that:

(A) follows generally accepted accounting principles; and

(B) includes:

(i) the individual's name;

(ii) identification of individual's representative or person assigned to receive the individual's income, if any;

(iii) admission date;

(iv) individual's earned interest, if any;

(v) documentation of each transaction; and

(vi) receipts for purchases and payments, including cash register tapes or sales statements from a vendor;

(2) ensure an individual's personal funds are expended only for the individual's use and benefit;

(3) reimburse the individual if the individual's personal funds are lost or stolen while in the program provider's control;

(4) not charge an individual or LAR for the administrative handling of a trust fund checking account;

(5) provide the individual or LAR with a quarterly statement for the individual's personal funds held by the program provider in a trust fund account that includes the following:

(A) name and location of the financial institution for the trust fund account;

(B) account number for the trust fund account;

(C) the statement coverage period;

(D) the balance at the beginning of the statement period;

(E) all deposits and withdrawals;

(F) interest earned, if any; and

(G) ending balance; and

(6) retain all statements from the financial institution regarding the trust fund account.

(b) A program provider must not charge bank fees to an individual or LAR if the individual's personal funds are maintained by the program provider in:

(1) a pooled checking account; or

(2) an individual checking account at a financial institution chosen by the program provider at the written request of the individual or LAR.

(c) If an individual or LAR chooses to have the program provider maintain the individual's personal funds in an individual checking account at a financial institution chosen by the individual or LAR, the individual or LAR must pay the bank fees.

(d) If the trust fund account is a pooled checking account, as described in §260.253(b)(1) of this subchapter (relating to Establishing a Trust Fund Account), that pays interest, the program provider must:

(1) distribute the interest to each individual for whom the program provider maintains personal funds; and

(2) prorate the actual interest:

(A) at the time the financial institution pays the interest; and

(B) on the basis of the individual's balance of personal funds in the account at the time the financial institution pays the interest.

(e) Within 72 hours after receiving a written request from an individual or LAR for an accounting of the individual's personal funds maintained in a trust fund account, a program provider must provide the individual or LAR with a written record of the individual's personal funds maintained by the program provider in a trust fund account.

§260.257. Individual's Access to Personal Funds.

When an individual whose personal funds are maintained in a trust fund account requests disbursement of a portion or all of the personal funds, a program provider must:

(1) determine if the individual has a sufficient amount of personal funds on deposit in the trust fund account to cover the requested disbursement;

(2) if the individual has a sufficient amount of personal funds on deposit in the trust fund account, provide the individual with requested funds within 72 hours after receiving the request; and

(3) if the individual does not have a sufficient amount of personal funds on deposit in the trust fund account, notify the individual, in writing, that the individual does not have sufficient personal funds in the trust fund.

§260.259. Petty Cash Fund.

(a) A program provider may maintain a petty cash fund with a portion of the personal funds maintained in the pooled checking account for the purpose of providing an individual with small amounts of cash, typically five dollars or less.

(b) A program provider must:

(1) maintain the petty cash fund in a secure place;

(2) set a dollar limit on the amount of a disbursement from the petty cash fund;

(3) reconcile the petty cash fund at least monthly;

(4) maintain a ledger of petty cash fund transactions that documents each deposit and disbursement; and

(5) include the following information in the ledger for each disbursement:

(A) name of the individual;

(B) date of the disbursement;

(C) amount of the disbursement; and

(D) signature of the individual or LAR or, if the individual or LAR is unable to sign the ledger, at least one witness.

§260.261. Trust Fund Transactions.

(a) A program provider must maintain a written trust fund ledger in which the following information is documented:

(1) date and amount of each deposit or withdrawal;

(2) source of each deposit;

(3) name of the individual on whose behalf the deposit is made;

(4) reason for each withdrawal;

(5) name of the person or entity who receives withdrawn funds; and

(6) balance after each transaction.

(b) A program provider must ensure an individual or LAR signs the trust fund ledger or a trust fund transaction form for each deposit and withdrawal at the time of the transaction.

(1) For a withdrawal, if an individual or LAR is unable to sign the trust fund ledger or trust fund transaction form, the program provider must obtain the signature of one person as a witness to the withdrawal.

(2) A program provider does not have to obtain a signature for a withdrawal that meets the definition of a recurring payment as described in §260.263 of this subchapter (relating to Recurring Payments).

§260.263. Recurring Payments.

(a) A program provider may make recurring payments on behalf of an individual using funds from the trust fund account if the individual or LAR submits a written authorization to the program provider.

(1) A program provider must ensure the written authorization:

(A) is signed and dated by the individual or LAR;

(B) includes the name of the business or entity to which the recurring payment is made;

(C) includes the amount of the recurring payment or, if the recurring payment is not a set amount, a description of the method for determining the amount of the recurring payment; and

(D) date the recurring payments begin.

(2) A program provider must maintain the original authorization in the individual's record.

(b) An individual or LAR must request and approve the program provider to stop recurring payments on behalf of the individual.

(1) The authorization must be in writing.

(2) The program provider must document the request, including the:

(A) name of the business or entity to which the recurring payment is made; and

(B) date the payment will stop.

§260.265. Receipt for Direct Payment to Vendor from Trust Fund Account.

(a) When a program provider makes a direct payment from the trust fund account to a vendor for an item or service authorized by the individual or LAR, the program provider must obtain a receipt from the vendor. The program provider must ensure the receipt includes:

(1) the name of the individual;

(2) the date the receipt was created;

(3) the dollar amount;

(4) a description of the item purchased; and

(5) the name of the business or entity from which the purchase was made.

(b) For payments made from a trust fund, a program provider must obtain on the receipt:

(1) the signature of the individual or LAR; or

(2) if the individual or representative cannot sign or is not available to sign, the signature of at least one witness to the payment.

§260.267. Trust Fund Documentation.

A program provider must:

(1) ensure trust fund documentation and supporting documents are readily accessible and retrievable for review by HHSC representatives and all applicable federal and state agencies or their representatives; and

(2) allow HHSC representatives and all applicable federal and state agencies or their representatives to make copies of trust fund related documentation and supporting documents at no charge.

§260.269. Trust Fund Refund.

If an individual or LAR submits a written request for the return of the balance of the individual's personal funds held by the program provider, the program provider must provide the funds to the individual or LAR within five business days after receipt of the written request.

§260.271. Trust Fund Procedures for Individual Transfer and Termination.

(a) When an individual transfers or is terminated from the DBMD Program, the program provider must:

(1) return the individual's personal funds to the individual or LAR and provide a written final accounting of those funds to the individual or LAR:

(A) in person; or

(B) by certified mail with return receipt;

(2) complete the refund and provide a final accounting within 10 business days after:

(A) the effective date of the transfer; or

(B) the date of the individual's termination;

(3) not make any payment using the individual's personal funds after receiving the notice of the individual's transfer or termination; and

(4) maintain the following documentation in the individual's trust fund record:

(A) a copy of the final accounting of the individual's personal funds;

(B) the amount refunded to the individual or LAR;

(C) the date the refund was made;

(D) the method of refund; and

(E) the signature of the individual or LAR if the refund was in cash or a copy of the check if the refund was made by check.

(b) If an individual's termination from the DBMD Program is because the individual is deceased, the program provider must:

(1) make a bona fide effort to locate the beneficiary, heir, or executor of a deceased individual's estate within 30 calendar days after the individual's death;

(2) if the individual was a Social Security beneficiary, contact the SSA;

(3) refund a deceased individual's personal funds and provide a final written accounting of those funds to the individual's beneficiary, heir, or executor either:

(A) in person; or

(B) by certified mail with return receipt;

(4) complete and provide a final written accounting within 30 calendar days after the individual's death, if the beneficiary, heir, or executor is known, located, or identified;

(5) not make any payments out of a deceased individual's trust fund; and

(6) maintain the following documentation in the individual's trust fund record:

(A) copy of the final accounting of the individual's personal funds;

(B) amount refunded to the beneficiary, heir, or executor of the deceased individual's estate;

(C) date the refund was made; and

(D) method of refund.

(c) To clear the account of an individual who is deceased but whose beneficiary, heir, or executor cannot be located within 30 calendar days after the individual's death, the program provider must:

(1) if the funds in the individual's account include Social Security or SSI benefits, follow SSA instructions;

(2) forward the individual's personal funds other than Social Security or SSI benefits to HHSC with the following information:

(A) individual's name;

(B) individual's social security number; and

(C) the amount of money being submitted to HHSC; and

(3) maintain the following in the trust fund record:

(A) documentation of the program provider's efforts to locate the beneficiary, heir, or executor of a deceased individual's estate; and

(B) proof of submission of the personal funds to HHSC.

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 31, 2022.

TRD-202203385
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER F. SERVICE DESCRIPTIONS AND REQUIREMENTS
DIVISION 1. ADAPTIVE AIDS

26 TAC §§260.301, 260.303, 260.305, 260.307, 260.309, 260.311

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.301. Authorization Amount and Other Limits for Adaptive Aids.

(a) HHSC approves a maximum of $10,000 per an individual's IPC period for adaptive aids, to include repair and maintenance.

(b) A program provider may:

(1) purchase or lease only an adaptive aid listed in the *Deaf Blind with Multiple Disabilities Program Manual;*

(2) purchase repair and maintenance of an adaptive aid purchased through the DBMD Program but not covered by a warranty; or

(3) purchase repair and maintenance of an adaptive aid that was not purchased through the DBMD Program but is identical to an adaptive aid listed in the *Deaf Blind with Multiple Disabilities Program Manual.*

(c) A program provider must ensure that:

(1) a purchased adaptive aid is the exclusive property and for the exclusive use of the individual for whom it is purchased; and

(2) a leased adaptive aid is for the exclusive use of the individual for whom it is leased.

(d) HHSC does not pay for enhancements to an adaptive aid or for repair and maintenance of an enhancement paid for by non-waiver resources.

§260.303. Requirements for Authorization to Purchase or Lease an Adaptive Aid.

(a) If an individual's service planning team identifies a need for an adaptive aid, a program provider must ensure the service planning team includes the adaptive aid in:

(1) an enrollment IPP and enrollment IPC developed in accordance with §260.65 of this chapter (relating to Development of an Enrollment IPP) and §260.67 of this chapter (relating to Development of a Proposed Enrollment IPC); or

(2) a revision or renewal IPC and IPP developed in accordance with §260.77(a) -(d) of this chapter (relating to Renewal and Revision of an IPP and IPC).

(b) A program provider must:

(1) ensure an HHSC Rationale for Adaptive Aids, Medical Supplies and Minor Home Modifications form is completed in accordance with the *Deaf Blind with Multiple Disabilities Program Manual* by the appropriate licensed professional;

(2) determine, as described in §260.67(b) of this chapter, if a non-waiver resource is available for the adaptive aid and, if applicable, obtain a written denial from the non-waiver resource;

(3) consider leasing the adaptive aid on a short-term basis, if:

(A) the permanent need for the adaptive aid cannot be determined; or

(B) the individual has an immediate need for the adaptive aid; and

(4) estimate the cost for the item, and if the adaptive aid is expected to:

(A) cost less than $500, document in the IPP the justification for the vendor selected; or

(B) cost $500 or more, follow the process described in §260.305 of this subchapter (relating to Requirements for Bids for an Adaptive Aid);

(5) if the proposed adaptive aid is a computer:

(A) obtain an evaluation from an appropriate professional, as described in the *Deaf Blind with Multiple Disabilities Program Manual,* that addresses:

(i) the individual's needs;

(ii) computer specifications; and

(iii) necessary orientation and training; and

(B) ensure that the actual cost of an evaluation obtained as described in this paragraph does not exceed $500.

(c) A program provider must electronically access TMHP information to verify that an adaptive aid requested on an IPC in accordance with this section has been approved by HHSC utilizing MESAV.

§260.305. Requirements for Bids for an Adaptive Aid.

(a) For an adaptive aid that costs $500 or more, a program provider must:

(1) obtain comparable bids for the requested adaptive aid from three vendors; and

(2) ensure the vendors are not related to the individual.

(b) A program provider must ensure a bid obtained in accordance with subsection (a) of this section includes:

(1) the total cost of the requested adaptive aid, which may be from a catalog, website, or brochure price list;

(2) the amount of any additional expenses related to the delivery of the adaptive aid, to include warranty, shipping and handling, taxes, installation, and other labor charges;

(3) the date of the bid, which must be within 30 calendar days before the date of the service planning team meeting at which the adaptive aid was recommended;

(4) the name, address, and telephone number of the vendor;

(5) for an adaptive aid other than interpreter services and specialized training for augmentative communication programs, a complete description of the adaptive aid and any associated items or modifications, which may include pictures or other descriptive information from a catalog, website, or brochure; and

(6) for interpreter services and specialized training for augmentative communication programs, the number of hours to be provided and the hourly rate of the service.

(c) A program provider may obtain only one bid or two comparable bids for an adaptive aid if the program provider provides written documentation that the adaptive aid is available only from those vendors.

(d) A program provider must choose the lowest bid unless the program provider has written documentation that justifies selection of the higher bid, other than personal preference. The following are examples of justifications that support payment of a higher bid:

(1) the higher bid is based on the inclusion of a longer warranty for the adaptive aid; and

(2) the higher bid is from a vendor that is more accessible to the individual than another vendor.

(e) If the adaptive aid is a vehicle modification, a program provider must obtain written approval from the vehicle's owner before making the modification. The owner must sign and date the approval.

(f) A program provider must ensure the specifications for a vehicle modification include:

(1) information on the vehicle to be modified, including:

(A) the year and model of the vehicle;

(B) a determination that the vehicle to be modified is the individual's primary vehicle;

(C) proof of ownership of the vehicle;

(D) current state inspection and registration for the vehicle;

(E) any required state insurance for the vehicle; and

(F) the mileage of the vehicle; and

(2) information on the needed modifications, including;

(A) an itemized list of parts and accessories, including prices;

(B) an itemized list of required labor, including labor charges; and

(C) warranty coverage.

(g) If a vehicle modification costs $1,000 or more and the vehicle has been driven more than 75,000 miles or is over four years old, a program provider must:

(1) obtain a written evaluation by an Automotive Service Excellence certified technician to ensure the sound mechanical condition of all major components of the vehicle;

(2) document the experience of the mechanic doing the evaluation; and

(3) include the actual cost of the written evaluation as part of the invoice cost not to exceed $150.

§260.307. Time Frames for Providing an Adaptive Aid.

(a) A program provider must ensure an individual receives an adaptive aid, other than a medically necessary supply or device:

(1) costing less than $500 within 14 business days after one of the following dates, whichever is later:

(A) the date HHSC approves the proposed IPC that includes the recommended adaptive aid; or

(B) the effective date of the individual's IPC as determined by the service planning team; and

(2) costing $500 or more within 30 business days after one of the following dates, whichever is later:

(A) the date HHSC approves the proposed IPC that includes the recommended adaptive aid; or

(B) the effective date of the individual's IPC as determined by the service planning team.

(b) For an adaptive aid that is a medically necessary supply or device listed in the *Deaf Blind with Multiple Disabilities Program Manual,* a program provider must ensure an individual receives the medical supply as follows:

(1) for a medically necessary supply or device that is not immediately needed by the individual, within five business days after one of the following dates, whichever is later:

(A) the date HHSC approves the proposed IPC that includes the recommended medically necessary supply or device; or

(B) the effective date of the individual's IPC as determined by the service planning team; and

(2) for a medically necessary supply or device that is immediately needed by the individual, within two business days after the date HHSC approves the IPC that includes the recommended medically necessary supply or device.

(c) If a program provider is unable to meet the delivery time frames described in subsections (a) or (b) of this section, a program provider may deliver the adaptive aid at a later date if:

(1) the reason for the delay is:

(A) beyond the program provider's control; and

(B) not caused directly by the program provider;

(2) a program provider notifies the individual or LAR and HHSC, orally and in writing, of the delay and provides a revised delivery date; and

(3) a program provider provides the notice to the individual or LAR and HHSC on or before the expiration of the delivery time frames described in subsections (a) or (b) of this section.

(d) A program provider must document the time and date of the oral notice described in subsection (c)(2) of this section in an individual's record and retain a copy of the written notice in the individual's record.

§260.309. Cost Effective Delivery of Adaptive Aid.

(a) A program provider must ensure that if an adaptive aid is delivered to an individual by a commercial carrier, such as United Parcel Service or the United States Postal Service, the most cost-effective carrier is used.

(b) A program provider may not use a commercial carrier to provide overnight delivery unless it is necessary to meet the time frame for a medically necessary supply or device immediately needed by an individual and there is no other more cost-effective means to deliver the adaptive aid within that time frame.

§260.311. Requirements of Program Provider Following Provision of Adaptive Aid.

(a) A program provider must ensure, upon delivery of the adaptive aid to an individual and before the adaptive aid is used, that the individual, unpaid caregiver, and service providers are provided with appropriate orientation and training in the proper use of the adaptive aid.

(b) Within 10 business days after an individual has received an adaptive aid, a program provider must:

(1) contact the individual to:

(A) determine if the adaptive aid meets the needs of the individual; and

(B) determine if appropriate orientation and training were provided to the individual on proper use of the adaptive aid; and

(2) document the result of that contact on the HHSC Documentation of Completion of Purchase form as described in the *Deaf Blind with Multiple Disabilities Program Manual.*

(c) If a program provider determines that an adaptive aid does not adequately meet an individual's needs because the individual needs training or other assistance, or the adaptive aid requires repair or adjustment, the program provider must:

(1) ensure that, within 14 business days after the determination, a person who is qualified to perform such training, assistance, repair, or adjustment visits the individual in person and performs the necessary functions; and

(2) document in the individual's record that the necessary training, assistance, repair, or adjustment is completed.

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 31, 2022.

TRD-202203386
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 2. MINOR HOME MODIFICATIONS

26 TAC §§260.313, 260.315, 260.317, 260.319, 260.321, 260.323, 260.325, 260.327, 260.329, 260.331

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Exec-

utive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.313. Items or Services Purchasable as a Minor Home Modification.

(a) A program provider may purchase as a minor home modification:

(1) only those items and services listed in the *Deaf Blind with Multiple Disabilities Program Manual;* and

(2) the necessary repair and maintenance of a minor home modification purchased through the DBMD program if:

(A) at least one year has elapsed from the date the minor home modification was completed; and

(B) the minor home modification is not covered by a warranty.

(b) A program provider may not purchase, as a minor home modification, an item or service not listed in the *Deaf Blind with Multiple Disabilities Program Manual.*

(c) The following are examples of items and services that may not be purchased as a minor home modification:

(1) general repair or maintenance of a residence, for example, repairing a leaking roof, rotten porch, termite damage, or leveling a floor;

(2) general remodeling of a residence that does not address an individual's specific needs;

(3) an adaptation that adds square footage to a residence; and

(4) construction of new room, including installation of plumbing and electricity.

§260.315. Authorization Limit for Minor Home Modifications and Amount for Repair and Maintenance.

(a) Except as provided in subsection (b) of this section, the maximum amount HHSC approves as payment for minor home modifications provided to an individual is $10,000 for the lifetime of the individual.

(b) In addition to the $10,000 lifetime limit described in subsection (a) of this section, HHSC may approve up to $300 per IPC period for repair and maintenance of minor home modifications purchased through the DBMD Program if at least one year has elapsed since the date the minor home modification was completed.

(c) Except as provided in subsection (d) of this section, a program provider is not required to follow the process in §260.317 of this division (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs Less than $1,000) to request approval for repair and maintenance of a minor home modification, but must include the amount requested:

(1) in an enrollment IPC developed in accordance with §260.67 of this chapter (relating to Development of a Proposed Enrollment IPC); or

(2) in a revision or renewal IPC developed in accordance with §260.77(a) - (d) of this chapter (relating to Renewal and Revision of an IPP and IPC).

(d) A program provider must follow the process described in §260.317 of this division if requesting authorization for repair and maintenance of a minor home modification if:

(1) the minor home modification is not purchased through the DBMD Program but is identical to an item or service that a program provider may purchase as a minor home modification listed in the *Deaf Blind with Multiple Disabilities Program Manual;* or

(2) the amount exceeds the $300 limit described in subsection (b) of this section and the individual has not reached the $10,000 lifetime limit described in subsection (a) of this section.

(e) A request described under subsection (d) of this section and authorized by HHSC is counted toward the $10,000 lifetime limit described in subsection (a) of this section if the individual has not reached the lifetime limit.

§260.317. Requesting Authorization to Purchase a Minor Home Modification that Costs Less than $1,000.

(a) To purchase a minor home modification for an individual that costs less than $1,000, a program provider:

(1) does not have to obtain specifications as described in §260.321 of this division (relating to Specifications for a Minor Home Modification);

(2) includes the cost of the minor home modification and the cost of the inspection of the minor home modifications, not to exceed $150, in an IPC and IPP developed in accordance with:

(A) for an enrollment IPP and enrollment IPC, §260.65 of this chapter (relating to Development of an Enrollment IPP) and §260.67 of this chapter (relating to Development of a Proposed Enrollment IPC); or

(B) for a revision or renewal IPP and IPC, §260.77(a) - (d) of this chapter (relating to Renewal and Revision of an IPP and IPC);

(3) ensures the case manager:

(A) obtains an HHSC Rationale for Adaptive Aids, Medical Supplies, and Minor Home Modifications form completed in accordance with the *Deaf Blind with Multiple Disabilities Program Manual;* and

(B) submits to HHSC:

(i) the IPC and IPP:

(I) in accordance with §260.61(l)(1) of this chapter (relating to Process for Enrollment of an Individual), for an individual requesting enrollment in the DBMD Program; or

(II) in accordance with §260.77(a) - (d) of this chapter for an individual receiving DBMD Program services; and

(ii) the completed HHSC Rationale for Adaptive Aids, Medical Supplies, and Minor Home Modifications form.

(b) HHSC reviews the documentation submitted in accordance with subsection (a)(3)(B) of this section and makes a determination in accordance with:

(1) for an enrollment IPC and IPP, §260.69 of this chapter (relating to HHSC's Review of Request for Enrollment); or

(2) for a revision or renewal IPC and IPP, §260.77(f) of this chapter.

(c) Before construction of a minor home modification begins, a program provider must:

(1) obtain written approval for construction of the modification from the owner of the property in question, unless such approval is granted in an applicable lease agreement; and

(2) ensure that the selected vendor obtains any required building permits.

(d) A program provider must direct a vendor to begin construction of a minor home modification within seven calendar days after one of the following, whichever is later:

(1) the date HHSC approves the proposed IPC; or

(2) the effective date of the IPC as determined by the service planning team.

§260.319. Requesting Authorization to Purchase a Minor Home Modification that Costs $1,000 or More.

(a) To purchase a minor home modification for an individual that costs $1,000 or more, a program provider must:

(1) ensure that the individual's service planning team includes the cost, not to exceed $200, of the specifications for the requested minor home modification in the individual's IPP and IPC developed in accordance with:

(A) for an enrollment IPP and enrollment IPC, §260.65 of this chapter (relating to Development of an Enrollment IPP) and §260.67 of this chapter (relating to Development of a Proposed Enrollment IPC); or

(B) for a revision or renewal IPP and IPC, §260.77(a) - (d) of this chapter (relating to Renewal and Revision of an IPP and IPC); and

(2) ensure the case manager:

(A) obtains an HHSC Rationale for Adaptive Aids, Medical Supplies, and Minor Home Modifications form completed in accordance with the *Deaf Blind with Multiple Disabilities Program Manual;* and

(B) submits to HHSC:

(i) the IPC and IPP:

(I) in accordance with §260.61(l)(1) of this chapter (relating to Process for Enrollment of an Individual) for an individual requesting enrollment in the DBMD Program; or

(II) in accordance with §260.77(a) - (d) of this chapter for an individual receiving DBMD Program services; and

(ii) the completed HHSC Rationale for Adaptive Aids, Medical Supplies, and Minor Home Modifications form.

(b) HHSC reviews the documentation submitted in accordance with subsection (a)(2)(B) of this section, and makes a determination in accordance with:

(1) for an enrollment IPP and enrollment IPC, §260.69 of this chapter (relating to HHSC's Review of Request for Enrollment); or

(2) for a revision or renewal IPP and IPC, §260.77(f) of this chapter.

(c) If HHSC approves the IPC for payment of the specifications, a program provider must:

(1) within 30 calendar days after the date HHSC approves the IPC, obtain the specifications in accordance with §260.321 of this division (relating to Specifications for a Minor Home Modification); and

(2) within 60 calendar days after the specifications are obtained:

(A) obtain bids from vendors in accordance with §260.323(a) - (c) of this division (relating to Bid Requirements for a Minor Home Modification); and

(B) select a vendor in accordance with §260.323(d) of this division to complete construction of the minor home modification.

(d) A program provider must:

(1) include the cost of the minor home modification from the bid submitted by the vendor selected as described in subsection (c)(2)(B) of this section and the cost of the inspection of the minor home modification, not to exceed $150, in an IPC and IPP developed in accordance with:

(A) for an enrollment IPP and enrollment IPC, §260.65 of this chapter and §260.67 of this chapter; or

(B) for a revision or renewal IPP and IPC, §260.77(a) - (d) of this chapter; and

(2) ensure the case manager submits the IPC and IPP to HHSC:

(A) in accordance with §260.61(l)(1) of this chapter for an individual requesting enrollment in the DBMD Program; or

(B) in accordance with §260.77(a) - (d) of this chapter for an individual receiving DBMD Program services.

(e) HHSC reviews the documentation submitted in accordance with subsection (d)(2) of this section, and makes a determination in accordance with:

(1) §260.69 of this chapter, for an enrollment IPP and enrollment IPC; or

(2) §260.77(f) of this chapter, for a revision or renewal IPP and IPC.

(f) Before construction of a minor home modification begins, a program provider must:

(1) obtain written approval for construction of the modification from the owner of the property in question, unless such approval is granted in an applicable lease agreement; and

(2) ensure that the selected vendor obtains any required building permits.

(g) A program provider must direct a vendor to begin construction of a minor home modification within seven calendar days after one of the following, whichever is later:

(1) the date HHSC approves the proposed IPC; or

(2) the effective date of the IPC as determined by the service planning team.

§260.321. Specifications for a Minor Home Modification.

(a) If HHSC authorizes payment for specifications of a minor home modification in accordance with §260.319 of this division (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs $1,000 or More), a program provider must:

(1) obtain the specifications from a person who has experience in constructing home modifications;

(2) ensure that the specifications:

(A) include a complete description of the minor home modification and any associated installations identified in the specifications;

(B) include a drawing or picture of both the existing room, structure, or other area and the proposed modification made to scale; and

(C) comply with the Texas Accessibility Standards promulgated by the Texas Department of Licensing and Regulation unless:

(i) a program provider determines that it is not structurally feasible to do so and documents, in writing, the basis for its determination; or

(ii) an individual or LAR requests, in writing, that the specifications not be in compliance with the Texas Accessibility Standards; and

(D) ensure the HHSC Specifications for Minor Home Modifications form is completed as described in the *Deaf Blind with Multiple Disabilities Program Manual*.

(b) A program provider must obtain an invoice from the person who develops the specifications. The cost of the specifications must not exceed $200.

§260.323. Bid Requirements for a Minor Home Modification.

(a) For a minor home modification that costs $1,000 or more, a program provider must obtain comparable bids for the minor home modification from three vendors. Comparable bids describe the minor home modification and any associated installations identified in the specifications required by §260.319 of this division (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs $1,000 or More).

(b) A program provider must obtain bids that:

(1) are based on the specifications obtained in accordance with §260.321 of this division (relating to Specifications for a Minor Home Modification); and

(2) include:

(A) an itemized list of materials and labor necessary to construct the modification;

(B) the cost of each material and labor listed;

(C) the date of the bid;

(D) the name, address, and telephone number of the vendor;

(E) a detailed explanation of the vendor's warranty for the modification, if any; and

(F) a statement that the vendor will make the minor home modification in accordance with the specifications obtained in accordance with §260.321 of this division and all applicable state and local building codes.

(c) A program provider may obtain only one bid or two comparable bids for a minor home modification if the program provider provides written documentation that the minor home modification is available only from those vendors.

(d) A program provider must choose the lowest bid unless the program provider has written documentation that justifies selection of the higher bid. An example of a justification that supports payment of a higher bid is that the higher bid is based on the inclusion of a longer warranty for the minor home modification.

(e) The person who developed the specifications required by §260.321 of this division may be one of the bidders required by this section.

§260.325. Time Frames for Completion of Minor Home Modification.

(a) A program provider must ensure that a minor home modification is completed within 60 calendar days after the date the vendor begins construction as directed by the program provider, in accordance with:

(1) §260.317(d) of this division (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs Less than $1,000); or

(2) §260.319(g) of this division (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs $1,000 or More).

(b) If a program provider determines that a minor home modification will not be completed within the time frame required by subsection (a) of this section, the program provider must notify the individual, in writing, of a new proposed date of completion. The new proposed date of completion must not be more than 30 calendar days after the time frame required by subsection (a) of this section.

(c) A program provider must maintain of copy of the notice described in subsection (b) of this section in an individual's record.

(d) If, before a minor home modification is completed, an individual or LAR notifies the program provider of the individual's intention to transfer, the program provider must ensure that the minor home modification is completed before the effective date of the transfer.

§260.327. Inspection of a Minor Home Modification.

(a) A program provider must, within seven calendar days after receiving information that a minor home modification is complete, ensure that an experienced inspector determines that:

(1) the minor home modification is complete;

(2) the minor home modification is made in accordance with the specifications required by §260.321 of this division (relating to Specifications for a Minor Home Modification); and

(3) the quality of workmanship of the minor home modification is adequate.

(b) A program provider must ensure that an inspector is not the vendor who completed the minor home modification and is not related to the individual.

(c) The person who developed the specifications may perform the inspection required by subsection (a) of this section unless that person is affiliated with the vendor who completed the minor home modification.

(d) A program provider must obtain an invoice not to exceed $150 from the person who conducted the inspection substantiating the cost of the inspection.

(e) If, based on the inspection, a program provider determines that the minor home modification meets the conditions listed in subsection (a) of this section, the program provider must:

(1) complete an HHSC Documentation of Completion of Purchase form as described in the *Deaf Blind with Multiple Disabilities Program Manual;*

(2) maintain the original in the individual's file; and

(3) provide a copy to the individual or LAR within seven business days after completion of the inspection.

(f) If, based on the inspection, a program provider determines that a minor home modification does not meet the conditions listed in subsection (a) of this section, the program provider must ensure the vendor meets the conditions within 30 calendar days after the program provider's determination.

(g) A program provider may not submit a claim for payment of a minor home modification until the program provider determines that the minor home modification meets the conditions listed in subsection (a) of this section.

§260.329. Repair or Replacement of a Minor Home Modification.

(a) HHSC does not authorize repair or maintenance of a minor home modification for one year after the date the minor home modification is completed.

(b) If a minor home modification requires repair or replacement within one year after the date of completion, a program provider must repair or replace the minor home modification at its own expense unless the repair or replacement is a result of intentional damage or neglect by the individual or a person in the individual's residence.

(c) If a minor home modification requires repair or replacement because the minor home modification was intentionally damaged, the repair or replacement must be done at the expense of the individual or LAR.

§260.331. Individual's Satisfaction with Minor Home Modification.

(a) A program provider must ensure that a service provider involved in purchasing the minor home modification for the individual:

(1) contacts the individual by phone or during an in-home visit within seven business days after completion of the inspection as described in §260.327 of this division (relating to Inspection of a Minor Home Modification) to determine whether the individual or LAR is satisfied with the minor home modification; and

(2) documents the result of the contact on an HHSC Documentation of Completion of Purchase form as described in the *Deaf Blind with Multiple Disabilities Program Manual*.

(b) If an individual or LAR is not satisfied with the minor home modification, the program provider must process the individual's or LAR's dissatisfaction as a complaint in accordance with 40 TAC §49.309 (relating to Complaint Process).

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 31, 2022.

TRD-202203387
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 3. REQUIREMENTS FOR OTHER DBMD PROGRAM SERVICES

26 TAC §§260.333, 260.335, 260.337, 260.339, 260.341, 260.343, 260.345, 260.347, 260.349, 260.351, 260.353, 260.355

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.333. Behavioral Support.

(a) A program provider must ensure that a behavioral support service provider:

(1) is licensed as a psychologist in accordance with the Texas Occupations Code Chapter 501;

(2) is a provisional license holder licensed in accordance with the Texas Occupations Code Chapter 501;

(3) is licensed as a psychological associate in accordance with the Texas Occupations Code Chapter 501;

(4) is licensed as a licensed behavior analyst in accordance with the Texas Occupations Code Chapter 506;

(5) is licensed as a clinical social worker in accordance with the Texas Occupations Code Chapter 505;

(6) is licensed as a professional counselor in accordance with the Texas Occupations Code Chapter 503; or

(7) is a behavior communication specialist who has:

(A) a master's or a doctoral degree in special education, psychology, or a related human services discipline from an accredited university or college, and three years of experience providing direct services to individuals who have deafblindness; or

(B) a bachelor's degree in psychology or special education from an accredited university or college and seven years of experience providing direct services to individuals who have deafblindness and multiple disabilities.

(b) A program provider must ensure that the behavioral support service provider:

(1) conducts an assessment of an individual's maladaptive behavior identified by the service planning team with an emphasis on communication barriers as a contributing factor;

(2) analyzes assessment findings;

(3) develops an individualized behavior support plan that describes strategies to address communication barriers consistent with goals and outcomes identified in the IPP;

(4) trains and consults with individual's family members and other service providers on implementation of the behavior support plan;

(5) monitors and evaluates effectiveness of the behavior support plan; and

(6) modifies the behavior support plan, as necessary.

(c) A program provider must ensure the behavioral support service provider conducts periodic evaluations of the individual's progress toward achieving the goals and outcomes described in the IPP with updates to the program provider.

(d) A program provider may bill HHSC for the following activities by a behavioral support service provider:

(1) assessing and evaluating the need for behavioral support services;

(2) developing and implementing a behavior support plan;

(3) periodic evaluations of the individual's progress toward achieving the goals and outcomes described in the behavior support plan, including updates to the program provider;

(4) providing direct therapeutic intervention;

(5) consulting with the individual's psychiatrist;

(6) interacting with the individual or LAR regarding the individual's condition and progress toward or achievement of goals;

(7) training and consulting with individual's family members and other service providers concerning implementation of the behavior support plan;

(8) participating in service planning team meetings, if requested;

(9) if the behavioral support service provider is licensed as described in subsection (a)(1) or (3) of this section, supervising and training an unlicensed service provider, for example, a service provider of day habilitation or CFC PAS/HAB, within the scope of 22 TAC Part 21, (relating to the Texas State Board of Examiners of Psychologists); and

(10) participating in a fair hearing at the request of a member of the service planning team to provide information within the scope of the service provider's licensure or certification, as appropriate.

§260.335. Chore Services.

(a) A program provider must ensure that chore services are provided only when an individual residing in a setting other than a residential setting described in §260.351 of this division (relating to Residential Services) or another person residing with the individual is not capable of performing or financially providing for those chores. Examples of chore services include such heavy household chores as:

(1) washing floors, windows, and walls;

(2) tacking down loose rugs and tiles; and

(3) moving heavy items of furniture.

(b) If an individual is residing in a rental property other than a residential setting described in §260.351 of this division, the program provider must review the lease agreement and determine whether the landlord is responsible for performing similar services before including chore services on the IPC. If the landlord is responsible for performing similar services, the program provider must not include chore services on the IPC.

(c) A program provider must:

(1) ensure that a person providing chore services:

(A) can read, write, and follow directions; and

(B) can perform household tasks; and

(2) maintain documentation in the personnel record that the service provider of chore services meets the requirements in paragraph (1) of this subsection.

(d) A program provider must not provide chore services to an individual receiving licensed assisted living or licensed home health assisted living.

§260.337. Case Management.

(a) A program provider must ensure that case management is provided in accordance with an individual's IPP, IPC, and Appendix C of the DBMD Program waiver application approved by CMS and available on the HHSC website, including:

(1) initiating and overseeing the process of assessment and reassessment of the individual's LOC;

(2) initiating and overseeing the process of the review of service plans at enrollment, annually, and as needed, including if requested by the individual or LAR;

(3) observing the individual in the individual's home and determining the intent and level of the individual's communication;

(4) if necessary, determining from the individual's non-verbal communication, the individual's likes and dislikes;

(5) leading the service planning team to use the person-centered planning process to develop a service plan that optimizes the opportunities for the individual to use the individual's abilities and to integrate in community settings;

(6) using the individual's knowledge of sign language and other communication systems to make the individual as aware as possible of the individual's service plan and options;

(7) communicating with service planning team members to ensure that the service plan is carried out appropriately;

(8) monitoring the success of the service plan by observing the individual at home and in the community;

(9) monitoring the provision of services included in the service plan on an ongoing basis; and

(10) monitoring services that assist the individual in gaining access to needed waiver and other state plan services, including medical, social, educational, and non-wavier services.

(b) The only activities that a program provider may bill as case management are:

(1) an in-person, email, phone call, or text message contact with an individual;

(2) an in-person, email, phone call, or text message contact with the LAR, primary caregiver, or an actively involved person regarding the individual's services;

(3) a phone call, text message, email, letter, or meeting with HHSC or community resources regarding the individual's services; and

(4) working with service providers regarding the individual, including:

(A) reviewing services, goals, and outcomes, as described in the individual's IPC and IPP;

(B) providing the training described in §260.205(g) of this chapter (relating to Training);

(C) monitoring training strategies used by service providers to carry out the goals and outcomes described in the IPP; and

(D) activities performed as a member of the service planning team.

§260.339. Dental Treatment.

(a) Dental treatment consists of the following:

(1) emergency dental treatments, which are 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;

(2) routine preventative dental treatments, which are examinations, x-rays, cleanings, sealants, oral prophylaxes, and topical fluoride applications;

(3) therapeutic dental treatments, which include fillings, scaling, extractions, crowns, and 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;

(4) orthodontic dental treatments, which are 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

(5) 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 does not include the administration of routine local anesthesia only.

(b) Dental treatment does not include cosmetic orthodontia.

(c) HHSC approves the following amounts as the maximum for an individual's dental treatment:

(1) $2,500 per IPC period for services described in subsection (a)(1) - (4) of this section; and

(2) $2,000 per IPC period for sedation, other than the administration of routine local anesthesia, as described in subsection (a)(5) of this section.

(d) For an initial dental exam, a program provider may include up to $200 on the IPC without submitting a completed HHSC Prior Authorization for Dental Services form signed by the individual's dentist to HHSC for approval. For all other dental treatments, a program provider must submit a completed HHSC Prior Authorization for Dental Services form that has been signed by the individual's dentist to HHSC with the IPC for authorization.

(e) If a program provider determines emergency dental treatment is necessary to ensure an individual's health and welfare and the necessary service is not included on the individual's IPC and IPP or exceeds the amount included in the IPC for dental treatment, a program provider must submit a revised IPC and revised IPP to HHSC in accordance with §260.77(c) of this chapter (relating to Renewal and Revision of an IPP and IPC).

(f) For an individual under 21 years of age, a program provider must first access dental treatment benefits through the Texas Health Steps--Comprehensive Care Program before dental treatment may be provided under the DBMD Program.

(g) A program provider must maintain, in the individual's record, a copy of the dentist's invoice for dental treatment.

(h) HHSC does not reimburse a program provider for cosmetic orthodontia.

§260.341. Employment Services.

(a) A program provider must ensure that a service provider of employment assistance or a service provider of supported employment meets the qualifications described in §260.203(g) of this chapter (relating to Qualifications of Program Provider Staff).

(b) Before including employment assistance on an individual's IPC, a program provider must ensure and maintain documentation in the individual's record that employment assistance is not available to the individual under a program funded under §110 of the Rehabilitation Act of 1973 or under a program funded under the Individuals with Disabilities Education Act (20 U.S.C. §1401 et seq.).

(c) A program provider must ensure that employment assistance:

(1) consists of a service provider performing the following activities:

(A) identifying an individual's employment preferences, job skills, and requirements for a work setting and work conditions;

(B) locating prospective employers offering employment compatible with an individual's identified preferences, skills, and requirements;

(C) contacting a prospective employer on behalf of an individual and negotiating the individual's employment;

(D) transporting the individual to help the individual locate competitive employment in the community; and

(E) participating in service planning team meetings;

(2) is provided in accordance with the individual's IPC and with Appendix C of the DBMD waiver application approved by CMS and available on the HHSC website;

(3) is not provided to an individual with the individual present at the same time that one of the following services is provided:

(A) day habilitation;

(B) transportation provided as a residential habilitation activity;

(C) supported employment;

(D) respite; or

(E) CFC PAS/HAB; and

(4) does not include using Medicaid funds paid by HHSC to a program provider for incentive payments, subsidies, or unrelated vocational training expenses, such as:

(A) paying an employer:

(i) to encourage the employer to hire an individual; or

(ii) for supervision, training, support, or adaptations for an individual that the employer typically makes available to other workers without disabilities filling similar positions in the business; or

(B) paying the individual:

(i) as an incentive to participate in employment assistance activities; or

(ii) for expenses associated with the start-up costs or operating expenses of an individual's business.

(d) Before including supported employment on an individual's IPC, a program provider must ensure and maintain documentation in the individual's record that supported employment is not available to the individual under a program funded under the Individuals with Disabilities Education Act (20 U.S.C. §1401 et seq.).

(e) A program provider must ensure that supported employment:

(1) consists of a service provider performing the following activities:

(A) making employment adaptations, supervising, and providing training related to an individual's assessed needs;

(B) transporting the individual to support the individual to be self-employed, work from home, or perform in a work setting; and

(C) participating in service planning team meetings;

(2) is provided in accordance with the individual's IPC and with Appendix C of the DBMD waiver application approved by CMS and available on the HHSC website;

(3) is not provided to an individual with the individual present at the same time that one of the following services are provided:

(A) day habilitation;

(B) transportation provided as a residential habilitation activity;

(C) employment assistance;

(D) respite; or

(E) CFC PAS/HAB; and

(4) does not include:

(A) sheltered work or other similar types of vocational services furnished in specialized facilities; or

(B) using Medicaid funds paid by HHSC to a program provider for incentive payments, subsidies, or unrelated vocational training expenses, such as:

(i) paying an employer:

(I) to encourage the employer to hire an individual; or

(II) to supervise, train, support, or make adaptations for an individual that the employer typically makes available to other workers without disabilities filling similar positions in the business; or

(ii) paying the individual:

(I) as an incentive to participate in supported employment activities; or

(II) for expenses associated with the start-up costs or operating expenses of an individual's business.

§260.343. Day Habilitation, Residential Habilitation, and CFC PAS/HAB.

(a) Day habilitation.

(1) Before including day habilitation on an individual's IPC, a program provider must ensure and maintain documentation in the individual's record that day habilitation is not available to the individual under a program funded under §110 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §701 et seq.) or under a program funded under the Individuals with Disabilities Education Act (20 U.S.C. §1401 et seq.).

(2) A program provider must ensure that day habilitation includes:

(A) assistance in acquiring, retaining, or improving the self-help, socialization, and adaptive skills necessary to live successfully in the community and participate in home and community life;

(B) providing the individual with individualized activities:

(i) in environments designed to foster the development of skills and behavior supportive of greater independence and personal choice consistent with achieving the outcomes identified in the individual's IPP; and

(ii) designed to reinforce therapeutic outcomes targeted by other DBMD Program services, CFC services, school, or other support providers; and

(C) providing transportation necessary for the individual's participation in day habilitation activities, such as shopping, swimming, going to the park, or other community activities.

(3) A program provider must ensure day habilitation:

(A) is provided to an individual in a non-residential setting separate from the individual's own or family home or the residence in which the individual receives licensed assisted living or licensed home health assisted living that:

(i) is accessible to and usable by the individual;

(ii) is maintained in good repair;

(iii) has at least two means of egress; and

(iv) is in continuous compliance with applicable local building codes and ordinances and applicable state and federal laws, rules, and regulations;

(B) reinforces:

(i) therapeutic outcomes identified by other DBMD Program services and CFC services; and

(ii) for an individual eligible for public education services, education goals in the Individualized Education Program (IEP) and services provided by the school district;

(C) includes transportation necessary for the individual's participation in day habilitation activities; and

(D) is not provided to an individual at the same time that any of the following services are provided:

(i) employment assistance with the individual present;

(ii) supported employment with the individual present;

(iii) transportation provided as a residential habilitation activity;

(iv) 24-hour licensed assisted living;

(v) 24-hour licensed home health assisted living;

(vi) respite; or

(vii) CFC PAS/HAB.

(4) A program provider must ensure a day habilitation service provider works with one individual at a time unless the individual's service planning team documents on the IPP that the individual's needs can be met with a day habilitation service provider to individual ratio of one-to-two or one-to-three.

(5) A program provider must ensure that for a service-provider-to-individual ratio higher than one-to-three, that the IPP includes a recommendation from the service planning team and supporting documentation of the individual's ability to integrate and meaningfully participate in an environment with a ratio higher than one-to-three.

(6) A program provider may bill for time spent by a day habilitation service provider:

(A) in direct contact with an individual;

(B) participating as a member of an individual's service planning team; or

(C) performing tasks delegated by a physician or RN.

(b) Residential habilitation.

(1) A program provider must ensure:

(A) residential habilitation:

(i) is not provided to an individual receiving licensed assisted living or licensed home health assisted living;

(I) in the individual's own or family home; or

(II) in a setting outside the individual's own or family home appropriate for the type of residential habilitation activities described in the individual's IPP;

(ii) includes:

(I) transportation; or

(II) assistance in securing transportation;

(III) assistance with ambulation and mobility;

(IV) reinforcement of behavioral support or therapy activities;

(V) assistance with medications and the performance of tasks delegated by an RN in accordance with state law;

(VI) supervision of the individual's safety and security;

(VII) assistance with acquisition, retention, or improvement in skills related to activities of daily living, including:

(-a-) personal grooming and cleanliness;

(-b-) bed making and household chores; and

(-c-) preparation and consumption of food;

(VIII) use of natural supports and typical community services; and

(IX) social interaction and participation in leisure activities; and

(iii) is not provided to the individual at the same time that one of the following services are provided:

(I) employment assistance with the individual present;

(II) supported employment with the individual present;

(III) day habilitation;

(IV) respite; or

(V) CFC PAS/HAB; and

(B) a residential habilitation service provider works with no more than one individual at a time.

(2) A program provider may bill for time spent by a residential habilitation service provider transporting an individual.

(c) CFC PAS/HAB.

(1) A program provider must ensure CFC PAS/HAB is not provided to an individual receiving licensed assisted living or licensed home health assisted living.

(2) A program provider must ensure CFC PAS/HAB is not provided to an individual at the same time that one of the following services are provided:

(A) employment assistance with the individual present;

(B) supported employment with the individual present;

(C) day habilitation;

(D) respite; or

(E) transportation provided as a residential habilitation activity.

(3) A program provider must ensure a CFC PAS/HAB service provider works with no more than one individual at a time.

(4) If an individual's IPC includes CFC PAS/HAB, a program provider must ensure compliance with §260.213 of this chapter (relating to Service Backup Plans).

§260.345. Intervener.

(a) A program provider must ensure an intervener:

(1) works with no more than one individual at a time;

(2) makes sights, sounds, and activities accessible to the individual by learning the specific communication system of the individual;

(3) provides communication and information to an individual concerning the individual's environment that otherwise would be available through vision and hearing;

(4) develops and prepares activities for the individual;

(5) forms a working alliance with the individual's family members, neighbors, employers, and professionals with whom the individual has contact;

(6) participates on the individual's service planning team;

(7) transports the individual to gain access to community services and resources required by the IPP;

(8) instructs and supports the individual in skills related to community involvement; and

(9) uses interpersonal communication, including sign language, speech, tangible communication symbols, gestures, calendars, and augmentative communication devices.

(b) A program provider must document the following outcomes for intervener services in an individual's record:

(1) the individual effectively communicates wants and needs to the intervener;

(2) the individual actively participates in ADLs to the extent of the individual's ability;

(3) the individual's choices are implemented;

(4) the individual is able to access and participate in community activities; and

(5) the individual is able to move safely and efficiently within home and community settings.

(c) If requested by HHSC, a program provider must be able to demonstrate the outcomes described in subsection (b) of this section.

(d) A program provider must ensure that an intervener is reimbursed in accordance with the career ladder described in §260.203(d) of this chapter (relating to Qualifications of Program Provider Staff).

§260.347. Nursing.

(a) A program provider must ensure that nursing:

(1) is ordered or prescribed by a physician or other medical practitioner acting within the scope of the practitioner's license; and

(2) is provided in accordance with:

(A) Texas Occupations Code Chapter 301;

(B) 22 TAC Chapter 217;

(C) 22 TAC Chapter 224; and

(D) 22 TAC Chapter 225.

(b) If an individual requires specialized licensed vocational nursing or specialized registered nursing, a program provider's RN must complete the HHSC Specialized Nursing Certification form as described in the Deaf Blind with Multiple Disabilities Program Manual and obtain HHSC authorization before providing specialized licensed vocational nursing or specialized registered nursing.

(1) The RN must indicate on the form that a physician has determined the individual requires:

(A) use of a ventilator at least six hours per day; or

(B) tracheostomy care at least once per day to include cleansing, dressing, and suctioning of the tracheostomy.

(2) The program provider must:

(A) ensure the case manager submits the completed form to HHSC with the IPC; and

(B) keep the original completed form in the individual's record.

(c) If HHSC approves specialized licensed vocational nursing or specialized registered nursing for an individual, the program provider must bill for specialized licensed vocational nursing or specialized registered nursing provided to the individual after the date of HHSC's authorization of these services.

(d) If an individual's IPC includes nursing, a program provider must ensure compliance with §260.213 of this chapter (relating to Service Backup Plans).

(e) A program provider may bill HHSC at the RN, LVN, specialized RN, or specialized LVN rates only for the following nursing activities:

(1) interacting in person or by telephone with an individual to provide professional or vocational nursing for which there is a documented or immediate medical necessity, including:

(A) preparing and administering medication or treatment ordered by a physician, podiatrist, or dentist;

(B) assisting or observing self-administration of medication; and

(C) assessing an individual's health status;

(2) interacting in person or by telephone with a person, except a service provider of nursing, case management, or a therapy, regarding the health status of an individual;

(3) performing health care procedures ordered or prescribed by a physician or medical practitioner and required by standards of professional practice or law to be performed by licensed nursing personnel;

(4) delegating, verifying the competency of, and supervising an unlicensed person in the performance of a task delegated in accordance with 22 TAC Part 11 (relating to Texas Board of Nursing);

(5) providing training to a service provider that is specific to an individual;

(6) providing training or orientation to an individual, LAR, family member, or service provider concerning an adaptive aid or minor home modification; and

(7) participating in service planning team meetings.

(f) A program provider may bill HHSC at a nursing rate for a nurse's performance of delegated tasks if:

(1) a service provider to whom a nurse has delegated the performance of delegated tasks is unavailable to perform those tasks;

(2) a backup service provider is unavailable; and

(3) the individual's health and welfare would be endangered if those tasks are not delivered.

(g) If a program provider bills HHSC as described in subsection (f) of this section, the program provider:

(1) must not bill for more than 10 hours of such services per IPC period;

(2) must document in the individual's record:

(A) efforts made to find a service provider who is not an RN or LVN to perform the delegated tasks; and

(B) reasons the failure to provide the delegated tasks would endanger the individual's health and welfare.

§260.349. Orientation and Mobility.

(a) A program provider must ensure an orientation and mobility service provider:

(1) evaluates an individual's ability to use existing senses to determine the individual's position within the environment, including home, school, work, and other community settings;

(2) develops a plan that:

(A) identifies the individual's goals and outcomes; and

(B) enables the individual to acquire skills to safely move from one place to another within the environment, including home, school, work, and other community settings; and

(3) trains other service providers to:

(A) create an environment in home, school, work, and community settings that enhances the individual's ability to move safely and efficiently; and

(B) carry through on goals and outcomes identified in the plan.

(b) A program provider must ensure an orientation and mobility service provider:

(1) has:

(A) certification from the Academy for the Certification of Vision Rehabilitation and Education Professionals; or

(B) the National Orientation and Mobility Certification through the National Blindness Professional Certification Board; or

(2) has a bachelor's or master's degree in orientation and mobility from a college or university accredited by a state agency or a non-governmental entity recognized by the United States Department of Education.

(c) A program provider may bill HHSC for orientation and mobility only for the following activities:

(1) assessing and evaluating the need for services;

(2) developing and implementing the plan described in subsection (a)(2) of this section;

(3) evaluating the individual's progress toward achieving the goals and outcomes described in the IPP with updates to the program provider;

(4) providing direct intervention;

(5) interacting with the individual or LAR regarding the individual's needs and progress toward achieving orientation and mobility goals;

(6) consulting with family members and other service providers regarding the individual's needs and progress toward achieving orientation and mobility goals;

(7) participating in service planning team meetings, when requested;

(8) training other service providers to carry through on orientation and mobility goals and outcomes; and

(9) participating in a fair hearing at the request of a member of the service planning team to provide information concerning orientation and mobility goals and outcomes.

§260.351. Residential Services.

(a) General.

(1) A program provider may provide residential services as:

(A) licensed assisted living, either 18-hour or 24-hour; or

(B) licensed home health assisted living, either 18-hour or 24-hour.

(2) A program provider must:

(A) provide personal assistance with ADLs and IADLs;

(B) provide assistance with housekeeping;

(C) provide therapeutic social and recreational activities;

(D) provide on-site response staff to meet scheduled or unpredictable needs;

(E) provide supervision of an individual's safety and security; and

(F) provide, make arrangements for, transportation other than medical transportation.

(3) An individual receiving either licensed assisted living or licensed home health assisted living must not receive:

(A) in-home respite;

(B) out-of-home respite;

(C) transportation provided as a residential habilitation activity;

(D) chore services;

(E) CFC PAS/HAB; or

(F) nursing services except those required for program eligibility.

(4) A program provider must ensure that an individual transitioning from institutional services to either licensed assisted living or licensed home health assisted living does not receive TAS.

(5) If an individual is absent from the individual's residence for six or more hours in a day, the program provider may bill for 18-hour licensed assisted living or 18-hour licensed home health assisted living and must not bill for 24-hour licensed assisted living or 24-hour licensed home health assisted living.

(6) If an individual's IPC includes day habilitation, the program provider may bill for 18-hour licensed assisted living or 18-hour licensed home health assisted living for a day on which the individual participates in day habilitation, but must not bill for 24-hour licensed assisted living or 24-hour licensed home health assisted living.

(7) A program provider must maintain documentation of the daily census using the HHSC Daily Census Documentation form or a form developed by the program provider that documents the information on the HHSC Daily Census Documentation form.

(8) A program provider must ensure that an individual's record includes the individual's progress or lack of progress in achieving the following outcomes for residential services:

(A) the ability to effectively communicate the individual's wants and needs to a residential services service provider;

(B) the ability to actively participate in activities of daily living to the extent of the individual's ability;

(C) the ability to implement the individual's choices;

(D) the ability to access and participate in community activities; and

(E) the ability to move safely and efficiently within home and community settings.

(b) Licensed assisted living.

(1) A program provider must provide licensed assisted living to no more than six persons in an ALF owned by the program provider.

(2) A program provider must not bill HHSC for the cost of a minor home modification for an individual who is receiving licensed assisted living.

(3) A program provider must not charge an individual or LAR a pet deposit for a service animal, including a guide dog, signal dog, or other animal individually trained to provide assistance to an individual who is receiving licensed assisted living.

(4) A program provider must maintain a ledger in accordance with generally accepted accounting principles with amounts paid for room and board by an individual who is receiving licensed assisted living.

(5) A program provider must provide a receipt for amounts paid for room and board by an individual who is receiving licensed assisted living.

(c) Licensed home health assisted living.

(1) A program provider must not allow more than three persons to reside in a residence in which the program provider provides licensed home health assisted living.

(2) A program provider must ensure that a residence in which licensed home health assisted living is provided:

(A) is accessible to and usable by the individuals receiving services in the residence;

(B) is maintained in good repair;

(C) has at least two means of egress from:

(i) the living areas; and

(ii) the individuals' bedrooms;

(D) has working smoke alarms installed to detect smoke in the kitchen, living areas, and the individuals' bedrooms;

(E) has a universal, fully-charged, and unexpired fire extinguisher easily accessible:

(i) from the kitchen;

(ii) from the laundry area;

(iii) from the vicinity of a hot water heater or furnace;

(iv) from each bedroom area; and

(v) on each floor of a multi-level residence;

(F) has a first aid kit that complies with American Red Cross recommendations with contents that are not out-of-date;

(G) has water temperature that does not exceed 110 degrees Fahrenheit from faucets used by an individual who cannot self-regulate the water temperature from a faucet the individual uses;

(H) has a locked container that can be used to store the medications for the individual as required by paragraph (3) of this subsection;

(I) has a place to store flammable or poisonous substances in a manner that makes them inaccessible to the individuals; and

(J) has a working carbon monoxide detector installed in each individual's bedroom.

(3) A program provider must ensure:

(A) an individual's prescribed medication is stored in a locked container and in the original container labeled with:

(i) individual's name;

(ii) date dispensed;

(iii) instructions;

(iv) name of medication with dosage; and

(v) physician's name;

(B) a medication requiring refrigeration is kept separate from food in a clearly labeled, designated locked container;

(C) a medication that is no longer needed by the individual or that is past its expiration date is disposed of according to federal and state laws and regulations;

(D) a medication prescribed for one individual is not given to another individual; and

(E) an individual takes prescribed medications according to the physician's instructions and over-the-counter medications according to the package directions.

(4) A program provider must conduct a home inspection and document the results of the inspection to determine compliance with the requirements in paragraph (2) of this subsection for a residence:

(A) before providing services and annually thereafter for a residence not used to provide licensed home health assisted living services before September 1, 2014; or

(B) before September 30, 2014 and annually thereafter for a residence used to provide licensed home health assisted living before September 1, 2014.

(5) A program provider must ensure correction of any noncompliance found during the home inspection and document the correction.

(6) A program provider must:

(A) develop and implement a written emergency response plan for the residence that describes the actions a program provider will take in the event of an emergency, such as a fire or other man-made or natural disaster, including evacuation or sheltering-in-place of the individual, as appropriate; and

(B) ensure that:

(i) the emergency response plan takes into account the abilities of the individual to follow the plan;

(ii) the individual receives instruction concerning the emergency response plan:

(I) within 48 hours after the individual moves into the residence and annually thereafter; and

(II) if the individual's ability to follow the emergency response plan changes;

(iii) the individual's service providers demonstrate competence in implementing the emergency response plan at the time job duties are assumed and annually thereafter;

(iv) the emergency response plan is reviewed and revised by the program provider when necessary and at least annually; and

(v) a copy of the current emergency response plan is:

(I) maintained in the residence; and

(II) accessible to service providers.

(7) A program provider must ensure:

(A) an individual successfully participates in a fire drill within 48 hours after the individual moves into the residence;

(B) all individuals in the residence successfully participate in a fire drill at least every 90 calendar days, with at least two drills per year conducted when at least one individual is sleeping; and

(C) an individual successfully participates in a fire drill within 48 hours after a change occurs in the individual's condition that may negatively affect the individual's ability to participate in a fire drill.

(8) A program provider must ensure:

(A) the residence has furnishings that are safe for the individual in all common areas;

(B) a bedroom in the residence:

(i) has at least:

(I) 80 square feet of floor space for a single occupancy room; and

(II) 60 square feet of floor space per individual in a double occupancy room;

(ii) was built as a bedroom when the residence was built, or was remodeled under a permit that meets local building codes;

(iii) is finished with walls or partitions of standard construction that go from floor to ceiling;

(iv) is adequately ventilated and lighted;

(v) has at least one window that will open freely and remain open from the inside without special tools;

(vi) has no more than two beds in any room;

(vii) has adequate drawer and closet space; and

(viii) provides comfortable sleeping arrangements for the individual;

(C) the residence has a common telephone or other communication system usable by the individual and for which:

(i) an individual has an opportunity to have input on residence procedures concerning:

(I) time limits on calls; and

(II) privacy during an individual's use of the phone; and

(ii) a program provider does not charge an individual for local calls; and

(D) bathrooms have adequate supplies of towels, washcloths, soap, and toilet tissue at all times.

§260.353. Respite.

(a) General.

(1) A program provider must ensure that respite consists of the following:

(A) assistance with ADLs;

(B) assistance with functional living tasks;

(C) assistance with planning and preparing meals;

(D) transportation or assistance in securing transportation;

(E) assistance with ambulation and mobility;

(F) reinforcement of behavioral support or therapy activities;

(G) assistance with medications and the performance of tasks delegated by an RN in accordance with state law;

(H) supervision of the individual's safety and security; and

(I) activities that facilitate the individual's:

(i) inclusion in community activities;

(ii) use of natural supports and typical community services;

(iii) social interaction:

(iv) participation in leisure activities; and

(v) daily and functional living skills.

(2) A program provider may deliver respite as:

(A) in-home respite; or

(B) out-of-home respite.

(3) A program provider must not:

(A) bill HHSC for more than 30 calendar days or 720 hours of respite per IPC period;

(B) provide respite to an individual receiving licensed assisted living or licensed home health assisted living;

(C) permit an individual's spouse or a service provider of transportation provided as a residential habilitation activity or CFC PAS/HAB with whom the individual lives to provide respite; or

(D) provide respite to an individual with the individual present at the same time that one of the following services are provided to the individual:

(i) employment assistance;

(ii) supported employment;

(iii) day habilitation;

(iv) transportation provided as a residential habilitation activity; or

(v) CFC PAS/HAB.

(4) A program provider must ensure that a respite service provider meets the qualifications described in §260.203 of this chapter (relating to Qualifications of Program Provider Staff) and the training requirements described in §260.205 of this chapter (relating to Training).

(b) In-home respite. A program provider must ensure that in-home respite is provided in the private residence of:

(1) the individual;

(2) the individual's family; or

(3) a respite service provider.

(c) Out-of-home respite.

(1) A program provider must ensure that out-of-home respite is provided in a location listed in paragraph (2) of this subsection acceptable to the individual or LAR that:

(A) is an accessible, safe, and comfortable environment for the individual; and

(B) promotes the individual's health and welfare.

(2) A program provider must provide out-of-home respite in:

(A) an ICF/IID with a certified capacity of six or less persons;

(B) an ALF with a licensed capacity of six or less persons; or

(C) an outdoor camp accredited by the American Camp Association.

(3) A program provider may provide out-of-home respite in a residence in which licensed assisted living or licensed home health assisted living is provided if:

(A) a vacancy exists in the residence;

(B) the individual or LAR approves; and

(C) the service planning team for each individual receiving services in that residence makes a determination that the respite visit will cause no threat to the health, safety, and welfare, or rights and needs of that individual.

§260.355. Therapies.

(a) A program provider must provide or ensure the provision of the following therapies:

(1) occupational therapy;

(2) physical therapy;

(3) speech-language pathology;

(4) audiology; and

(5) dietary services.

(b) A program provider must ensure a therapy:

(1) is delivered by an appropriately licensed service provider, as follows:

(A) for occupational therapy, an occupational therapist licensed in accordance with Texas Occupations Code Chapter 454;

(B) for physical therapy, a physical therapist licensed in accordance with Texas Occupations Code Chapter 453;

(C) for speech-language pathology, a speech-language pathologist licensed in accordance with Texas Occupations Code Chapter 401;

(D) for audiology, an audiologist licensed in accordance with Texas Occupations Code Chapter 401; or

(E) for dietary services, a dietitian licensed in accordance with Texas Occupations Code Chapter 701.

(2) includes, as appropriate, the following activities:

(A) screening and assessment;

(B) developing and implementing a treatment plan that, as appropriate, includes a plan to:

(i) transfer a therapy task to an unlicensed service provider; and

(ii) change the role of the therapist to a supervisory role;

(C) directing therapeutic intervention in accordance with the appropriate chapter of the Texas Occupations Code;

(D) consulting with or training of family members and other service providers;

(E) participating on an individual's service planning team, when appropriate;

(F) informing the physician and other appropriate professionals of changes in the individual's health status that may require a change in the IPC;

(G) preparing a report to the case manager as described in subsection (g) of this section;

(H) supervising and training an unlicensed service provider within the scope of applicable state statutes and rules; and

(I) conducting assessments and preparing specifications for the procurement of an adaptive aid or minor home modification; and

(3) is provided to an individual at a location agreeable to the individual or LAR.

(c) A program provider must:

(1) obtain a physician's order for therapy before the delivery of the therapy;

(2) ensure that the physician's order includes the following:

(A) individual's name;

(B) type of therapy;

(C) frequency and duration of therapy;

(D) other instructions, if applicable;

(E) physician's name and medical specialty; and

(F) effective date of the order; and

(3) retain the physician's order in the individual's record.

(d) A program provider may accept faxed physician's orders for therapy services.

(1) The program provider does not have to obtain a countersignature of the faxed orders by the prescribing physician.

(2) The program provider must ensure the faxed orders are legible.

(e) If requested by an individual's service planning team, a service provider of a therapy may screen an individual for therapy services without obtaining a physician's order.

(f) A program provider may bill HHSC only for the following therapy activities:

(1) screening, assessing, and evaluating the need for services;

(2) developing and implementing a treatment plan;

(3) periodically evaluating the individual's progress toward achieving the goals and outcomes described in the IPP for the therapy service and providing updates to the program provider;

(4) providing direct therapeutic intervention;

(5) interacting with the individual or LAR regarding the individual's condition and progress toward or achievement of goals;

(6) training the individual to use an adaptive aid;

(7) delegating therapy tasks to an unlicensed person in accordance with rules of the appropriate licensing board;

(8) consulting with family members and other service providers regarding the individual's DBMD Program and CFC services;

(9) informing the physician and the program provider of changes in the individual's health status requiring a service plan change;

(10) participating in service planning team meetings, if requested;

(11) supervising and training an unlicensed service provider within the scope of the therapy examining board rules;

(12) participating in a fair hearing at the request of a member of the service planning team to provide information within the scope of the service provider's license;

(13) assisting with writing specifications for adaptive aids; and

(14) providing consultation or justification for the procurement of an adaptive aid or minor home modification.

(g) A program provider must ensure an appropriately licensed therapist provides a report to the individual's case manager at least 10 calendar days before the review described in §260.77(a) of this chapter (relating to Renewal and Revision of an IPP and IPC) that:

(1) reviews the individual's progress toward achieving the goals and outcomes described in the IPP for that therapy;

(2) reviews whether the services are meeting the individual's needs;

(3) documents whether the individual's needs have changed; and

(4) documents attempts to teach maintenance services and techniques to other service providers.

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 31, 2022.

TRD-202203388
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 4. NON-BILLABLE TIME AND ACTIVITIES

26 TAC §260.357

STATUTORY AUTHORITY

The new section 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.357. Non-Billable Time and Activities.

A program provider must not bill for and HHSC does not reimburse for:

(1) services provided to an individual before HHSC's approval of the individual's request for enrollment in the DBMD Program;

(2) supervision of service providers unless providing delegated tasks;

(3) phone calls, text messages, emails, letters, or meetings with HHSC or community resources that do not directly address an individual's services;

(4) administrative meetings or staff meetings;

(5) in-service training, general training, continuing education, or conferences;

(6) employee conferences or evaluations;

(7) filing claims for services;

(8) traveling to and from an individual's residence, except when a day habilitation, transportation provided as a residential habilitation activity, or in-home respite service provider is transporting the individual;

(9) processing paperwork or completing records or reports;

(10) services not included on an approved IPC;

(11) services that are mutually exclusive;

(12) other services and activities not authorized, permitted, or allowed under this chapter;

(13) routine care and supervision that a family member is legally obligated to provide;

(14) activities or supervision for which a payment is made by a source other than Medicaid;

(15) room and board;

(16) any expense related to providing transportation provided as a residential habilitation activity, nursing, out-of-home respite in a camp, case management, adaptive aids, intervener services, or CFC PAS/HAB outside the program provider's contracted service delivery area, including costs for transportation or lodging;

(17) transportation provided as a residential habilitation activity, nursing, out-of-home respite in a camp, case management, adaptive aids, intervener services, or CFC PAS/HAB provided to an individual outside the program provider's contracted service delivery area if the individual has received services outside the program provider's contracted service delivery during a period of more than 60 consecutive days;

(18) two or more services provided at the same time by the same service provider; or

(19) an item or service provided to an individual at the request of the individual or LAR that is not a reimbursable item in the DBMD 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.

Filed with the Office of the Secretary of State on August 31, 2022.

TRD-202203389
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 5. CFC ERS

26 TAC §260.359

STATUTORY AUTHORITY

The new section 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.359. CFC ERS.

(a) A program provider must ensure that CFC ERS is provided only to an individual:

(1) who is not receiving licensed assisted living or home health licensed assisted living; and

(2) who:

(A) lives alone, who is alone for significant parts of the day, or has no regular caregiver for extended periods of time; and

(B) would otherwise require extensive routine supervision.

(b) Installing equipment.

(1) A program provider must ensure that CFC ERS equipment is installed within 14 business days after one of the following dates, whichever is later:

(A) the date HHSC approves the proposed IPC that includes CFC ERS; or

(B) the effective date of the individual's IPC as determined by the service planning team.

(2) At the time CFC ERS equipment is installed, a program provider must ensure that:

(A) the equipment is installed in accordance with the manufacturer's installation instructions;

(B) an initial test of the equipment is made;

(C) the equipment has an alternate power source in the event of a power failure;

(D) the individual is trained on the use of the equipment, including:

(i) demonstrating how the equipment works; and

(ii) having the individual activate an alarm call;

(E) an explanation is given to the individual that the individual must:

(i) participate in a system check each month; and

(ii) contact the CFC ERS provider if:

(I) the individual's telephone number or address changes; or

(II) one or more of the individual's responders change; and

(F) the individual is informed that a responder, in response to an alarm call, may forcibly enter the individual's home if necessary.

(3) A program provider must ensure that the date and time of the CFC ERS equipment installation and compliance with the requirements in paragraphs (1) and (2) of this subsection are documented in the individual's record.

(c) Securing responders. A program provider must ensure that, on or before the date CFC ERS equipment is installed:

(1) an attempt is made to obtain from an individual, the names and telephone numbers of at least two responders, such as a relative or neighbor;

(2) public emergency personnel:

(A) is designated as a second responder if the individual provides the name of only one responder; or

(B) is designated as the sole responder if the individual does not provide the names of any responders; and

(3) the name and telephone number of each responder is documented in the individual's record.

(d) Conducting a system check.

(1) At least once during each calendar month a program provider must ensure that a system check is conducted on a date and time agreed to by the individual.

(2) A program provider must ensure that the date, time, and result of the system check is documented in the individual's record.

(3) If, as a result of the system check:

(A) the equipment is working properly but the individual is unable to successfully activate an alarm call, the program provider must ensure that a request is made of the case manager to convene a service planning team meeting to determine if CFC ERS meets the individual's needs; or

(B) the equipment is not working properly, the program provider must ensure that, within three calendar days of the system check, the equipment is repaired or replaced.

(e) Failing to complete a system check. If a system check is not conducted in accordance with subsection (d)(1) of this section, a program provider must ensure that:

(1) the failure to comply is because of good cause; and

(2) the good cause is documented in the individual's record.

(f) Alarm call.

(1) A program provider must ensure that an alarm call is responded to 24 hours a day, seven days a week.

(2) A program provider must ensure that, if an alarm call is made, the CFC ERS provider:

(A) within 60 seconds of the alarm call, attempts to contact the individual to determine if an emergency exists;

(B) immediately contacts a responder, if as a result of attempting to contact the individual:

(i) the CFC ERS provider confirms there is an emergency; or

(ii) the CFC ERS provider is unable to communicate with the individual; and

(C) documents the following information in the individual's record when the information becomes available:

(i) the name of the individual;

(ii) the date and time of the alarm call, recorded in hours, minutes, and seconds;

(iii) the response time, recorded in seconds;

(iv) the time the individual is called in response to the alarm call, recorded in hours, minutes, and seconds;

(v) the name of the contacted responder, if applicable;

(vi) a brief description of the reason for the alarm call; and

(vii) if the reason for the alarm call is an emergency, a statement of how the emergency was resolved.

(3) If an alarm call results in a responder being dispatched to the individual's home for an emergency, the program provider must ensure that:

(A) the case manager receives written notice of the alarm call within one business day after the alarm call;

(B) if the CFC ERS provider is a contracted provider, the program provider receives written notice from the contracted provider within one business day after the alarm call; and

(C) the written notices required by subparagraphs (A) and (B) of this paragraph is maintained in the individual's record.

(g) Equipment failure.

(1) A program provider must ensure that, if an equipment failure occurs, other than during a system check required by subsection (d)(1) of this section:

(A) the individual is informed of the equipment failure; and

(B) the equipment is replaced within one business day after the failure becomes known by the CFC ERS provider.

(2) If an individual is not informed of the equipment failure or the equipment is not replaced in compliance with paragraph (1) of this subsection, the program provider must:

(A) determine whether the failure to inform the individual or replace the equipment was because of good cause; and

(B) as soon as possible, ensure that the individual is informed of the equipment failure and the equipment is replaced.

(h) Low battery.

(1) A program provider must ensure that, if the ERS equipment registers five or more "low battery" signals in a 72-hour period:

(A) a visit to an individual's home is made to conduct a system check within five business days after the low battery signals occur; and

(B) if the battery is defective, the battery is replaced during the visit.

(2) If a system check or battery replacement is not made in accordance with paragraph (1) of this subsection, a program provider must:

(A) determine whether the failure to conduct a system check or replace a defective battery was because of good cause; and

(B) as soon as possible, conduct a system check and replace a defective battery.

(i) Documenting equipment failure or low battery. A program provider must ensure that the following information is documented in an individual's record:

(1) the date the equipment failure or low battery signal became known by the CFC ERS provider;

(2) the equipment or subscriber number;

(3) a description of the problem;

(4) the date the equipment or battery was repaired or replaced; and

(5) the good cause for failure to comply with subsections (g)(1) and (h)(1) of this section.

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 31, 2022.

TRD-202203390
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER G. PROGRAM PROVIDER-OWNED RESIDENTIAL SETTINGS

26 TAC §260.401, 260.403

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.401. Residential Agreements.

(a) During a service planning team meeting to develop an enrollment, a revised, or a renewal IPP, a case manager must inform an individual or LAR of the following if the individual is interested in receiving licensed assisted living:

(1) that if the individual or LAR selects licensed assisted living, the individual or LAR will be responsible for paying the cost of room and board in accordance with a residential agreement described in subsections (b) and (c) of this section;

(2) that if the individual or LAR does not pay room and board as required by a residential agreement, the individual's program provider may evict the individual in accordance with the residential agreement and state law; and

(3) that if the program provider evicts the individual:

(A) the individual will not receive licensed assisted living until the delinquent room and board is paid; and

(B) the IPC will be revised to own home or family home if the delinquent room and board is not paid.

(b) An individual's program provider must ensure that an individual receiving licensed assisted living has a written residential agreement with the program provider.

(c) The residential agreement required by subsection (b) of this section must include:

(1) the physical address of the residence;

(2) the name of the individual;

(3) the name of the program provider;

(4) the beginning date of the residential agreement;

(5) the date the residential agreement expires;

(6) a provision that the individual may furnish and decorate the individual's bedroom;

(7) a provision that:

(A) the program provider and the individual or LAR agree that the residential agreement is a "lease" under Texas Property Code Chapter 92 and that they are subject to state law governing residential tenancies, including Texas Property Code Chapters 24, 91, and 92 and the Texas Rules of Civil Procedure Rule 510; and

(B) to the extent allowed by law, in the event of a conflict or inconsistency between any provision of the residential agreement and any provision of state statutory law, including Texas Property Code Chapters 91 and 92, the provision in the residential agreement governs;

(8) a provision that the individual or LAR is not waiving any right or remedy provided to tenants under state law and is not agreeing to any notice period that is shorter than the notice period to which tenants are entitled under state law;

(9) the amount the individual or LAR is paying for room and board;

(10) the day of the month that the amount for room and board is due, which must not be before the day of the month an individual receives a primary source of income such as supplemental security income and social security disability insurance;

(11) the amount of a late fee, which may be charged only once per month and must not exceed 10 percent of the amount for room and board, that the program provider may charge the individual or LAR if room and board is not paid by the day it is due;

(12) a provision that allows the individual to terminate the residential agreement before its expiration date without any obligation under the residential agreement except an obligation that accrued before the date of termination, if the individual permanently moves from the residence for any reason, including transferring to a different program provider;

(13) a provision that, if the individual permanently moves from the residence, the program provider agrees to refund any amount the individual has paid under the residential agreement for days the individual did not reside in the residence;

(14) a provision that an amount refunded under the circumstances described in paragraph (13) of this subsection will be calculated by:

(A) dividing the monthly amount the individual pays under the residential agreement by the number of days in the month; and

(B) multiplying the quotient from subparagraph (A) of this paragraph by the number of days for which the individual paid but did not reside in the residence;

(15) a provision that the individual may furnish and decorate the individual's bedroom;

(16) a provision that the program provider agrees to be responsible for all repairs to the residence resulting from normal wear and tear, as defined in Texas Property Code §92.001;

(17) a provision that the individual will pay for damages to property in the residence if the individual caused the damage and the damage is not ordinary wear and tear;

(18) a provision that allows eviction of the individual only if:

(A) the individual or LAR fails to pay room or board, which does not include any late fee; or

(B) the individual's DBMD Program services and CFC services are terminated;

(19) a provision that the program provider will, before giving the individual or LAR a notice to vacate, give the individual or LAR a notice of proposed eviction that allows the individual or LAR at least 60 calendar days to pay the delinquent room or board;

(20) a provision that if the individual or LAR pays the delinquent room and board within the period required by paragraph (19) of this subsection, the program provider will not give the individual or LAR a notice to vacate or otherwise proceed to evict the individual;

(21) a provision that the program provider will not demand the entire balance of the unpaid room and board owed under the residential agreement if the individual or LAR violates the residential agreement;

(22) a provision that the program provider and the individual or LAR are not entitled to reimbursement for attorney's fees arising out of any dispute relating to the residential agreement; and

(23) the signature of the program provider and individual or the LAR.

(d) A program provider must:

(1) give the individual or LAR at least three calendar days to review, request changes, and sign the residential agreement;

(2) ensure the residential agreement is fully executed before the individual begins living in a residence in which licensed home health assisted living is provided, except that the individual may begin living in such a residence before the residential agreement is fully executed in the event of an emergency;

(3) if an individual begins living in a residence in which licensed home health assisted living is provided before a residential agreement is fully executed because of an emergency, as allowed by paragraph (2) of this subsection:

(A) document the details of the emergency; and

(B) ensure the residential agreement is fully executed within seven calendar days after the individual begins living in the residence; and

(4) provide one copy of the residential agreement to the individual or LAR within three calendar days after the date the residential agreement is fully executed.

(e) If a program provider becomes aware that a modification to subsection (c)(15) of this section is needed based on a specific assessed need of an individual, the program provider must:

(1) notify the case manager of the needed modification; and

(2) provide the case manager the documentation described in §260.403(b)(2) of this chapter (relating to Requirements for Program Provider-Owned Residential Settings).

(f) If a case manager receives a notification and documentation as described in subsection (e) of this section, the case manager

must convene a meeting of the service planning team to revise the individual's IPP in accordance with §260.403(b) of this chapter.

(g) After the service planning team revises the individual's IPP, as required by subsection (f) of this section, the program provider may implement the modification.

(h) If an individual or LAR is delinquent in payment of room or board and the program provider wants to evict the individual, the program provider must:

(1) notify the case manager that the individual or LAR is delinquent in the payment of room or board under the residential agreement and that the program provider wants to evict the individual;

(2) after providing the notification required by paragraph (1) of this subsection, meet with the individual or LAR, including the representative payee if one has been appointed by the Social Security Administration, and the case manager to discuss the alleged non-payment of room or board and possible eviction; and

(3) if the program provider intends to proceed to evict the individual, at the meeting required by paragraph (2) of this subsection:

(A) give the individual or LAR a written notice of proposed eviction that allows the individual or LAR at least 60 calendar days to pay the delinquent room and board; and

(B) provide the case manager with a copy of the written notice of proposed eviction.

(i) If the individual or LAR pays the delinquent room or board within the period required by subsection (h)(3) of this section, the program provider must not give the individual or LAR a notice to vacate or otherwise proceed to evict the individual.

(j) If the individual or LAR does not pay the delinquent room and board within the period required by subsection (h)(3) of this section, the program provider:

(1) must report the failure to pay to one of the following as appropriate:

(A) the SSA;

(B) the probate court that appointed the individual's guardian; or

(C) DFPS as an allegation of the LAR's exploitation of the individual;

(2) must meet with the individual or LAR to discuss alternative living settings for the individual; and

(3) if the program provider wants to proceed to evict the individual, the program provider must:

(A) give the individual or LAR a written notice to vacate the residence in accordance with the residential agreement and state law; and

(B) send a copy of the written notice described in subparagraph (A) of this paragraph to the individual's case manager within one business day after the individual or LAR is given the notice.

(k) If an individual is evicted by a program provider and the individual or LAR has not paid the delinquent room and board, the case manager must convene a meeting or meetings to revise the IPP and revise the IPC as described in §260.77 of this chapter (relating to Renewal and Revision of an IPP and IPC). If the individual or LAR wants to keep licensed assisted living on the individual's IPC, the case manager must inform the individual or LAR at the meeting or meetings that HHSC will deny licensed assisted living if included on the individual's IPC, until the individual pays the delinquent room and board.

(l) If a program provider evicts an individual who has an LAR and the LAR fails to arrange an alternative living setting for the individual, the program provider must report the LAR's failure to DFPS as neglect of the individual and notify the case manager that such report was made.

(m) If an individual pays the delinquent room and board, a program provider must, within one business day after the payment, notify the individual's case manager that the individual is no longer delinquent.

§260.403. Requirements for Program Provider-Owned Residential Settings.

(a) A program provider must ensure that, except as provided in subsection (b) of this section, in a residence in which licensed assisted living is provided:

(1) an individual has privacy in the individual's bedroom;

(2) an individual sharing a bedroom has a choice of roommates;

(3) a lock is installed on the individual's bedroom door at no cost to the individual, and that:

(A) the lock is operable by the individual; and

(B) only the individual, a roommate of the individual, and staff designated by the program provider have keys to the individual's bedroom door;

(4) an individual can furnish and decorate the individual's bedroom;

(5) while in the residence, an individual has the freedom and support:

(A) to control the individual's schedules and activities that are not part of the IPP for licensed assisted living; and

(B) to have access to food at any time;

(6) an individual may have visitors of the individual's choosing at any time; and

(7) the residence is physically accessible to the individual.

(b) If an individual's service planning team determines that any of the requirements in subsection (a)(1) - (6) of this section must be modified, the service planning team must:

(1) revise the individual's IPP in accordance with §260.77 of this chapter (relating to Renewal and Revision of an IPP and IPC); and

(2) document on the individual's IPP:

(A) a description of the specific and individualized assessed need that justifies the modification;

(B) a description of any positive interventions and supports that have been tried but did not work;

(C) a description of any less intrusive methods of meeting the need that have been tried but did not work;

(D) a description of the condition that is directly proportionate to the specific assessed need;

(E) a description of how data will be routinely collected and reviewed to measure the ongoing effectiveness of the modification;

(F) the established time limits for periodic reviews to determine if the modification is still necessary or can be terminated;

(G) the individual's or LAR's signature on the IPP evidencing informed consent to the modification; and

(H) the program provider's assurance that the modification will cause the individual no harm.

(c) After the service planning team revises an individual's IPP, as required by subsection (b) of this section, the program provider must implement the modification.

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 31, 2022.

TRD-202203391
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER H. DECLARATION OF DISASTER

26 TAC §260.451

STATUTORY AUTHORITY

The new section 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§260.451. Exceptions to Certain Requirements During Declaration of Disaster.

(a) HHSC may allow a program provider to use one or more of the exceptions described in subsections (c) - (n) of this section while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect. HHSC notifies program providers:

(1) if HHSC allows an exception to be used; and

(2) if an exception is allowed to be used, the date the exception must no longer be used, which may be before the declaration of a state of disaster expires.

(b) In this section "disaster area" means the area of the state specified in an executive order or proclamation described in subsection (a) of this section.

(c) Notwithstanding §260.61(c) of this chapter (relating to Process for Enrollment of an Individual), an initial visit for an individual who resides in the disaster area may be conducted by videoconferencing or in person.

(d) If the initial visit described in subsection (c) of this section is conducted by videoconferencing:

(1) the case manager may complete the requirements described in §260.61(c)(1) - (3) of this chapter by videoconferencing;

(2) the case manager or an appropriate professional must not complete an adaptive behavior screening assessment required by §260.61(c)(6) of this chapter by videoconferencing;

(3) the case manager or an RN must not complete a Related Conditions Eligibility Screening Instrument required by §260.61(c)(7) of this chapter by videoconferencing;

(4) an RN may complete a nursing assessment of an individual who resides in the disaster area required by §260.61(c)(8) in accordance with the RN's licensing requirements by videoconferencing or in person;

(5) the case manager must not perform the assessment needed to complete the ID/RC Assessment required by §260.61(c)(4) of this chapter by videoconferencing; and

(6) the signature of the individual or LAR on a Waiver Program Verification of Freedom of Choice form required by §260.61(c)(5) of this chapter may be replaced by the case manager noting on the form that the individual or LAR chose the DBMD Program over the ICF/IID Program.

(e) Notwithstanding §260.67(a) of this chapter (relating to Development of a Proposed Enrollment IPC), a service planning team meeting for an individual who resides in the disaster area may be conducted by videoconferencing or in person.

(f) If the service planning team meeting described in subsection (e) of this section is conducted by videoconferencing:

(1) the case manager may obtain the signatures of the service planning team members other than the individual or LAR on the proposed enrollment IPC required by §260.67(c)(1) of this chapter after the service planning team meeting; and

(2) the case manager may replace the signature of the individual or LAR on the proposed enrollment IPC required by §260.67(c)(1) of this chapter by noting on the enrollment IPC that the individual or LAR orally agreed to the proposed enrollment IPC.

(g) Notwithstanding §260.77(a) of this chapter (relating to Renewal and Revision of an IPP and IPC), a case manager may meet with an individual who resides in the disaster area and the LAR by videoconferencing or in person.

(h) Notwithstanding §260.77(b)(1)(E), (c)(1), or (d)(1) of this chapter, a service planning team meeting for an individual who resides in the disaster area may be conducted by videoconferencing or in person.

(i) If a service planning team meeting described in subsection (h) of this section is conducted by videoconferencing, a case manager must:

(1) replace the signature of an individual or LAR required by §260.77(a)(5)(A), (b)(1)(E)(vii), (c)(3), or (d)(3) of this chapter by documenting on the new or revised IPP that the individual or LAR orally agreed to the new or revised IPP;

(2) obtain the signatures of the service planning team members required by §260.77(a)(5)(A), (b)(1)(E)(vii), (c)(3), or (d)(3) of this chapter, other than the individual or LAR, on the revision or renewal IPP after the service planning team meeting;

(3) replace the signature of the individual or LAR on a proposed renewal or proposed revised IPC required by §260.77(a)(5)(A), (b)(1)(E)(vii), (c)(3), or (d)(3) of this chapter by documenting on the

proposed renewal or proposed revised IPC that the individual or LAR orally agreed to the proposed renewal or proposed revised IPC; and

(4) obtain the signatures of the service planning team members required by §260.77(a)(5)(A), (b)(1)(E)(vii), (c)(3), or (d)(3) of this chapter, other than the individual or LAR, on the revision or renewal IPC after the service planning team meeting.

(j) Notwithstanding §260.77(a)(2)(C) of this chapter, a case manager is not required to ensure that an individual who resides in the disaster area or LAR sign the HHSC IPP Service Review form or a form the program provider developed, if:

(1) the meeting required by §260.77(a) of this chapter is conducted by telephone or videoconferencing;

(2) the individual or LAR orally agree with the HHSC IPP Service Review form or a form the program provider developed; and

(3) the case manager documents the individual's or LAR's oral agreement on the HHSC IPP Service Review form or a form the program provider developed.

(k) Notwithstanding §260.301(a) of this chapter (relating to Authorization Amount and Other Limits for Adaptive Aids), the service limit may be exceeded if:

(1) the requested adaptive aid or repair that causes the service limit to be exceeded is:

(A) an adaptive aid that replaces an adaptive aid that was destroyed as a result of the disaster; or

(B) the repair of an adaptive aid that was damaged as a result of the disaster; and

(2) the requested adaptive aid or repair added to the individual's IPC does not exceed a total limit of $15,000 during the IPC period, which includes the cost of repair and maintenance of an adaptive aid.

(l) Notwithstanding §260.303(a)(1) and (b) of this chapter (relating to Requirements for Authorization to Purchase or Lease an Adaptive Aid) and §260.305(a)(1), (c), (d), (f) and (g) of this chapter (relating to Requirements for Bids for an Adaptive Aid), if an individual requests the repair or replacement of an adaptive aid damaged or destroyed as result of a disaster:

(1) instead of the service planning team completing the HHSC Rationale for Adaptive Aids, Medical Supplies, and Minor Home Modifications form, the program provider must obtain:

(A) a description of the repair or replacement of an adaptive aid that was damaged or destroyed as a result of the disaster; and

(B) one bid for the requested repair or replacement of an adaptive aid from a vendor that complies with §260.305(b) of this chapter; and

(2) the case manager must submit to HHSC, no later than 180 days after the effective date of the order or proclamation described in subsection (a) of this section:

(A) the renewal or revised IPC;

(B) the renewal or revised IPP;

(C) the description and bid of the repair or replacement described in paragraph (1) of this subsection; and

(D) a written statement that the requested adaptive aid or repair is not available through a third-party resource.

(m) Notwithstanding §260.315(a) of this chapter (relating to Authorization Limit for Minor Home Modification and Amount for Repair and Maintenance), the service limit of minor home modifications for an individual who resides in the disaster area may be exceeded if:

(1) the requested minor home modification that causes the service limit to be exceeded is:

(A) a minor home modification that replaces a minor home modification that was destroyed as a result of the disaster; or

(B) a repair of a minor home modification that was damaged as a result of the disaster; and

(2) the requested minor home modification or repair added to the individual's IPC does not exceed the total limit of $15,000 for a minor home modification during the time the individual is enrolled in the DBMD program.

(n) Notwithstanding §§260.317, 260.319, 260.321, and 260.323 (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs Less than $1,000, Requesting Authorization to Purchase a Minor Home Modification that Costs $1,000 or More, Specifications for a Minor Home Modification, and Bid Requirements for a Minor Home Modification), if an individual requests the repair or replacement of a minor home modification damaged or destroyed as a result of a disaster:

(1) the program provider must obtain:

(A) a description of the repair or replacement of a minor home modification that was damaged or destroyed as a result of the disaster; and

(B) one bid for the requested repair or replacement of a minor home modification from a vendor that includes:

(i) the total cost of the requested minor home modification, which may be from a catalog, website, or brochure price list;

(ii) the amount of any additional expenses related to the delivery of the minor home modification, including shipping and handling, taxes, installation, and other labor charges;

(iii) the date of the bid; and

(iv) the name, address, and telephone number of the vendor, who may not be a relative of the individual;

(2) the case manager must:

(A) include the cost of the minor home modification or repair in the individual's proposed renewal or proposed revised IPC and IPP;

(B) obtain the individual or LAR's oral agreement;

(C) document the individual's or LAR's oral agreement on the proposed renewal or proposed revised IPC and IPP; and

(D) sign the proposed renewal or proposed revised IPC and IPP;

(3) the program director or the RN designated by the program provider must sign the proposed renewal or proposed revised IPC and IPP; and

(4) the program provider must submit to HHSC, no later than 180 days after the effective date of the order or proclamation described in subsection (a) of this section:

(A) the proposed renewal or proposed revised IPC;

(B) the renewal or revised IPP;

(C) the description and bid of the repair or replacement described in paragraph (1) of this subsection; and

(D) a written statement that the requested minor home modification or repair is not available through a third-party resource.

(o) Notwithstanding §260.205(c)(1) and (2) of this chapter (relating to Training), a program director, a case manager, an intervener, and a service provider may complete an online training course in cardiopulmonary resuscitation and choking prevention but an in-person evaluation by a qualified instructor is not required to be completed, if:

(1) as a result of the disaster, the service provider is unable to arrange for the in-person evaluation; and

(2) the in-person evaluation is completed within 90 calendar days after the disaster ends.

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 31, 2022.

TRD-202203392
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

CHAPTER 262. TEXAS HOME LIVING (TxHmL) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)

SUBCHAPTER A. GENERAL PROVISIONS

26 TAC §§262.1 - 262.9

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes in the Texas Administrative Code (TAC), Title 26, Part 1, new Chapter 262, Texas Home Living (TxHmL) Program and Community First Choice (CFC), Subchapters A - I, comprised of §§262.1 - 262.9, 262.101 - 262.107, 262.201, 262.202, 262.301 - 262.304, 262.401, 262.501 - 262.508, 262.601, 262.602, 262.701, and 262.801.

BACKGROUND AND PURPOSE

The TxHmL Program is a Medicaid waiver program approved by the Centers for Medicare & Medicaid Services (CMS) under §1915(c) of the Social Security Act. This waiver program provides community-based services and supports to an eligible individual as an alternative to services provided in an institutional setting. One purpose of the proposal is to move certain TxHmL Program rules from 40 TAC Chapter 9, Subchapter N to 26 TAC Chapter 262. The repeal of §§9.551, 9.552, 9.554, 9.556, 9.558, 9.560 - 9.563, 9.566 - 9.568, 9.570, 9.571, 9.573-9.575, 9.582, and 9.583 in 40 TAC Chapter 9, Subchapter N are proposed elsewhere in this issue of the *Texas Register.* In 2014, CMS amended this regulation to establish new requirements for Home and Community-Based Services (HCBS) Medicaid Programs, including requirements for HCBS Program settings and person-centered planning. CMS has given states until March 2023 to be in full compliance with the requirements in 42 CFR §441.301(c)(1) - (5). The proposed new rules will also ensure compliance with the requirements in 42 CFR Chapter IV, Subchapter C, Part 441, Subpart K, §441.530, regarding Home and Community-Based Setting, §441.535, regarding Assessment of functional need; and §441.540 regarding the Person-centered service plan, for Community First Choice (CFC) services because CFC services are available in the TxHmL Program.

Additional purposes of the proposed new rules are described below.

The proposed new rules implement Texas Government Code §531.02161(b)(4) which requires HHSC to ensure that, if cost effective, clinically effective, and allowed by federal law, a Medicaid recipient has the option to receive certain services, including occupational therapy (OT), physical therapy (PT), and speech-language pathology as a telehealth service.

The proposed new rules require the initial TxHmL eligibility assessments to be conducted in person and the Community First Choice (CFC) personal assistance services/habilitation (PAS/HAB) assessment to be completed in person unless certain conditions exist, in which case the assessment may be completed by telehealth, telephone, or video conferencing. These requirements help ensure the assessments are thorough and accurate.

The proposed new rules include provisions regarding the denial, suspension, reduction, or termination of an individual's TxHmL Program services to explain HHSC's process in taking one of these actions. The proposed new rules change the existing service coordination monitoring requirement from 90 days to 30 days during an individual's suspension.

The proposed new rules require a program provider and local intellectual and developmental disability authority (LIDDA) to submit a translation of non-English documentation submitted to HHSC. The purpose of the proposed new rule is to help ensure that HHSC's reviews of documentation are efficient.

The proposed new rules require a registered nurse (RN) to complete a comprehensive nursing assessment of an individual in person under specified circumstances. This requirement is included so that the entire comprehensive nursing assessment is completed when necessary to help ensure the health and safety of an individual.

The proposed new rules codify current practice related to individuals transferring to another program provider or choosing a different service delivery option in the TxHmL Program.

The proposed new rules provide that HHSC may allow program providers and service coordinators to use one or more of the exceptions specified in the rule while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect. This provision is added to help ensure that providers and service coordinators are able to provide services effectively during a disaster.

SECTION-BY-SECTION SUMMARY

New Subchapter A, General Provisions

Proposed new §262.1, Purpose, describes the purpose of the rules.

Proposed new §262.2, Application, describes the persons to whom Chapter 262 applies.

Proposed new §262.3, Definitions, defines the terms used in the new chapter including definitions for the following terms: "audio-only," "comprehensive nursing assessment," "delegated nursing task," "DID--Determination of intellectual disability," "DID report,"

"EVV--Electronic visit verification," "health maintenance activities," "in person or in-person," "platform," "professional therapies," "store and forward technology," "synchronous audio-visual," "TAC--Texas Administrative Code," "telehealth service," "transfer IPC," and "videoconferencing."

Proposed new §262.4, Description of the TxHmL Program and CFC, provides descriptions of the TxHmL Program and CFC including provisions about waiver contract areas and the consumer directed services option.

Proposed new §262.5, Description of TxHmL Program Services, provides a description of the TxHmL Program services available through the TxHmL Program.

Proposed new §262.6, Description of CFC Services, provides a description of the CFC services available through the TxHmL Program.

Proposed new §262.7, Requirement for Translation, requires program providers and local intellectual and developmental disability authorities to, when they submit documentation to HHSC containing information that is not in English, submit a translation of the information in English at the same time.

Proposed new §262.8, Comprehensive Nursing Assessment, requires an RN to complete the comprehensive nursing assessment for an applicant or individual who has nursing on their individual plan of care (IPC), using the HHSC Comprehensive Nursing Assessment form. The proposed new rule also specifies when a comprehensive nursing assessment must be completed in person, and when the comprehensive nursing assessment does not have to be completed in person.

Proposed new §262.9, Providing Physical Therapy, Occupational Therapy, and Speech and Language Pathology as a Telehealth Service, allows a service provider of PT, OT, or speech and language pathology to provide PT, OT, or speech and language pathology to an individual as a telehealth service unless the service is required to be provided in person in accordance with the Texas Medicaid Provider Procedures Manual. The proposed new rule describes the requirements for providing PT, OT, or speech and language pathology as a telehealth service, including obtaining the individual's or LAR's consent before the provision of the telehealth service. The proposed new rule also sets forth the PT, OT, or speech and language pathology services that must be provided to an individual in person.

New Subchapter B, Eligibility, Enrollment, and Review

Proposed new §262.101, Eligibility Criteria for TxHmL Program Services and CFC Services, describes the eligibility criteria for TxHmL Program Services and CFC Services. The proposed rule is different from the current rule regarding eligibility criteria because the proposed rule specifically lists a hospital, an inpatient chemical dependency treatment facility, and a mental health facility as settings in which an individual cannot reside instead of using the phrase, "a facility licensed or subject to being licensed by the Department of State Health Services." In addition, the proposed rule is different from the current rule because the proposed rule does not include, as a prohibited residential setting, a setting in which two or more dwellings create a distinguishable residential area. HHSC included provisions in proposed new §262.202, Requirements for Service Settings, that are consistent with 42 CFR §441.301(c)(5)(v) regarding settings that are presumed to have the qualities of an institution.

Proposed new §262.102, TxHmL Interest List, describes how HHSC maintains the interest list for individuals interested in receiving services in the TxHmL Program. The proposed rule is different from the current rule in how HHSC assigns an interest list date to an applicant after the applicant's name is removed from the interest list in accordance with subsection (g)(1) - (4) and the applicant requests to be placed back on the list. In the current rule, if such an applicant makes the request within 90 days after their name was removed from the list, HHSC adds the applicant's name to the TxHmL interest list using the interest list date that was in effect at the time the applicant's name was removed from the list. In the proposed rule, HHSC adds the applicant's name to the TxHmL interest list in this situation using the interest list date that was in effect at the time the applicant's name was removed, only if the request to be placed back on the list is the applicant's first request. Further, if the applicant's request to be placed back on the list is made more than 90 days after their name was removed from the list and the request is the applicant's first request, the proposed rule provides that HHSC adds the applicant's name to the interest list using the interest list date that was in effect at the time the applicant's name was removed from the list, if HHSC determines that extenuating circumstances exist. If a request to be placed back on the interest list by an applicant in these situations is not the applicant's first request, the proposed rule provides that the applicant's name is added back using the date of the request as the interest list date. The reason for this change is to remove an incentive for an applicant to repeatedly decline a written offer of TxHmL Program services.

Proposed new §262.103, Process for Enrollment of Applicants, describes the process for offering an applicant enrollment and enrolling an applicant into the TxHmL Program.

Proposed new §262.104, LOC Determination, describes the process for a LIDDA to request a level of care (LOC) from HHSC for an applicant and for a program provider to request an LOC from HHSC for an individual.

Proposed new §262.105, LON Assignment, describes the process for requesting a level of need (LON) from HHSC for an applicant and an individual and the LONs that may be assigned. The proposed rule also describes the criteria that must exist and process for an individual's LON to be increased because of the individual's dangerous behavior.

Proposed new §262.106, HHSC Review of LON, describes the process by which HHSC reviews an LON.

Proposed new §262.107, Reconsideration of LON Assignment, describes the process by which a LIDDA may request a reconsideration by HHSC of an LON assignment.

New Subchapter C, Person-Centered Planning

Proposed new §262.201, Person-Centered Planning Process, requires a service coordinator and program provider to ensure the person-centered planning process is led by an individual to the maximum extent possible and that the person-centered planning process be used to develop a person directed plan (PDP), implementation plan, initial IPC, renewal IPC, revised IPC, service backup plan, and transportation plan. The proposed new rule also describes the activities involved in the person-centered planning process.

Proposed new §262.202, Requirements for Service Settings, requires a program provider to ensure that a setting in which the individual receives TxHmL Program and CFC services meets

certain criteria, including that it's based on the individual's preferences and needs; it supports the individual's access to the greater community to the same degree as a person not enrolled in a Medicaid waiver program; it ensures the individual's rights of privacy, dignity, and respect; and it optimizes an individual's independence in making life choices. In addition, the proposed rule requires that a setting in which an individual receives a TxHmL Program service is not located in a building that provides inpatient institutional treatment, or in a building on the grounds of or immediately adjacent to a public institution, or that has the effect of isolating individuals from the broader community of persons not receiving Medicaid HCBS, unless CMS determines through a heightened scrutiny review that the setting does not have the qualities of an institution and does have the qualities of home and community-based settings.

New Subchapter D, Development and Review of an IPC

Proposed new §262.301, IPC Requirements, describes the requirements of an IPC.

Proposed new §262.302, Renewal and Revision of an IPC, describes the process for developing a renewal IPC and a revision IPC. The proposed rule includes several requirements that are not part of the current rule regarding renewal IPCs and revision IPCs, including requiring the service coordinator to convene a meeting to update the PDP and develop a renewal IPC, or revised IPC if the addition, removal, or change of a service results in the addition, removal, or change to an outcome in the PDP. If the change made to an existing service does not require the addition, removal, or a change to an outcome in the PDP, the proposed rule requires the service coordinator to document the reasons for the IPC revision. The proposed rule requires the program provider to convene a meeting with the individual or LAR to develop the implementation plans the TxHmL Program services except for community support; CFC services except for CFC support management; and transportation plan. In addition, the proposed rule requires the service coordinator to send a copy of the updated PDP and HHSC HCS/TxHmL CFC PAS/HAB Assessment form to the program provider, the individual or LAR, and, if applicable, the financial management services agency (FMSA).

Proposed new §262.303, HHSC Review of an IPC, describes HHSC's process for reviewing an IPC. The proposed rule provides that HHSC may review an IPC to determine if it meets the IPC requirements described in proposed §262.301, IPC Requirements, and to determine if the IPC exceeds the cost limit as described in §262.101(a)(4), Eligibility Criteria for TxHmL Program Services and CFC Services. In addition, the proposed rule codifies current practice that HHSC may deny or reduce a TxHmL or CFC service if an IPC does not meet requirements in §262.301 or the cost limits described in §262.101(a)(4).

Proposed new §262.304, Service Limits, lists the service limits for certain TxHmL Program services provided to an individual. The proposed rule allows an individual to use $300 per IPC year for maintenance of a minor home modification (MHM) before reaching the lifetime limit for MHM. Under the current policy, the lifetime limit of $7,500 must be exhausted prior to the use of the $300 maintenance fee. This change gives the individual flexibility to use the MHM funds for maintenance. The proposed rule also provides that a program provider may request authorization of a requisition fee for an adaptive aid, dental treatment, and MHM that is in addition to the service limits for these services to codify current practice.

New Subchapter E, Reimbursement by HHSC

Proposed new §262.401, Program Provider Reimbursement, describes how a program provider is reimbursed for services provided in the TxHmL Program. The proposed rule describes the basis for payment of service by HHSC to a program provider and requires a program provider to submit a service claim that meets certain requirements, including 40 TAC §49.311, Claims Payment, and the TxHmL Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers. The proposed rule explains when a program provider may submit a claim for a service provided during the period of the individual's suspension or after termination of the service. The proposed rule requires a claim submitted for an adaptive aid that costs $500 or more or for a minor home modification that costs $1,000 or more to be supported by a written assessment from a licensed professional. The proposed rule describes reasons that HHSC does not pay for or recoups payments for a service, including a program provider not complying with 40 TAC §49.305, Records, or providing CFC PAS/HAB, in-home day habilitation, or in-home respite and the service claim does not match the EVV visit transaction. The proposed rule provides that HHSC conducts fiscal compliance reviews and describes the actions HHSC may take as the result of a review.

New Subchapter F, Transfer, Denials, Suspension, Reduction and Termination

Proposed new §262.501, Process for Individual to Transfer to a Different Program Provider or FMSA, describes the process for an individual to transfer to a different program provider or FMSA.

Proposed new §262.502, Process for Individual to Receive a Service Through the CDS Option that the Individual is Receiving from a Program Provider, describes the process for an individual to transfer services received through the consumer directed services (CDS) option to a program provider.

Proposed new §262.503, Denial of a Request for Enrollment into the TxHmL Program, describes the basis and process for HHSC to deny an individual's request for enrollment into the TxHmL Program.

Proposed new §262.504, Denial of TxHmL Program Services or CFC Services, describes the basis and process for HHSC to deny an TxHmL Program Service or CFC Service.

Proposed new §262.505, Suspension of TxHmL Program Services and CFC Services, describes the basis and process for HHSC to suspend an individual's TxHmL Program services and CFC service.

Proposed new §262.506, Reduction of TxHmL Program Services or CFC Services, describes the basis and process for HHSC to reduce an individual's TxHmL Program service or CFC service.

Proposed new §262.507, Termination of TxHmL Program Services and CFC Services with Advance Notice, describes the basis and process for HHSC to terminate an individual's TxHmL Program Services and CFC Services when advance notice of the termination is required.

Proposed new §262.508, Termination of TxHmL Program Services and CFC Services Without Advance Notice, describes the basis and process for HHSC to terminate an individual's TxHmL Program Services and CFC Services when advance notice of the termination is not required.

New Subchapter G, Hearings

Proposed new §262.601, Fair Hearing, describes the requirement for applicants and individuals to receive a notice of the right to request a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A, Uniform Fair Hearing Rules.

Proposed new §262.602, Program Provider's Right to Administrative Hearing, describes when a program provider may request an administrative hearing.

New Subchapter H, LIDDA Requirements

Proposed new §262.701, LIDDA Requirements for Providing Service Coordination in the TxHmL Program, describes requirements for the LIDDA in the provision of service coordination to applicants and individuals. The proposed rule includes several provisions that are not part of the current rule regarding LIDDA requirements. Specifically, the proposed rule changes the timeframe requirement for a service coordinator to complete a comprehensive non-introductory person-centered service planning training from two years to within six months after the service coordinator's date of hire unless an extension of the six-month timeframe is granted by HHSC. The proposed rule requires the service coordinator to ensure that the updated finalized PDP is signed by the individual or LAR. In addition, the proposed rule requires the service coordinator to ensure the service planning team determines whether an individual who does not have a guardian would benefit from having a guardian or a less restrictive alternative to a guardian. The proposed rule also describes the requirements for a service coordinator to inform applicants and individuals about responsibilities related to EVV.

New Subchapter I, Declaration of Disaster

Proposed new §262.801, Exceptions to Certain Requirements During Declaration of Disaster, provides that HHSC may allow program providers and service coordinators to use one or more of the exceptions described in the rule while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect. The rule provides that HHSC notifies program providers and LIDDAs if it allows an exception to be used and the date an allowed exception must no longer be used. The proposed rule also defines "disaster area."

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, there will be an estimated additional cost to state government as a result of enforcing and administering the proposed rule that allows an individual to use $300 per IPC year for maintenance of an MHM before reaching the lifetime limit for MHMs.

The effect on state government for each year of the first five years the proposed rule is in effect is an estimated cost of $5,186 in fiscal year (FY) 2022, $5,186 in FY 2023, $5,186 in FY 2024, $5,186 in FY 2025, and $5,186 in FY 2026.

In addition, Trey Wood has determined that for each year of the first five years that the rules will be in effect, there may be additional costs to state government if an individual in a disaster area needs to exceed the service limits for adaptive aids and MHMs if an adaptive aid or MHM is damaged or destroyed as a result of the disaster.

Trey Wood has also determined that for each year of the first five years that the rules will be in effect, there will be an additional cost to local government as a result of enforcing and administering the rules that require a LIDDA to conduct an inventory for client and agency planning, and certain standardized measures for completing a determination of intellectual disability in person. However, there are multiple complexities and uncertainties related to the fiscal impact of this requirement for HHSC to provide an estimate of these costs.

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 a new rule;

(6) the proposed rules will repeal 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 the rules could have an adverse economic effect on small businesses and micro-businesses due to the cost to comply. There will be no adverse economic effect on rural communities. No rural communities contract with HHSC to provide services in the HCS program.

HHSC does not have the data to estimate the number of small businesses or micro-businesses subject to the rule; however, as of January 24, 2022, there are 531 TxHmL program providers. As of January 24, 2022, there are 610 HCS and TxHmL legal entities. Legal entities include program providers that may be contracted to be both HCS program providers and TxHmL program providers and program providers that are only contracted to be HCS program providers or TxHmL program providers.

HHSC did not consider any alternative methods for the proposed new rule requiring a program provider or LIDDA to submit a translation of information in English if the program provider or LIDDA submits documentation to HHSC containing information that is not in English, because there is no alternative method that would achieve the purpose of ensuring that HHSC's reviews of the documentation submitted are efficient.

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 receive a source of federal funds or comply with federal law.

PUBLIC BENEFIT AND COSTS

Stephanie Stephens, State Medicaid Director, has determined that for each year of the first five years the rules are in effect, individuals will benefit from the implementation of federal regulations that help ensure an individual receives services that are person-centered and promote the autonomy of the individual and

that are provided in a setting that is integrated in the greater community.

Trey Wood has also 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 because of the requirement for a program provider and LIDDA, when they submit documentation to HHSC containing information that is not in English, to submit a translation of the information in English at the same time. However, HHSC lacks sufficient information to provide an estimate of these costs.

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 HEARING

A public hearing to receive comments on this proposal will be held via GoToWebinar on September 26, 2022 at 1:00 p.m. (central time). The link to register for the GoToWebinar meeting is https://attendee.gotowebinar.com/register/5797564706801514763.

Persons requiring further information, special assistance, or accommodations should contact Olu Oguntade at (512) 438-4478.

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 701 W. 51st Street, Austin, Texas 78751; or emailed to HHSRulesCoordinationOffice@hhs.texas.gov.

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 21R057" in the subject line.

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§262.1. Purpose.

The purpose of this subchapter is to describe certain policies, procedures, and requirements of the TxHmL Program.

§262.2. Application.

This chapter applies to:

(1) a program provider;

(2) a LIDDA;

(3) an applicant and the applicant's LAR; and

(4) an individual and the individual's LAR.

§262.3. Definitions.

The following words and terms, when used in this subchapter, 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 applicant or individual by a person, as determined by the applicant's or individual's service planning team or program provider, based on the person's:

(A) interactions with the applicant or individual;

(B) availability to the applicant or individual for assistance or support when needed; and

(C) knowledge of, sensitivity to, and advocacy for the applicant's or individual's needs, preferences, values, and beliefs.

(3) ADLs--Activities of daily living. Basic personal everyday activities including tasks such as eating, toileting, grooming, dressing, bathing, and transferring.

(4) Agency foster home--This term has the meaning set forth in Texas Human Resources Code §42.002.

(5) Applicant--A Texas resident seeking services in the Texas Home Living (TxHmL) Program.

(6) Audio-only--An interactive, two-way audio communication platform that only uses sound.

(7) Auxiliary aid--A service or device that enables an individual with impaired sensory, manual, or speaking skills to participate in the person-centered planning process. An auxiliary aid includes interpreter services, transcription services, and a text telephone.

(8) 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).

(9) Calendar day--Any day, including weekends and holidays.

(10) CDS option--Consumer directed services option. A service delivery option as defined in 40 TAC §41.103 (relating to Definitions).

(11) CFC--Community First Choice.

(12) CFC ERS--CFC emergency response services.

(13) CFC FMS--The term used for financial management services on the individual plan of care (IPC) of an applicant or individual if the applicant will receive or the individual receives only CFC personal assistance services (PAS)/habilitiation (HAB) through the CDS option.

(14) CFC support consultation--The term used for support consultation on the IPC of an applicant or individual if the applicant will receive or the individual receives only CFC PAS/HAB through the CDS option.

(15) CMS--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.

(16) Competitive employment--Employment that pays an individual at least minimum wage if the individual is not self-employed.

(17) Comprehensive nursing assessment--A comprehensive physical and behavioral assessment of an individual, including the individual's health history, current health status, and current health needs, that is completed by a registered nurse (RN).

(18) Contract--A provisional contract or a standard contract.

(19) Delegated nursing task--A nursing task delegated by a registered nurse to an unlicensed person in accordance with:

(A) 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); and

(B) 22 TAC Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).

(20) DFPS--The Department of Family and Protective Services.

(21) DID--Determination of intellectual disability. This term has the meaning set forth in §304.102 of this title (relating to Definitions).

(22) DID report--Determination of intellectual disability report. This term has the meaning set forth in §304.102 of this title.

(23) EVV--Electronic visit verification. This term has the meaning set forth in 1 TAC §354.4003 (relating to Definitions).

(24) 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.

(25) FMS--Financial management services.

(26) FMSA--Financial management services agency. As defined in 40 TAC §41.103, an entity that provides FMS to an individual participating in the CDS option.

(27) Former military member--A person who served in the United States Army, Navy, Air Force, Marine Corps, Coast Guard, or Space Force:

(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.

(28) HCS--Home and Community-based Services. Services provided through the HCS Program operated by the Texas Health and Human Services Commission (HHSC) as authorized by CMS in accordance with §1915(c) of the Social Security Act.

(29) Health maintenance activities--This term has the meaning set forth in 22 TAC §225.4 (relating to Definitions).

(30) Health-related tasks--Specific tasks related to the needs of an individual, which can be delegated or assigned by a licensed health care professional under state law to be performed by a service provider of CFC PAS/HAB. This includes tasks delegated by an RN; health maintenance activities, 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.

(31) HHSC--The Texas Health and Human Services Commission.

(32) Hospital--A public or private institution licensed or exempt from licensure in accordance with Texas Health and Safety Code (THSC) Chapters 13, 241, 261, or 552.

(33) 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.

(34) ICAP--Inventory for Client and Agency Planning. An instrument designed to assess a person's needs, skills, and abilities.

(35) 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 in accordance with THSC Chapter 252; or

(B) certified by HHSC, including a state supported living center.

(36) 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.

(37) ID/RC Assessment--Intellectual Disability/Related Conditions Program Assessment. A form used by HHSC for level of care determination and level of need assignment.

(38) Implementation plan--A written document developed by a program provider for an individual that, for each TxHmL Program service and CFC service on the individual's IPC to be provided by the program provider except for community support and CFC support management, includes:

(A) a list of outcomes identified in the person-directed plan that will be addressed using TxHmL Program services and CFC services;

(B) specific objectives to address the outcomes required by subparagraph (A) of this paragraph that are:

(i) observable, measurable, and outcome-oriented; and

(ii) derived from assessments of the individual's strengths, personal goals, and needs;

(C) a target date for completion of each objective;

(D) the number of units of TxHmL Program services and CFC services needed to complete each objective;

(E) the frequency and duration of TxHmL Program services and CFC services needed to complete each objective; and

(F) the signature and date of the individual, legally authorized representative (LAR), and the program provider.

(39) Individual--A person enrolled in the TxHmL Program.

(40) Initial IPC--The first IPC for an individual developed before the individual's enrollment into the TxHmL Program.

(41) Inpatient chemical dependency treatment facility--A facility licensed in accordance with THSC Chapter 464, Facilities Treating Persons with a Chemical Dependency.

(42) In person or in-person--Within the physical presence of another person who is awake. In person or in-person does not include using videoconferencing or a telephone.

(43) Intellectual disability--This term has the meaning set forth in §304.102 of this title.

(44) IPC--Individual plan of care. A written plan that:

(A) states:

(i) the type and amount of each TxHmL Program service and each CFC service, except for CFC support management, to be provided to an individual during an IPC year;

(ii) the services and supports to be provided to the individual through resources other than TxHmL Program services or CFC services, including natural supports, medical services, and educational services; and

(iii) if an individual will receive CFC support management; and

(B) is authorized by HHSC.

(45) IPC cost--Estimated annual cost of TxHmL Program services included on an IPC.

(46) IPC year--The effective period of an initial IPC and renewal IPC as described in this paragraph.

(A) Except as provided in subparagraph (B) of this paragraph, the IPC year for an initial and renewal IPC is a 365-calendar day period starting on the begin date of the initial or renewal IPC.

(B) If the begin date of an initial or renewal IPC is March 1 or later in a year before a leap year or January 1 - February 28 of a leap year, the IPC year for the initial or renewal IPC is a 366-calendar day period starting on the begin date of the initial or renewal IPC.

(C) A revised IPC does not change the begin or end date of an IPC year.

(47) LAR--Legally authorized representative. A person authorized by law to act on behalf of a person with regard to a matter described in this subchapter, including a parent, guardian, or managing conservator of a minor; a guardian of an adult; an agent appointed under a power of attorney; or a representative payee appointed by the Social Security Administration. An LAR, such as an agent appointed under a power of attorney or representative payee appointed by the Social Security Administration, may have limited authority to act on behalf of a person.

(48) LIDDA--Local intellectual and developmental disability authority. An entity designated by the executive commissioner of HHSC, in accordance with THSC §533A.035.

(49) LOC--Level of care. A determination given to an applicant or individual as part of the eligibility determination process based on data submitted on the ID/RC Assessment.

(50) LON--Level of need. An assignment given by HHSC to an applicant or individual that is derived from the ICAP service level score and from selected items on the ID/RC Assessment.

(51) Managed care organization--This term has the meaning set forth in Texas Government Code §536.001.

(52) MAO Medicaid--Medical Assistance Only Medicaid. A type of Medicaid by which an applicant or individual qualifies financially for Medicaid assistance but does not receive Supplemental Security Income (SSI) benefits.

(53) Medicaid HCBS--Medicaid home and community-based services. Medicaid services provided to an individual in an individual's home and community, rather than in a facility.

(54) Mental health facility--A facility licensed in accordance with THSC Chapter 577, Private Mental Hospitals and Other Mental Health Facilities.

(55) 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.

(56) Military member--A member of the United States military serving in the Army, Navy, Air Force, Marine Corps, Coast Guard, or Space Force 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.

(57) Natural supports--Unpaid persons, including family members, volunteers, neighbors, and friends, who voluntarily assist an individual to achieve the individual's identified goals.

(58) 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.

(59) Nursing facility--A facility licensed in accordance with THSC Chapter 242.

(60) PDP--Person-directed plan. A plan developed with an applicant or individual and LAR using an HHSC form that describes the supports and services necessary to achieve the desired outcomes identified by the applicant or individual and LAR and to ensure the applicant's or individual's health and safety.

(61) Performance contract--A written agreement between HHSC and a LIDDA for the performance of delegated functions, including those described in THSC §533A.035.

(62) 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.

(63) Platform--This term has the meaning set forth in Texas Government Code §531.001(4-d).

(64) Post-move monitoring visit--A visit conducted by the service coordinator in accordance with the Intellectual and Developmental Disability Preadmission Screening and Resident Review (IDD-PASRR) Handbook.

(65) Pre-move site review--A review conducted by the service coordinator in accordance with HHSC's IDD PASRR Handbook.

(66) Professional therapies--Services that consist of the following:

(A) audiology services;

(B) behavioral support;

(C) dietary services;

(D) occupational therapy services;

(E) physical therapy services; and

(F) speech and language pathology.

(67) Program provider--A person, as defined in 40 TAC §49.102 (relating to Definitions), that has a contract with HHSC to provide TxHmL Program services, excluding an FMSA.

(68) Provisional contract--A contract that HHSC enters into with a program provider in accordance with 40 TAC §49.208 (relating to Provisional Contract Application Approval) that has a term of no more than three years, not including any extension agreed to in accordance with 40 TAC §49.208(e).

(69) Related condition--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 age 22;

(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.

(70) 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 TxHmL Program Billing Requirements.

(71) Renewal IPC--An IPC developed for an individual in accordance with §262.302(a) of this chapter (relating to Renewal and Revision of an Individual's IPC).

(72) Residential child care facility--The term has the meaning set forth in Texas Human Resources Code §42.002.

(73) Revised IPC--An IPC that is revised during an IPC year in accordance with §262.302 of this chapter to add a new TxHmL Program service or CFC service or change the amount of an existing service.

(74) RN--Registered nurse. A person licensed to practice professional nursing in accordance with Texas Occupations Code Chapter 301.

(75) Service backup plan--A plan that ensures continuity of a service that is critical to an individual's health and safety if service delivery is interrupted.

(76) Service coordination--A service as defined in 40 TAC Chapter 2, Subchapter L (relating to Service Coordination for Individuals with an Intellectual Disability).

(77) Service coordinator--An employee of a LIDDA who provides service coordination to an individual.

(78) Service planning team--One of the following:

(A) for an applicant or individual other than one described in subparagraphs (B) or (C) of this paragraph, a planning team consisting of:

(i) an applicant or individual and LAR;

(ii) the service coordinator; and

(iii) other persons chosen by the applicant, individual, or LAR, for example, a staff member of the program provider, a family member, a friend, or a teacher;

(B) for an applicant 21 years of age or older who is residing in a nursing facility and enrolling in the TxHmL Program, a planning team consisting of:

(i) the applicant and LAR;

(ii) service coordinator;

(iii) a staff member of the program provider;

(iv) providers of specialized services;

(v) a nursing facility staff person who is familiar with the applicant's needs;

(vi) other persons chosen by the applicant or LAR, for example, a family member, a friend, or a teacher; and

(vii) at the discretion of the LIDDA and with the approval of the individual or LAR, other persons who are directly involved in the delivery of services to persons with an intellectual or developmental disability; or

(C) for an individual 21 years of age or older who has enrolled in the TxHmL program from a nursing facility or has enrolled in the TxHmL Program as a diversion from admission to a nursing facility, for 180 days after enrollment, a planning team consisting of:

(i) the individual and LAR;

(ii) the service coordinator;

(iii) a staff member of the program provider;

(iv) other persons chosen by the individual or LAR, for example, a family member, a friend, or a teacher; and

(v) at the discretion of the LIDDA and with the approval of the individual or LAR, other persons who are directly involved in the delivery of services to persons with an intellectual or developmental disability.

(79) Service provider--A person, who may be a staff member, who directly provides a TxHmL Program service or CFC service to an individual.

(80) 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 member, volunteer, or controlling person, unless a consensual sexual relationship with an adult individual existed before the service provider, staff member, volunteer, or controlling person became a service provider, staff member, volunteer, or controlling person.

(81) Sexual activity--An activity that is sexual in nature, including kissing, hugging, stroking, or fondling with sexual intent.

(82) 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.

(83) Staff member--An employee or contractor of a TxHmL Program provider.

(84) Standard contract--A contract that HHSC enters into with a program provider in accordance with 40 TAC §49.209 (relating to Standard Contract) that has a term of no more than five years, not including any extension agreed to in accordance 40 TAC §49.209(d).

(85) 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.

(86) Store and forward technology--This term has the meaning set forth in Texas Occupations Code §111.001(2).

(87) Synchronous audio-visual--An interactive, two-way audio and video communication platform that:

(A) allows a service to be provided to an individual in real time; and

(B) conforms to the privacy requirements under the Health Insurance Portability and Accountability Act.

(88) TAC--Texas Administrative Code. A compilation of state agency rules published by the Texas Secretary of State in accordance with Texas Government Code Chapter 2002, Subchapter C.

(89) Telehealth service--This term has the meaning set forth in Texas Occupations Code §111.001.

(90) Temporary Admission--A stay in a facility listed in §262.505(a) of this chapter (relating to Suspension of TxHmL Program Services and CFC Services) for 270 calendar days or less or, if an extension is granted in accordance with §262.505(h) of this chapter, a stay in such a facility for more than 270 calendar days.

(91) THSC--Texas Health and Safety Code. Texas statute relating to health and safety.

(92) Transfer IPC--An IPC that is developed in accordance with §262.501 of this chapter (relating to Process for Individual to Transfer to a Different Program Provider or FMSA) or §262.502 of this chapter (relating to Process for Individual to Receive a Service Through the CDS Option that the Individual is Receiving from a Program Provider) when an individual transfers to another program provider or chooses a different service delivery option.

(93) Transition plan--A written plan developed in accordance with §303.701 of this title (relating to Transition Planning for a Designated Resident) for an applicant residing in a nursing facility who is enrolling in the TxHmL Program.

(94) Transportation plan--A written plan based on person-directed planning and developed with an applicant or individual using HHSC Individual Transportation Plan form available on the HHSC website. A transportation plan is used to document how community support will be delivered to support an individual's desired outcomes and purposes for transportation as identified in the PDP.

(95) TxHmL Program--The Texas Home Living Program operated by HHSC as authorized by CMS in accordance with §1915(c) of the Social Security Act. The TxHmL Program provides community-based services and supports to eligible individuals who live in their own homes or in their family homes.

(96) Vendor hold--A temporary suspension of payments that are due to a program provider under a contract.

(97) 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.

(98) Videoconferencing--An interactive, two-way audio and video communication:

(A) used to conduct a meeting between two or more persons who are in different locations; and

(B) that conforms to the privacy requirements under the Health Insurance Portability and Accountability Act.

(99) Volunteer--A person who works for a program provider without compensation, other than reimbursement for actual expenses.

§262.4. Description of the TxHmL Program and CFC.

(a) The TxHmL Program is a Medicaid waiver program approved by CMS pursuant to §1915(c) of the Social Security Act. It provides community-based services and supports to eligible individuals who live in their own homes or in their family homes.

(b) Enrollment in the TxHmL Program is limited to the number of individuals in specified target groups and to the geographic areas approved by CMS.

(c) TxHmL Program services described in §262.5 of this subchapter (relating to Description of TxHmL Program Services) are selected for inclusion in an individual's IPC to ensure the individual's health, safety, welfare, and integration in the community. TxHmL Program services and CFC Services supplement rather than replace the individual's natural supports and other community services for which

the individual may be eligible and prevent the individual's admission to an institutional setting.

(d) CFC is a state plan option governed by 42 CFR Chapter 441, Subpart K, regarding Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice) that provides the following services to individuals:

(1) CFC PAS/HAB;

(2) CFC ERS; and

(3) CFC support management for an individual receiving CFC PAS/HAB.

(e) HHSC has grouped Texas counties into geographical areas, referred to as "local service areas," each of which is served by a LIDDA. HHSC has further grouped the local service areas into "waiver contract areas." A list of the counties included in each local service area and waiver contract area is available on the HHSC website.

(1) A program provider may provide TxHmL Program services and CFC services only to persons residing in the counties specified for the program provider in the HHSC automated enrollment and billing system.

(2) A program provider must have a separate contract for each waiver contract area served by the program provider.

(3) A program provider may have a contract to serve one or more local service areas within a waiver contract area, but the program provider must serve all of the counties within each local service area covered by the contract.

(4) A program provider may not have more than one contract per waiver contract area.

(f) A program provider must comply with all applicable state and federal laws, rules, and regulations.

(g) The CDS option is a service delivery option, described in 40 TAC Chapter 41 (relating to Consumer Directed Services Option), in which an individual or LAR employs and retains service providers and directs the delivery of a service through the CDS option, as described in 40 TAC §41.108 (relating to Services Available Through the CDS Option).

§262.5. Description of TxHmL Program Services.

(a) TxHmL Program services are described in this section and in Appendix C of the TxHmL Program waiver application approved by CMS.

(1) Adaptive aids include devices, controls, or items that are necessary to address specific needs identified in an individual's service plan. Adaptive aids enable an individual to maintain or increase the ability to perform ADLs or the ability to perceive, control, or communicate with the environment in which the individual lives.

(2) Audiology is the provision of audiology as defined in the Texas Occupations Code Chapter 401.

(3) Speech and language pathology is the provision of speech-language pathology, as defined in the Texas Occupations Code Chapter 401.

(4) Occupational therapy is the practice of occupational therapy as described in the Texas Occupations Code Chapter 454.

(5) Physical therapy is the provision of physical therapy as defined in the Texas Occupations Code Chapter 453.

(6) Dietary is the provision of nutrition services as defined in the Texas Occupations Code Chapter 701.

(7) Behavioral support is the provision of specialized interventions that:

(A) assist an individual to increase adaptive behaviors to replace or modify maladaptive or socially unacceptable behaviors that prevent or interfere with the individual's inclusion in home and family life or community life; and

(B) improve an individual's quality of life.

(8) Day habilitation is assistance with acquiring, retaining, or improving self-help, socialization, and adaptive skills provided in a location other than the residence of an individual. Day habilitation does not include in-home day habilitation.

(9) In-home day habilitation is assistance with acquiring, retaining, or improving self-help, socialization, and adaptive skills provided in the individual's residence.

(10) Dental treatment is:

(A) emergency dental treatment;

(B) preventive dental treatment;

(C) therapeutic dental treatment; and

(D) orthodontic dental treatment, excluding cosmetic orthodontia.

(11) Minor home modifications are physical adaptations to an individual's residence to address specific needs identified by an individual's service planning team.

(12) Licensed vocational nursing is the provision of licensed vocational nursing, as defined in the Texas Occupations Code Chapter 301.

(13) Registered nursing is the provision of professional nursing, as defined in the Texas Occupations Code Chapter 301.

(14) Specialized registered nursing is the provision of registered nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(15) Specialized licensed vocational nursing is the provision of licensed vocational nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(16) Community support provides transportation to an individual.

(17) Respite provides temporary relief for an unpaid caregiver of an individual in a location other than the individual's residence.

(18) In-home respite provides temporary relief for an unpaid caregiver of an individual in the individual's residence.

(19) Employment assistance provides assistance to help an individual locate paid employment in the community.

(20) Supported employment provides assistance, 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.

(b) The services described in this subsection are for an individual who is receiving at least one TxHmL Program service through the CDS option.

(1) FMS is a service defined in 40 TAC §41.103 (relating to Definitions).

(2) Support consultation is a service defined in 40 TAC §41.103.

§262.6. Description of CFC Services.

(a) CFC services are described in this subsection and in the Medicaid State Plan approved by CMS and available on the HHSC website.

(1) CFC PAS/HAB:

(A) 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.

(2) CFC support management provides training to an individual or LAR on how to select, manage, and dismiss an unlicensed service provider of CFC PAS/HAB, as described in the TxHmL Handbook, if:

(A) the individual is receiving CFC PAS/HAB; and

(B) the individual or LAR requests to receive CFC support management; and

(3) CFC ERS consists of backup systems and supports used to ensure continuity of services and supports, including electronic devices and an array of available technology, personal emergency response systems, and other mobile communication devices and is provided only to an individual who:

(A) lives alone, who is alone for significant parts of the day, or has no regular caregiver for extended periods of time; and

(B) would otherwise require extensive routine supervision.

§262.7. Requirement for Translation.

If a program provider or LIDDA submits documentation to HHSC containing information that is not in English, the program provider or LIDDA must, at the same time, submit a translation of the information in English.

§262.8. Comprehensive Nursing Assessment.

(a) An RN must complete a comprehensive nursing assessment:

(1) of an applicant in person, if the applicant's initial IPC includes a sufficient number of RN nursing units for the program provider's RN to perform a comprehensive nursing assessment as described in §262.103(o)(1) of this chapter (relating to Process for Enrollment of Applicants); and

(2) of an individual in person:

(A) when the health status of the individual changes;

(B) at least annually if a nursing service is on the individual's renewal IPC;

(C) before an unlicensed service provider performs a delegated nursing task; and

(D) if the RN who completed the most recent comprehensive nursing assessment of the individual is no longer providing a nursing service to the individual, except as provided in subsection (b) of this section.

(b) The comprehensive nursing assessment required to be completed in accordance with subsection (a)(2)(D) of this section does not have to be completed in person if an unlicensed service provider is not performing a delegated nursing task or a health maintenance activity for the individual.

(c) An RN must document a comprehensive nursing assessment required by subsection (a) of this section using the HHSC Comprehensive Nursing Assessment form.

§262.9. Providing Physical Therapy, Occupational Therapy, and Speech and Language Pathology as a Telehealth Service.

(a) Except as described in subsection (c) of this section, a service provider of physical therapy, occupational therapy, or speech and language pathology may provide physical therapy, occupational therapy, or speech and language pathology to an individual as a telehealth service.

(b) If a service provider of physical therapy, occupational therapy, or speech and language pathology provides physical therapy, occupational therapy, or speech and language pathology to an individual as a telehealth service, a program provider must ensure that the service provider:

(1) uses a synchronous audio-visual platform to interact with the individual, supplemented with or without asynchronous store and forward technology;

(2) does not use an audio-only platform to provide the service; and

(3) before providing the telehealth service:

(A) obtains the written informed consent of the individual or LAR to provide the service; or

(B) obtains the individual or LAR's oral consent to receive the telehealth service and documents the oral consent in the individual's record.

(c) A program provider must ensure that a service provider of physical therapy, occupational therapy, or speech and language pathology performs certain services in person, as required by the Texas Medicaid Provider Procedures Manual. Such services include:

(1) a service that requires a physical agent modality or hands-on therapy, such as a paraffin bath, aquatic therapy, manual therapy, massage, and ultrasound;

(2) orthotic management and training, initial encounter and subsequent encounters;

(3) prosthetic management or training for an upper or lower extremity, initial encounter and subsequent encounters;

(4) a wheelchair assessment and training; and

(5) a complex rehabilitation technology assessment.

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 31, 2022.

TRD-202203395
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER B. ELIGIBILITY, ENROLLMENT, AND REVIEW

26 TAC §§262.101 - 262.107

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§262.101. Eligibility Criteria for TxHmL Program Services and CFC Services.

(a) An applicant or individual is eligible for TxHmL Program services if:

(1) the applicant or individual meets the financial eligibility criteria as described in Appendix B of the TxHmL waiver application approved by CMS and available on the HHSC website;

(2) the applicant or individual meets one of the following criteria:

(A) based on a DID and as determined by HHSC in accordance with §262.104 of this subchapter (relating to LOC Determination), the applicant or individual qualifies for an ICF/IID LOC I as defined in §261.238 of this title (relating to ICF/MR Level of Care I Criteria); or

(B) meets the following criteria:

(i) based on a DID and as determined by HHSC in accordance with §262.105 of this subchapter (relating to LON Assignment), qualifies for one of the following levels of care:

(I) an ICF/IID LOC I as defined in §261.238 of this title; or

(II) an ICF/IID LOC VIII as defined in §261.239 of this title (relating to ICF/MR Level of Care VIII Criteria);

(ii) meets one of the following:

(I) resides in a nursing facility immediately before enrolling in the TxHmL Program; or

(II) is at imminent risk of entering a nursing facility as determined by HHSC; and

(iii) is offered TxHmL Program services designated for a member of the reserved capacity group "Individuals with a level of care I or VIII residing in a nursing facility" included in Appendix B of the TxHmL Program waiver application approved by CMS and available on the HHSC website;

(3) the applicant or individual has been assigned an LON in accordance with §262.105 of this subchapter;

(4) the applicant or individual has an IPC cost that does not exceed $17,000;

(5) the applicant or individual is not enrolled in another waiver program and is not receiving a service that may not be received if the individual is enrolled in the TxHmL Program, as identified in the Mutually Exclusive Services table in Appendix I of the TxHmL Handbook available on the HHSC website;

(6) the applicant or individual has chosen, or the applicant's or individual's LAR has chosen, participation in the TxHmL Program over participation in the ICF/IID Program;

(7) the applicant's or individual's service planning team concurs that the TxHmL Program services and, if applicable, non-TxHmL Program services for which the applicant or individual may be eligible are sufficient to ensure the applicant's or individual's health and welfare in the community;

(8) the applicant or individual does not reside in:

(A) a hospital;

(B) an ICF/IID;

(C) a nursing facility;

(D) an assisted living facility licensed or subject to being licensed in accordance with THSC Chapter 247;

(E) a residential child care facility licensed by HHSC unless it is an agency foster home;

(F) an inpatient chemical dependency treatment facility;

(G) a mental health facility;

(H) a residential facility operated by the Texas Workforce Commission; or

(I) a residential facility operated by the Texas Juvenile Justice Department, a jail, or a prison; and

(9) the applicant or individual requires the provision of:

(A) at least one TxHmL Program service per month or a monthly monitoring visit by a service coordinator as described in

§262.701(o) of this chapter (relating to LIDDA Requirements for Providing Service Coordination in the TxHmL Program); and

(B) at least one TxHmL Program service per IPC year.

(b) Except as provided in subsection (c) of this section, an applicant or individual is eligible for a CFC service under this subchapter if the applicant or individual:

(1) meets the criteria described in subsection (a) of this section; and

(2) requires the provision of the CFC service.

(c) To be eligible for a CFC service under this chapter, an applicant or individual receiving MAO Medicaid must, in addition to meeting the eligibility criteria described in subsection (b) of this section, receive a TxHmL Program service at least monthly, as required by 42 CFR §441.510(d), which may not be met by a monthly monitoring visit by a service coordinator as described in §262.701(o)(1) and (2) of this chapter.

§262.102. TxHmL Interest List.

(a) A LIDDA must maintain an up-to-date interest list of applicants interested in receiving TxHmL Program services for whom the LIDDA is the applicant's designated LIDDA in the HHSC data system.

(b) A person may request that an applicant's name be added to the TxHmL interest list by contacting the LIDDA serving the Texas county in which the applicant or person resides.

(c) If a request is made in accordance with subsection (b) of this section for an applicant who resides in Texas, a LIDDA must add the applicant's name to the TxHmL interest list using the date the LIDDA receives the request as the TxHmL interest list date.

(d) For an applicant determined diagnostically or functionally ineligible during the enrollment process for the Community Living Assistance and Support Services (CLASS) Program, Deaf-Blind with Multiple Disabilities (DBMD) Program, or Medically Dependent Children Program (MDCP):

(1) if the applicant's name is not on the TxHmL interest list, at the request of the applicant or LAR, HHSC adds the applicant's name to the TxHmL interest list using the applicant's interest list date for the program for which the applicant was determined ineligible as the TxHmL interest list date;

(2) if the applicant's name is on the TxHmL interest list and the applicant's interest list date for the program for which the applicant was determined ineligible is earlier than the applicant's TxHmL interest list date, at the request of the applicant or LAR, HHSC changes the applicant's TxHmL interest list date to the applicant's interest list date for the program for which the applicant was determined ineligible as the TxHmL interest list date; or

(3) if the applicant's name is on the TxHmL interest list and the applicant's TxHmL interest list date is earlier than the applicant's interest list date for the program for which the applicant was determined ineligible, HHSC does not change the applicant's TxHmL interest list date.

(e) This subsection applies to an applicant who was enrolled in MDCP and, because the individual did not meet the LOC criteria for medical necessity for nursing facility care or did not meet the age requirement of being under 21 years of age, was determined ineligible for MDCP after November 30, 2019.

(1) At the request of the applicant or LAR, HHSC adds the applicant's name to the TxHmL interest list:

(A) using the MDCP interest list date as the TxHmL interest list date, if the applicant's name is not on the TxHmL interest list but it was previously on the TxHmL interest list; or

(B) using the date HHSC receives the request as the TxHmL interest list date, if the applicant's name is not on the TxHmL interest list and it never has been on the TxHmL interest list.

(2) At the request of the applicant or LAR, HHSC changes the TxHmL interest list date to the MDCP interest list date if the applicant's MDCP interest list date is earlier than the applicant's TxHmL interest list date.

(f) HHSC or the LIDDA removes an applicant's name from the TxHmL interest list if:

(1) the applicant or LAR requests in writing that the applicant's name be removed from the TxHmL interest list;

(2) the applicant moves out of Texas, unless the applicant is a military family member living outside of Texas:

(A) while the military member is on active duty; or

(B) for less than one year after the former military member's active duty ends;

(3) the applicant declines an offer of TxHmL Program services or, as described in §262.103(f) of this subchapter (relating to Process for Enrollment of Applicants), an offer of TxHmL Program services is withdrawn, unless the applicant is a military family member living outside of Texas:

(A) while the military member is on active duty; or

(B) for less than one year after the former military member's active duty ends;

(4) the applicant is a military family member living outside of Texas for more than one year after the former military member's active duty ends;

(5) the applicant is deceased; or

(6) HHSC has denied the applicant enrollment in the TxHmL Program and the applicant or LAR has had an opportunity to exercise the applicant's right to appeal the decision in accordance with §262.601 of this chapter (relating to Fair Hearing) and did not appeal the decision, or appealed and did not prevail.

(g) If HHSC or the LIDDA removes an applicant's name from the TxHmL interest list in accordance with subsection (f)(1) - (4) of this section and, within 90 calendar days after the name was removed, the LIDDA receives an oral or written request from a person to add the applicant's name to the TxHmL interest list:

(1) the LIDDA must notify HHSC of the request; and

(2) HHSC:

(A) adds the applicant's name to the TxHmL interest list using the TxHmL interest list date that was in effect at the time the applicant's name was removed from the TxHmL interest list; and

(B) notifies the applicant or LAR in writing that the applicant's name has been added to the TxHmL interest list in accordance with subparagraph (A) of this paragraph.

(h) If HHSC or the LIDDA removes an applicant's name from the TxHmL interest list in accordance with subsection (f)(1)-(4) of this section, the LIDDA receives an oral or written request from a person to add the applicant's name to the TxHmL interest list within 90 calendar days after the name was removed, and the request is the applicant's first request:

(1) the LIDDA must notify HHSC of the request; and

(2) HHSC:

(A) adds the applicant's name to the TxHmL interest list using the TxHmL interest list date that was in effect at the time the applicant's name was removed from the TxHmL interest list; and

(B) notifies the applicant or LAR in writing that the applicant's name has been added to the TxHmL interest list in accordance with subparagraph (A) of this paragraph.

(i) If HHSC or the LIDDA removes an applicant's name from the TxHmL interest list in accordance with subsection (f)(1)-(4) of this section, the LIDDA receives an oral or written request from a person to add the applicant's name to the TxHmL interest list more than 90 calendar days after the name was removed, and the request is the applicant's first request:

(1) one of the following occurs:

(A) the LIDDA adds the applicant's name to the TxHmL interest list using the date the LIDDA receives the oral or written request as the TxHmL interest list date; or

(B) if HHSC determines that extenuating circumstances exist, HHSC adds the applicant's name to the TxHmL interest list using the TxHmL interest list date that was in effect at the time the applicant's name was removed from the TxHmL interest list as the TxHmL interest list date; and

(2) HHSC notifies the applicant or LAR in writing that the applicant's name has been added to the TxHmL interest list in accordance with paragraph (1) of this subsection.

(j) If HHSC or the LIDDA removes an applicant's name from the TxHmL interest list in accordance with subsection (f)(1)-(4) of this section, the LIDDA receives an oral or written request from a person to add the applicant's name to the TxHmL interest list, and the request is not the applicant's first request:

(1) the LIDDA adds the applicant's name to the TxHmL interest list using the date the LIDDA receives the oral or written request as the TxHmL interest list date; and

(2) HHSC notifies the applicant or LAR in writing that the applicant's name has been added to the TxHmL interest list in accordance with paragraph (1) of this subsection.

(k) If HHSC or the LIDDA removes an applicant's name from the TxHmL interest list in accordance with subsection (f)(6) of this section and the LIDDA subsequently receives an oral or written request from a person to add the applicant's name to the TxHmL interest list:

(1) the LIDDA must add the applicant's name to the TxHmL interest list using the date the LIDDA receives the oral or written request as the TxHmL interest list date; and

(2) HHSC notifies the applicant or LAR in writing that the applicant's name has been added to the TxHmL interest list in accordance with paragraph (1) of this subsection.

§262.103. Process for Enrollment of Applicants.

(a) HHSC notifies a LIDDA, in writing, when the opportunity for enrollment in the TxHmL Program becomes available in the LIDDA's local service area and directs the LIDDA to offer enrollment to the applicant:

(1) whose interest list date, assigned in accordance with §262.102 of this subchapter (relating to TxHmL Interest List), is earliest on the statewide interest list for the TxHmL Program as maintained by HHSC;

(2) whose name is not coded in the HHSC data system as having been determined ineligible for the TxHmL Program and who is receiving services from the LIDDA that are funded by general revenue in an amount that would allow HHSC to fund the services through the TxHmL Program; or

(3) who is a member of a target group identified in the approved TxHmL waiver application.

(b) Except as provided in subsection (c) of this section, a LIDDA must offer enrollment in the TxHmL Program in writing and deliver it to the applicant or LAR by United States mail or by hand delivery.

(c) A LIDDA must offer enrollment in the TxHmL Program to an applicant described in subsection (a)(2) or (3) of this section in accordance with HHSC's procedures.

(d) A LIDDA must include in a written offer that is made in accordance with subsection (a)(1) of this section:

(1) a statement that:

(A) if the applicant or LAR does not respond to the offer of enrollment in the TxHmL Program within 30 calendar days after the LIDDA's written offer, the LIDDA withdraws the offer; and

(B) if the applicant is currently receiving services from the LIDDA that are funded by general revenue and the applicant or LAR declines the offer of enrollment in the TxHmL Program, the LIDDA terminates those services that are similar to services provided in the TxHmL Program; and

(2) the HHSC Deadline Notification form, which is available on the HHSC website.

(e) If an applicant or LAR responds to an offer of enrollment in the TxHmL Program, a LIDDA must:

(1) provide the applicant, LAR, and, if the LAR is not a family member, at least one family member (if possible) both an oral and a written explanation of the services and supports for which the applicant may be eligible, including the ICF/IID Program (both state supported living centers and community-based facilities), waiver programs authorized under §1915(c) of the Social Security Act, and other community-based services and supports, using the HHSC Explanation of Services and Supports document which is available on the HHSC website;

(2) provide the applicant and LAR both an oral and a written explanation of all TxHmL Program services and CFC services using the HHSC Understanding Program Eligibility and Services form, which is available on the HHSC website; and

(3) give the applicant or LAR the HHSC Waiver Program Verification of Freedom of Choice form, which is available on the HHSC website to document the applicant's choice between the TxHmL Program or the ICF/IID Program.

(f) A LIDDA must withdraw an offer of enrollment in the TxHmL Program made to an applicant or LAR if:

(1) within 30 calendar days after the LIDDA's offer made to the applicant or LAR in accordance with subsection (a)(1) of this section, the applicant or LAR does not respond to the offer of enrollment in the TxHmL Program;

(2) within seven calendar days after the applicant or LAR receives the HHSC Waiver Program Verification of Freedom of Choice form from the LIDDA in accordance with subsection (e)(3) of this section, the applicant or LAR does not use the form to document the applicant's choice of the TxHmL Program;

(3) within 30 calendar days after the applicant or LAR receives the contact information regarding all available program providers in the LIDDA's local service area in accordance with subsection (k)(2)(A) of this section, the applicant or LAR does not document a choice of a program provider using the HHSC Documentation of Provider Choice form, which is available on the HHSC website;

(4) the applicant or LAR does not complete the necessary activities to finalize the enrollment process and HHSC has approved the withdrawal of the offer; or

(5) the applicant has moved out of the State of Texas.

(g) If a LIDDA withdraws an offer of enrollment in the TxHmL Program made to an applicant, the LIDDA must notify the applicant or LAR of such action, in writing, by certified United States mail.

(h) If an applicant is currently receiving services from a LIDDA that are funded by general revenue and the applicant declines the offer of enrollment in the TxHmL Program, the LIDDA must terminate those services that are similar to services provided in the TxHmL Program.

(i) If a LIDDA terminates an applicant's services in accordance with subsection (h) of this section, the LIDDA must notify the applicant or LAR of the termination, in writing, by certified United States mail and provide an opportunity for a review in accordance with 40 TAC §2.46 (relating to Notification and Appeals Process).

(j) A LIDDA must retain in an applicant's record:

(1) the HHSC Waiver Program Verification of Freedom of Choice form;

(2) the HHSC Documentation of Provider Choice form;

(3) the HHSC Deadline Notification form; and

(4) any correspondence related to the offer of enrollment in the TxHmL Program.

(k) If an applicant or LAR accepts the offer of enrollment in the TxHmL Program, the LIDDA must compile and maintain information necessary to process the applicant's request for enrollment in the TxHmL Program.

(1) The LIDDA must complete an ID/RC Assessment in accordance with §262.104(a)(1) of this subchapter (relating to LOC Determination).

(A) The LIDDA must:

(i) do one of the following:

(I) conduct a DID in accordance with §304.401 of this title (relating to Conducting a Determination of Intellectual Disability) except that the following activities must be conducted in person:

(-a-) a standardized measure of the individual's intellectual functioning using an appropriate test based on the characteristics of the individual; and

(-b-) a standardized measure of the individual's adaptive abilities and deficits reported as the individual's adaptive behavior level; or

(II) review and endorse a DID report in accordance with §304.403 of this title (relating to Review and Endorsement of a Determination of Intellectual Disability Report); and

(ii) determine whether the applicant has been diagnosed by a licensed physician as having a related condition.

(B) The LIDDA must:

(i) conduct an ICAP assessment in person; and

(ii) recommend an LON assignment to HHSC in accordance with §262.105 of this subchapter (relating to LON Assignment).

(C) The LIDDA must enter the information from the completed ID/RC Assessment in the HHSC data system and electronically submit the information to HHSC in accordance with §262.104(a)(2) of this subchapter and §262.105(a) of this subchapter and submit supporting documentation as required by §262.106 of this subchapter (relating to HHSC Review of LON).

(2) The LIDDA must:

(A) provide names and contact information to the applicant or LAR for all program providers in the LIDDA's local service area;

(B) arrange for meetings or visits with potential program providers as requested by the applicant or the LAR; and

(C) ensure that the applicant's or LAR's choice of a program provider is documented on the HHSC Documentation of Provider Choice form and that the form is signed by the applicant or LAR and retained by the LIDDA in the applicant's record.

(3) The LIDDA must assign a service coordinator who, together with other members of the service planning team, must:

(A) develop a PDP; and

(B) if CFC PAS/HAB is included on the PDP, complete the HHSC HCS/TxHmL CFC PAS/HAB Assessment form, which is available on the HHSC website, to determine the number of CFC PAS/HAB hours the applicant needs.

(4) The CFC PAS/HAB assessment form required by paragraph (3)(B) of this subsection must be completed in person with the individual unless the following conditions are met, in which case the form may be completed by videoconferencing or telephone:

(A) the service coordinator gives the individual the opportunity for completing the form in person in lieu of completing it by videoconferencing or telephone and the individual agrees to the form being completed by videoconferencing or telephone; and

(B) the individual receives appropriate in-person support during the completion of the form by videoconferencing or telephone.

(l) A service coordinator must:

(1) in accordance with 40 TAC Chapter 41, Subchapter D (relating to Enrollment, Transfer, Suspension, and Termination):

(A) inform the applicant or LAR of the applicant's right to participate in the CDS option; and

(B) inform the applicant or LAR that the applicant or LAR may choose to have one or more services provided through the CDS option, as described in 40 TAC §41.108 (relating to Services Available Through the CDS Option); and

(2) if the applicant or LAR chooses to participate in the CDS option, comply with §262.701(r) of this chapter (relating to LIDDA Requirements for Providing Service Coordination in the TxHmL Program).

(m) The service coordinator must develop an initial IPC with the applicant or LAR based on the PDP and in accordance with §262.301 of this chapter (relating to IPC Requirements).

(n) If an applicant or LAR chooses to receive a TxHmL Program service or CFC service provided by a program provider, the service coordinator must review the initial IPC with potential program providers as requested by the applicant or the LAR.

(o) A service coordinator must:

(1) ensure that the initial IPC includes a sufficient number of RN nursing units for the program provider's RN to perform a comprehensive nursing assessment, unless:

(A) nursing services are not on the initial IPC and the applicant or LAR and selected program provider have determined that no nursing tasks will be performed by an unlicensed service provider as documented on the HHSC Nursing Task Screening Tool form; or

(B) an unlicensed service provider will perform a nursing task and a physician has delegated the task as a medical act under Texas Occupations Code Chapter 157, as documented by the physician;

(2) if an applicant or LAR refuses to include a sufficient number of RN nursing units on the initial IPC for the program provider's RN to perform a comprehensive nursing assessment as required by paragraph (1) of this subsection:

(A) inform the applicant or LAR that the refusal:

(i) will result in the applicant not receiving nursing services from the program provider; and

(ii) if the applicant needs community support, day habilitation, employment assistance, supported employment, respite, or CFC PAS/HAB from the program provider, will result in the applicant not receiving the service unless:

(I) the program provider's unlicensed service provider does not perform nursing tasks in the provision of the service; and

(II) the program provider determines that it can ensure the applicant's health, safety, and welfare in the provision of the service; and

(B) document the refusal of the RN nursing units on the initial IPC for a comprehensive nursing assessment by the program provider's RN in the applicant's record;

(3) negotiate and finalize the initial IPC and the date services will begin with the selected program provider, consulting with HHSC if necessary to reach agreement with the selected program provider on the content of the initial IPC and the date services will begin;

(4) ensure that the applicant or LAR signs and dates the initial IPC in person, electronically, by fax, or by United States mail;

(5) ensure that the selected program provider signs and dates the initial IPC, demonstrating agreement that the services will be provided to the applicant; and

(6) sign and date the initial IPC to demonstrate that the service coordinator agrees that the requirements described in §262.301(c) of this chapter have been met.

(p) A service coordinator must:

(1) provide an oral and written explanation to the applicant or LAR of the following information using the HHSC Understanding Program Eligibility and Services form, which is available on the HHSC website:

(A) the eligibility requirements for TxHmL Program services as described in §262.101(a) of this subchapter (relating to Eligibility Criteria for TxHmL Program Services and CFC Services); and

(B) if the applicant's PDP includes CFC services:

(i) the eligibility requirements for CFC services as described in §262.101(b) of this subchapter to applicants who do not receive MAO Medicaid; and

(ii) the eligibility requirements for CFC services as described in §262.101(c) of this subchapter to applicants who receive MAO Medicaid; and

(2) provide an oral and written explanation to the applicant or LAR of:

(A) the reasons TxHmL Program services may be terminated as described in §262.507 of this chapter (relating to Termination of TxHmL Program Services and CFC Services with Advance Notice) and §262.508 of this chapter (relating to Termination of TxHmL Program Services and CFC Services without Advance Notice); and

(B) if the applicant's PDP includes CFC services, the reasons CFC services may be terminated as described in §262.507 and §262.508 of this chapter.

(q) After an initial IPC is finalized and signed in accordance with subsection (o) of this section, the LIDDA must:

(1) enter the information from the initial IPC in the HHSC data system and electronically submit the information to HHSC;

(2) keep the original initial IPC in the individual's record;

(3) ensure the information from the initial IPC entered in the HHSC data system and electronically submitted to HHSC contains information identical to the information on the initial IPC; and

(4) submit other required enrollment information to HHSC;

(r) HHSC notifies the applicant or LAR, the selected program provider, the FMSA, if applicable, and the LIDDA of its approval or denial of the applicant's enrollment. If the enrollment is approved, HHSC authorizes the applicant's enrollment in the TxHmL Program through the HHSC data system and issues an enrollment letter to the applicant that includes the effective date of the applicant's enrollment in the TxHmL Program.

(s) The selected program provider and the individual or LAR must develop:

(1) an implementation plan for:

(A) TxHmL Program services, except for community support, that is based on the individual's PDP and initial IPC; and

(B) CFC services, except for CFC support management, that is based on the individual's PDP, IPC, and if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form; and

(2) a transportation plan, if community support is included on the PDP.

(t) Before the applicant's service begin date, a LIDDA must provide to the selected program provider and FMSA, if applicable:

(1) copies of all enrollment documentation and associated supporting documentation, including relevant assessment results and recommendations;

(2) the completed ID/RC Assessment;

(3) the IPC;

(4) the applicant's PDP; and

(5) if CFC PAS/HAB is included on the PDP, a copy of the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form.

(u) In accordance with §262.401(a)(5)(N) of this chapter (relating to Program Provider Reimbursement), if a selected program provider provides services before the date of an applicant's enrollment into the TxHmL Program, HHSC does not pay the program provider for the services.

§262.104. LOC Determination.

(a) A LIDDA must request an LOC from HHSC for an applicant in accordance with this subsection.

(1) The LIDDA must complete an ID/RC Assessment for an applicant that:

(A) includes the LOC recommended by a person qualified to perform an initial evaluation of LOC in accordance with Appendix B of the TxHmL Program waiver application approved by CMS; and

(B) is signed and dated in accordance with the instructions for completing the ID/RC Assessment.

(2) The LIDDA must enter information from the completed ID/RC Assessment in the HHSC data system and electronically submit the information to HHSC.

(3) The LIDDA must ensure that the information entered in the HHSC data system and electronically submitted to HHSC in accordance with paragraph (2) of this subsection is identical to the information on the completed ID/RC Assessment.

(4) The LIDDA must send a copy of the completed ID/RC Assessment and supporting documentation to HHSC, as requested by HHSC.

(b) A LIDDA must request an LOC for an individual from HHSC in accordance with this subsection.

(1) No more than 60 calendar days before the expiration date of an individual's ID/RC Assessment, a LIDDA must:

(A) complete an ID/RC Assessment that:

(i) includes the LOC recommended by a person qualified to perform a reevaluation of LOC in accordance with Appendix B of the TxHmL Program waiver application approved by CMS; and

(ii) is signed and dated in accordance with the instructions for completing the ID/RC Assessment; and

(B) enter information from the completed ID/RC Assessment in the HHSC data system and electronically submit the information to HHSC.

(2) A LIDDA must:

(A) ensure that the information entered in the HHSC data system and electronically submitted to HHSC is identical to the information on the completed ID/RC Assessment;

(B) within three calendar days after entering the information in the HHSC data system and electronically submitting the information to HHSC, provide the program provider with a copy of the completed ID/RC Assessment; and

(C) send a copy of the completed ID/RC Assessment and supporting documentation to HHSC, as requested by HHSC.

(3) If the LIDDA enters information from a completed ID/RC Assessment in the HHSC data system and electronically submits the information to HHSC on a date that is more than 180 calendar days after the expiration date of the previous ID/RC Assessment, the LIDDA must:

(A) send to HHSC a copy of the completed ID/RC Assessment by a method, as instructed by HHSC, that:

(i) includes the recommended LOC; and

(ii) is signed and dated in accordance with the instructions for completing the ID/RC Assessment;

(B) within three calendar days after sending the completed ID/RC Assessment to HHSC, provide the program provider with a copy of the completed ID/RC Assessment; and

(C) submit documentation supporting the ID/RC Assessment to HHSC, as requested by HHSC.

(c) Information on an ID/RC Assessment must be supported by current data obtained from standardized evaluations and formal assessments that measure physical, emotional, social, and cognitive factors. A LIDDA must maintain the signed and dated ID/RC Assessment and documentation supporting the recommended LOC in an applicant's or individual's record.

(d) When HHSC receives a request for an LOC in accordance with subsection (a) or (b) of this section, HHSC determines if an applicant or individual qualifies for an LOC required by §262.101(a)(2) of this subchapter (relating to Eligibility Criteria for TxHmL Program Services and CFC Services).

(e) HHSC approves an LOC or sends a written notification:

(1) to the applicant, individual, or LAR that the applicant or individual is not eligible for TxHmL Program services or CFC services and provides the applicant, individual, or LAR with an opportunity to request a fair hearing in accordance with §262.601 of this chapter (relating to Fair Hearing);

(2) to the LIDDA that the LOC has been denied; and

(3) to the program provider using the HHSC data system that the LOC has been denied, if the applicant has selected a program provider or an individual is receiving services from a program provider.

(f) An LOC determination is valid for a period of time as described in this subsection.

(1) Except as provided in paragraph (2) of this subsection, an LOC determination is valid for a 365-calendar day period starting on the begin date of the ID/RC Assessment.

(2) If the begin date of the ID/RC Assessment is March 1 or later in a year before a leap year or January 1 - February 28 of a leap year, the LOC determination is valid for a 366-calendar day period starting on the begin date of the ID/RC Assessment.

(g) An ID/RC Assessment submitted in accordance with subsection (b) of this section is effective on the date after the individual's previous ID/RC Assessment expires.

§262.105. LON Assignment.

(a) A LIDDA must request that HHSC assign an LON for an applicant or individual by entering the information from the completed ID/RC Assessment in the HHSC data system and electronically submitting the information to HHSC that includes the recommended LON and, as appropriate, submitting supporting documentation in accordance with §262.106(b) of this subchapter (relating to HHSC Review of LON). The electronically submitted ID/RC Assessment must con-

tain information identical to the information on the signed and dated ID/RC Assessment.

(b) A LIDDA must, in accordance with §262.106(a) of this subchapter, submit supporting documentation to HHSC as requested by HHSC for a review of a recommended or assigned LON.

(c) A LIDDA must maintain the applicant's or individual's ICAP assessment booklet supporting the recommended LON in the applicant's or individual's record and other documentation supporting the requested LON, including:

(1) the individual's PDP, including the deliberations and conclusions of the applicant's or individual's service planning team;

(2) assessments and interventions by qualified professionals; and

(3) behavior support plans.

(d) If a pervasive plus LON (LON 9) is recommended, a LIDDA must maintain documentation that proves:

(1) the applicant or individual exhibits extremely dangerous behavior that could be life threatening to the applicant or individual or to others;

(2) a written behavior support plan has been implemented that meets HHSC guidelines and is based on ongoing written data, targets the extremely dangerous behavior with individualized objectives, and specifies intervention procedures to be followed when the extremely dangerous behavior occurs;

(3) management of the applicant's or individual's behavior requires a person to exclusively and constantly supervise the individual during the individual's waking hours, which must be at least 16 hours per day;

(4) the person supervising the individual has no other duties or activities during the period of supervision; and

(5) the individual's ID/RC Assessment is correctly scored with a "2" in the **Behavior** section.

(e) HHSC assigns an LON for an individual based on the individual's ICAP service level score, information reported on the individual's ID/RC Assessment, and required supporting documentation.

(f) A LIDDA must submit documentation supporting a recommended LON to HHSC in accordance with HHSC instructions regarding LON packet submission available on the HHSC website.

(g) HHSC assigns one of five LONs as follows:

(1) an intermittent LON (LON 1) is assigned if the individual's ICAP service level score equals 7, 8, or 9;

(2) a limited LON (LON 5) is assigned if the individual's ICAP service level score equals 4, 5, or 6;

(3) an extensive LON (LON 8) is assigned if the individual's ICAP service level score equals 2 or 3;

(4) a pervasive LON (LON 6) is assigned if the individual's ICAP service level score equals 1; and

(5) regardless of an individual's ICAP service level score, an LON 9 is assigned if the individual meets the criteria set forth in subsection (i) of this section.

(h) An LON 1, 5, or 8, determined in accordance with subsection (g) of this section, is increased to the next LON by HHSC, due to an individual's dangerous behavior, if supporting documentation submitted to HHSC proves that:

(1) the individual exhibits dangerous behavior that could cause serious physical injury to the individual or others;

(2) a written behavior support plan has been implemented that meets HHSC guidelines and is based on ongoing written data, targets the dangerous behavior with individualized objectives, and specifies intervention procedures to be followed when the behavior occurs;

(3) more service providers are needed and available than would be needed if the individual did not exhibit dangerous behavior;

(4) service providers are constantly prepared to physically prevent the dangerous behavior or intervene when the behavior occurs; and

(5) the individual's ID/RC Assessment is correctly scored with a "1" in the "Behavior" section.

(i) HHSC assigns an LON 9 if supporting documentation submitted to HHSC proves that:

(1) the individual exhibits extremely dangerous behavior that could be life threatening to the individual or to others;

(2) a written behavior support plan has been implemented that meets HHSC guidelines and is based on ongoing written data, targets the extremely dangerous behavior with individualized objectives, and specifies intervention procedures to be followed when the behavior occurs;

(3) management of the individual's behavior requires a service provider to exclusively and constantly supervise the individual during the individual's waking hours, which must be at least 16 hours per day;

(4) the service provider assigned to supervise the individual has no other duties during such assignment; and

(5) the individual's ID/RC Assessment is correctly scored with a "2" in the "Behavior" section.

(j) A service coordinator must conduct an ICAP assessment in accordance with this subsection.

(1) A service coordinator must conduct an ICAP assessment of an individual:

(A) within three years after the individual's enrollment and every third year thereafter;

(B) if changes in the individual's functional skills or behavior occur that are not expected to be of short duration or cyclical in nature; or

(C) if the individual's skills and behavior are inconsistent with the individual's assigned LON.

(2) If the results of an ICAP assessment demonstrate that the individual's LON assignment may not be accurate, the service coordinator must submit a completed ID/RC Assessment to HHSC recommending a revision of the individual's LON assignment.

(k) A LIDDA must retain in the individual's record results and recommendations of individualized assessments and other pertinent records documenting the recommended LON assignment.

§262.106. HHSC Review of LON.

(a) HHSC may review a recommended or assigned LON at any time to determine if it is appropriate. If HHSC reviews an LON, a LIDDA must submit documentation supporting the LON to HHSC in accordance with HHSC's request. Based on its review, HHSC may modify an LON.

(b) Documentation supporting a recommended LON must be submitted by the LIDDA and received by HHSC within seven calendar days after the LIDDA has entered the information from the completed ID/RC Assessment in the HHSC data system and electronically submitted the information to HHSC.

(c) Within 21 calendar days after receiving the supporting documentation, HHSC:

(1) requests additional documentation;

(2) electronically approves the recommended LON and establishes the effective date; or

(3) sends written notification that the recommended LON has been denied.

(d) HHSC reviews any additional documentation submitted in accordance with HHSC request and electronically approves the recommended LON or sends written notification to the LIDDA that the recommended LON has been denied.

§262.107. Reconsideration of LON Assignment.

(a) A LIDDA may request that HHSC reconsider an LON assignment.

(b) A LIDDA may receive reconsideration only if the LIDDA submitted documentation supporting the recommended LON as required by §262.106(b) of this subchapter (relating to HHSC Review of LON).

(c) To request reconsideration of an LON assignment, the LIDDA must submit a written request for reconsideration to HHSC within 10 calendar days after receipt of the notification from HHSC that the recommended LON was denied. A LIDDA may send HHSC documentation, in addition to that required by §262.106(b) of this subchapter, to support the request for reconsideration of an LON assignment.

(d) Within 21 calendar days after receipt of a request for reconsideration, HHSC electronically approves the recommended LON or sends written notification that the recommended LON has been denied to the service coordinator.

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 31, 2022.

TRD-202203396
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 428-1929

♦ ♦ ♦

SUBCHAPTER C. PERSON-CENTERED PLANNING AND SERVICE SETTINGS

26 TAC §262.201, §262.202

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§262.201. Person-Centered Planning Process.

(a) Person-centered planning is a process that empowers an applicant or individual to plan the applicant's or individual's services and supports to achieve desired outcomes.

(b) The service coordinator and program provider must ensure the person-centered planning process is led by an individual to the maximum extent possible. An individual's LAR has a participatory role, as needed and as defined by the individual, unless State law confers decision-making authority to the LAR.

(c) The person-centered planning process must be used to develop a PDP, implementation plan, initial IPC, renewal IPC, revised IPC, service backup plan, and transportation plan.

(d) The person-centered planning process must:

(1) include people chosen by an applicant, individual, or LAR;

(2) provide the information and support the applicant or individual needs to lead the planning process and make informed choices and decisions;

(3) occur at a time and location convenient to the applicant or individual and LAR;

(4) consider the applicant's or individual's cultural preferences;

(5) provide information in plain language to the applicant or individual in a manner that is accessible to:

(A) the applicant or individual through the provision of an auxiliary aid at no cost to the applicant or individual in accordance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act; and

(B) the applicant or individual with limited English proficiency through the provision of language services at no cost to the applicant or individual, including oral interpretation and written translations;

(6) use strategies for solving conflict or disagreement within the person-centered planning process;

(7) provide information to the individual or LAR to allow the individual or LAR to make informed decisions including:

(A) a written and oral description of the services available in the TxHmL Program; and

(B) the name and qualifications of the individual's service providers in writing; and

(8) inform the individual or LAR that the individual or LAR may request revisions to the PDP, implementation plan, initial IPC, renewal IPC, revised IPC, service backup plan, and transportation plan at any time by communicating the request to the service coordinator or the program provider.

(e) A program provider must participate in a service planning team meeting if requested by the individual or LAR.

§262.202. Requirements for Service Settings.

(a) A program provider must ensure that a setting in which an individual receives a TxHmL Program service or a CFC service:

(1) is based on the needs and preferences of the individual as documented in the individual's PDP;

(2) is integrated in and supports the individual's access to the greater community to the same degree as a person not enrolled in a Medicaid waiver program, including opportunities for the individual:

(A) to seek employment and work in a competitive integrated setting;

(B) engage in community life; and

(C) control personal resources;

(3) ensures the individual's rights of privacy, dignity and respect, and freedom from coercion and restraint; and

(4) optimizes, not regiments, individual initiative, autonomy, and independence in making life choices, including choices regarding daily activities, physical environment, and with whom to interact.

(b) Except as provided in subsection (c) of this section, a program provider must ensure that TxHmL Program services and CFC services are not provided in a setting that is presumed to have the qualities of an institution. A setting is presumed to have the qualities of an institution if the setting:

(1) is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment;

(2) is located in a building on the grounds of, or immediately adjacent to, a public institution; or

(3) has the effect of isolating individuals from the broader community of persons not receiving Medicaid HCBS.

(c) A program provider may provide a TxHmL Program service or a CFC service to an individual in a setting that is presumed to have the qualities of an institution as described in subsection (b) of this section, if CMS determines through a heightened scrutiny review that the setting:

(1) does not have the qualities of an institution; and

(2) does have the qualities of home and community-based settings.

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 31, 2022.

TRD-202203397
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER D. DEVELOPMENT AND REVIEW OF AN IPC

26 TAC §§262.301 - 262.304

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§262.301. IPC Requirements.

(a) An IPC must be based on the PDP and specify:

(1) the type and amount of each TxHmL Program service and CFC service to be provided to the individual during an IPC year;

(2) the services and supports to be provided to the individual through resources other than TxHmL Program services or CFC services during an IPC year, including natural supports, medical services, day activity, and educational services;

(3) if an individual will receive CFC support management; and

(4) if there are any TxHmL Program services or CFC services identified on the PDP as critical, requiring a service backup plan.

(b) If an applicant's or individual's IPC includes only CFC PAS/HAB to be delivered through the CDS option, a service coordinator must include in the IPC:

(1) CFC FMS instead of FMS; and

(2) if the applicant or individual will receive support consultation, CFC support consultation instead of support consultation.

(c) The type and amount of each TxHmL Program service and CFC service in an IPC:

(1) must be necessary to protect the individual's health and welfare in the community;

(2) must not be available to the individual through any other source, including the Medicaid State Plan, other governmental programs, private insurance, or the individual's natural supports;

(3) must be the most appropriate type and amount to meet the individual's needs;

(4) must be cost effective;

(5) must be necessary to enable community integration and maximize independence;

(6) if an adaptive aid or minor home modification, must:

(A) be included on HHSC's approved list in the TxHmL Program Billing Requirements; and

(B) be within the service limit described in §262.304 of this subchapter (relating to Service Limits);

(7) if an adaptive aid costing $500 or more, must be supported by a written assessment from a licensed professional specified by HHSC in the TxHmL Program Billing Requirements;

(8) if a minor home modification costing $1,000 or more, must be supported by a written assessment from a licensed professional specified by HHSC in the TxHmL Program Billing Requirements;

(9) if dental treatment, must be within the service limit described in §262.304 of this subchapter; and

(10) if CFC PAS/HAB, must be supported by the HHSC HCS/TxHmL CFC PAS/HAB Assessment form.

§262.302. Renewal and Revision of an Individual's IPC

(a) Renewal and Revision of an IPC. At least annually, and before the expiration of an individual's IPC, the individual's IPC must be renewed and revised in accordance with this subsection and HHSC's instructions.

(1) At least 30 but no more than 90 calendar days before the expiration of an individual's IPC, the service coordinator must:

(A) notify the service planning team that the individual's PDP must be reviewed and updated;

(B) convene a meeting with the service planning team to:

(i) review and update the individual's PDP and develop a renewal IPC; and

(ii) if CFC PAS/HAB is included on the PDP, complete the HHSC HCS/TxHmL CFC PAS/HAB Assessment form to determine the number of CFC PAS/HAB hours the individual needs;

(C) ensure the individual or LAR signs the finalized PDP; and

(D) use the HHSC Understanding Program Eligibility and Services form to provide an individual or LAR both an oral and a written explanation of:

(i) the eligibility requirements for the TxHmL Program as described in §262.101(a) of this chapter (relating to Eligibility Criteria for TxHmL Program Services and CFC Services);

(ii) if the individual's PDP includes CFC services:

(I) the eligibility requirements for CFC services as described in §262.101(b) of this chapter to individuals who do not receive MAO Medicaid; and

(II) the eligibility requirements for CFC services as described in §262.101(c) of this chapter to individuals who receive MAO Medicaid;

(iii) all TxHmL Program services as described in §262.5 of this chapter (relating to Description of TxHmL Program Services) and all CFC services as described in §262.6 of this chapter (relating to Description of CFC Services);

(iv) the reasons TxHmL Program services may be terminated as described in §262.507 of this chapter (relating to Termination of TxHmL Program Services and CFC Services with Advance Notice) and §262.508 of this chapter (relating to Termination of TxHmL Program Services and CFC Services without advance notice) or suspended as described in §262.505 of this chapter (relating to Suspension of TxHmL Program Services and CFC Services); and

(v) if the individual's PDP includes CFC services, the reasons CFC services may be terminated as described §262.507 of this chapter and §262.508 of this chapter or suspended as described in §262.505 of this chapter.

(2) The HHSC HCS/TxHmL CFC PAS/HAB Assessment form required by paragraph (1)(B)(ii) of this subsection must be completed in person with the individual unless the following conditions are met, in which case the form may be completed by videoconferencing or telephone:

(A) the service coordinator gives the individual the opportunity for completing the form in person in lieu of completing it by videoconferencing or telephone and the individual agrees to the form being completed by videoconferencing or telephone; and

(B) the individual receives appropriate in-person support during the completion of the form by videoconferencing or telephone.

(3) The service coordinator must convene a meeting with the service planning team to develop a revised IPC and update the PDP if:

(A) a new service is being added to or a current service is being removed from the IPC; or

(B) the amount of a service is being increased or decreased and requires the addition of, removal of, or a change to an outcome in the PDP.

(4) The service coordinator must ensure that the updated finalized PDP is signed by the individual or LAR.

(5) If the amount of an existing service on an IPC is being increased or decreased or a requisition fee is added or removed and the addition of, removal of, or a change to an outcome in the PDP is not required, the service coordinator is not required to convene a meeting with the service planning team to develop a revised IPC, but must document the reasons for the revised IPC.

(6) A service coordinator must:

(A) sign and date the renewal or revised IPC;

(B) ensure that the individual or LAR signs and dates the renewal or revised IPC in person, electronically, by fax, or by United States mail;

(C) ensure that the program provider signs and dates the renewal or revised IPC demonstrating agreement that the services will be provided to the individual;

(D) after the renewal or revised IPC is signed and dated, enter information from the renewal or revised IPC in the HHSC data system and electronically submit the information to HHSC;

(E) ensure that the information entered in the HHSC data system and electronically submitted to HHSC is identical to the information on the original signed and dated renewal or revised IPC; and

(F) keep the original signed and dated renewal or revised IPC in the individual's record.

(7) The service coordinator, within 10 calendar days after the PDP is updated, must send a copy of the following to the program provider, the individual or LAR, and, if applicable, the FMSA:

(A) the updated PDP;

(B) the renewal or revised IPC; and

(C) if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form.

(8) The program provider must convene a meeting with the individual or LAR to develop, before the effective date of the renewal IPC or revised IPC:

(A) an implementation plan for:

(i) TxHmL Program services, except for community support, that is based on the individual's PDP and renewal IPC; and

(ii) CFC services, except for CFC support management, that is based on the individual's PDP, and renewal or revised IPC, and if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form; and

(B) a transportation plan, if community support is included on the PDP.

(b) If an individual or LAR requests support management during an IPC year, the service coordinator must revise the IPC as described in subsection (a)(3) of this section.

§262.303. HHSC Review of an IPC.

(a) HHSC may review an IPC to determine if:

(1) the type and amount of TxHmL Program services and CFC services specified in the IPC meet the requirements described in §262.301 of this subchapter (relating to IPC Requirements); and

(2) the IPC exceeds the cost limit as described in §262.101(a)(4) of this chapter (relating to Eligibility Criteria for TxHmL Program Services and CFC Services).

(b) If requested by HHSC for an IPC review described in subsection (a) of this section, a LIDDA must submit documentation supporting the IPC to HHSC.

(c) Based on a review of an IPC, HHSC may deny or reduce an TxHmL Program service or a CFC service in accordance with §262.504 of this chapter (relating to Denial of TxHmL Program Services or CFC Services) and §262.506 of this chapter (relating to Reduction of TxHmL Program Services or CFC Services).

§262.304. Service Limits.

(a) The following limits apply to an individual's TxHmL Program services:

(1) for adaptive aids, $10,000 during an IPC year;

(2) for dental treatment, $1,000 during an IPC year;

(3) for minor home modifications:

(A) $7,500 during the time the individual is enrolled in the TxHmL Program, which may be paid in one or more IPC years; and

(B) a maximum of $300 for repair and maintenance during the IPC year; and

(4) for day habilitation and in-home day habilitation combined, 260 units during an IPC year.

(b) A program provider may request, in accordance with the TxHmL Program Billing Requirements, authorization of a requisition fee:

(1) for an adaptive aid that is in addition to the $10,000 service limit described in subsection (a)(1) of this section;

(2) for dental treatment that is in addition to the $1,000 service limit described in subsection (a)(2) of this section; or

(3) for a minor home modification that is in addition to the $7,500 service limit described in subsection (a)(3)(A) of this section.

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 31, 2022.

TRD-202203398
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER E. REIMBURSEMENT BY HHSC

26 TAC §262.401

STATUTORY AUTHORITY

The new section 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§262.401. Program Provider Reimbursement.

(a) Program provider reimbursement.

(1) HHSC pays a program provider for services as described in this paragraph.

(A) HHSC pays for community support, nursing, in-home respite, respite, day habilitation, in-home day habilitation, employment assistance, supported employment, professional therapies, and CFC PAS/HAB in accordance with the reimbursement rate for the specific service.

(B) HHSC pays for adaptive aids, minor home modifications, and dental treatment based on the actual cost of the item or service and, if requested, a requisition fee in accordance with the TxHmL Program Billing Requirements available on the HHSC website.

(C) HHSC pays for CFC ERS based on the actual cost of the service not to exceed the reimbursement rate ceiling for CFC ERS.

(2) To be paid for the provision of a service, a program provider must submit a service claim that meets the requirements in 40 TAC §49.311 (relating to Claims Payment) and the TxHmL Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers.

(3) If an individual's TxHmL Program services or CFC services are suspended or terminated, a program provider must not submit a claim for services provided during the period of the individual's suspension or after the termination except the program provider may submit a claim for a service provided on the first calendar day of the suspension or termination.

(4) If a program provider submits a claim for an adaptive aid that costs $500 or more or for a minor home modification that costs $1,000 or more, the claim must be supported by a written assessment from a licensed professional specified by HHSC in the TxHmL Program Billing Requirements and other documentation as required by the TxHmL Program Billing Requirements.

(5) HHSC does not pay a program provider for a service or recoups any payments made to the program provider for a service if:

(A) the individual receiving the service was, at the time the service was provided, ineligible for the TxHmL Program or Medicaid benefits, or was an inpatient of a hospital, nursing facility, or ICF/IID;

(B) the service was not included on the signed and dated IPC of the individual in effect at the time the service was provided;

(C) the service was not provided in accordance with the TxHmL Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers;

(D) the service was not documented in accordance with the TxHmL Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers;

(E) the program provider does not comply with 40 TAC §49.305 (relating to Records);

(F) the claim for the service was not prepared and submitted in accordance with the TxHmL Program Billing Requirements or the CFC Billing Requirements Guidelines for HCS and TxHmL Program Providers;

(G) the program provider does not have the documentation described in subsection (a)(4) of this section;

(H) before including employment assistance on an individual's IPC, the program provider does not ensure and maintain documentation in the individual's record that employment assistance is not available to the individual under a program funded under §110 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §701 *et seq.*) or under a program funded under the Individuals with Disabilities Education Act (20 U.S.C. §1401 *et seq.*);

(I) before including supported employment on an individual's IPC, the program provider does not ensure and maintain documentation in the individual's record that supported employment is not available to the individual under a program funded under the Individuals with Disabilities Education Act (20 U.S.C. §1401 *et seq.*);

(J) HHSC determines that the service would have been paid for by a source other than the TxHmL Program;

(K) the service was provided by a service provider who did not meet the qualifications to provide the service as described in the TxHmL Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers;

(L) the service was not provided in accordance with a signed and dated IPC meeting the requirements set forth in §262.301 of this subchapter (relating to IPC Requirements);

(M) the service was not provided in accordance with the PDP or the implementation plan;

(N) the service was provided before the individual's date of enrollment into the TxHmL Program;

(O) for community support, the service is not provided in accordance with a transportation plan and §262.5(a)(16) of this chapter (relating to Description of TxHmL Program Services);

(P) the service was not provided; or

(Q) for CFC PAS/HAB, in-home day habilitation, and in-home respite, if the service claim for the service does not match the EVV visit transaction as required by 1 TAC §354.4009(a)(4) (relating to Requirements for Claims Submission and Approval).

(6) A program provider must refund to HHSC any overpayment made to the program provider within 60 days after the program provider's discovery of the overpayment or receipt of a notice of such discovery from HHSC, whichever is earlier.

(7) Except as provided in paragraph (8) of this subsection, if HHSC approves an LOC requested in accordance with §262.104(b)(3) of this chapter (relating to LOC Determination), HHSC pays a program provider for services provided to an individual for a period of not more than 180 calendar days after the individual's previous ID/RC Assessment expires.

(8) If HHSC determines that an ID/RC Assessment was submitted more than 180 calendar days after the expiration date of the previous ID/RC Assessment because of circumstances beyond a program provider's control, HHSC may pay the program provider for a period of more than 180 calendar days after the individual's previous ID/RC Assessment expires.

(9) HHSC does not withhold payments to a program provider if a LIDDA fails to enter information from an individual's renewal IPC and the program provider continues to provide services in accordance with the most recent IPC authorized by HHSC.

(b) Provider fiscal compliance reviews.

(1) HHSC conducts provider fiscal compliance reviews to determine a program provider is in compliance with:

(A) this chapter;

(B) the TxHmL Program Billing Requirements;

(C) the CFC Billing Requirements for HCS and TxHmL Program Providers;

(D) 40 TAC Chapter 49, Subchapter C; and

(E) the program provider's Community Services Contract-Provider Agreement.

(2) HHSC conducts provider fiscal compliance reviews in accordance with the Provider Fiscal Compliance Review Protocol set forth in the TxHmL Program Billing Requirements and the CFC Billing Requirements for HCS and TxHmL Program Providers. As a result of a provider fiscal compliance review, HHSC may:

(A) recoup payments from a program provider; and

(B) based on the amount of unverified claims, require a program provider to develop and submit, in accordance with HHSC's instructions, a corrective action plan that improves the program provider's billing practices.

(3) A corrective action plan required by HHSC in accordance with paragraph (2)(B) of this subsection must:

(A) include:

(i) the reason the corrective action plan is required;

(ii) the corrective action to be taken;

(iii) the person responsible for taking each corrective action; and

(iv) a date by which the corrective action will be completed that is no later than 90 calendar days after the date the program provider is notified the corrective action plan is required;

(B) be submitted to HHSC within 30 calendar days after the date the program provider is notified the corrective action plan is required; and

(C) be approved by HHSC before implementation.

(4) Within 30 calendar days after HHSC receives a corrective action plan, HHSC notifies the program provider if HHSC approved the corrective action plan or if the plan requires changes.

(5) If HHSC requires a program provider to develop and submit a corrective action plan in accordance with paragraph (2)(B) of this subsection and the program provider requests an administrative hearing for the recoupment in accordance with §262.602 of this chap-

ter (relating to Program Provider's Right to Administrative Hearing), the program provider is not required to develop or submit a corrective action plan while a hearing decision is pending. HHSC notifies the program provider if the requirement to submit a corrective action plan or the content of such a plan changes based on the outcome of the hearing.

(6) If a program provider does not submit a corrective action plan or complete a required corrective action within the time frames described in paragraph (3) of this subsection, HHSC may impose a vendor hold on payments due to the program provider until the program provider takes the corrective action.

(7) If a program provider does not submit a corrective action plan or complete a required corrective action within 30 calendar days after the date a vendor hold is imposed in accordance with paragraph (6) of this subsection, HHSC may terminate the contract.

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 31, 2022.

TRD-202203399
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER F. TRANSFERS, DENIALS, SUSPENSIONS, REDUCTION AND TERMINATION

26 TAC §§262.501 - 262.508

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§262.501. Process for Individual to Transfer to a Different Program Provider or FMSA.

(a) If a service coordinator receives information that an individual or LAR wants to transfer to a different program provider or FMSA, the service coordinator must:

(1) document the date the information was received in the individual's record;

(2) if the information was received by a person other than the individual or LAR, within three business days after the information was received:

(A) contact the individual or LAR to confirm whether the individual wants to transfer to a different program provider or FMSA; and

(B) if the service coordinator confirms that the individual or LAR wants to transfer, document such confirmation in the individual's record; and

(3) within three business days after confirming that the individual or LAR wants to transfer:

(A) explain to the individual or LAR that the individual may transfer to a program provider or FMSA of the individual's or LAR's choice whose enrollment has not reached its service capacity in the HHSC data system; and

(B) provide the individual or LAR the names and contact information of all program providers or FMSAs in the geographic location preferred by the individual or LAR.

(b) After the individual or LAR selects a different program provider or FMSA, the service coordinator must coordinate with the individual, LAR, the transferring program provider or FMSA and the receiving program provider or FMSA to determine a transfer effective date that is:

(1) not earlier than the date of the meeting described in subsection (c)(2) of this section; and

(2) agreed to by the service coordinator, the individual or LAR, and the receiving program provider.

(c) On or before the transfer effective date, the service coordinator must:

(1) take action to complete the HHSC Request for Transfer of Waiver Program Services form in accordance with the TxHmL Handbook;

(2) convene a meeting with the individual or LAR and the receiving program provider or receiving FMSA to develop a transfer IPC;

(3) send the individual's IPC, ID/RC Assessment, and PDP to the receiving program provider or the receiving FMSA;

(4) if the individual is transferring to a different program provider, request the following records of the individual from the transferring program provider;

(A) pertinent medication records and medical information;

(B) Medicaid card;

(C) Medicare information, if applicable;

(D) the ICAP assessment booklet and computer scoring sheet;

(E) trust fund/financial records and any money due the individual;

(F) behavior support plan, if applicable;

(G) guardianship information, if applicable; and

(H) any other pertinent information to ensure health and safety or continuity of services;

(5) within two business days after receipt of the records requested in accordance with paragraph (4) of this subsection, send the records to the receiving program provider; and

(6) if, within three business days after requesting that the program provider provide records as described in paragraph (4) of this subsection, the service coordinator does not receive all of the records requested, notify HHSC that the records were not received.

(d) Within 10 business days after the transfer effective date, the service coordinator must:

(1) complete data entry into the HHSC data system in accordance with the TxHmL Handbook after the activities described in subsection (c) of this section are completed; and

(2) send the transfer IPC and HHSC Request for Transfer of Waiver Program Services form to HHSC.

§262.502. Process for Individual to Receive a Service Through the CDS Option that the Individual is Receiving from a Program Provider.

(a) If a service coordinator receives information that an individual or LAR wants to receive a service through the CDS option that the individual is receiving from a program provider, the service coordinator must:

(1) document the date the information was received in the individual's record;

(2) if the information was received by a person other than the individual or LAR, within three business days after the information was received:

(A) contact the individual or LAR to confirm whether the individual wants to receive a service through the CDS option that the individual is receiving from a program provider; and

(B) if the service coordinator confirms that the individual or LAR wants to receive a service through the CDS option that the individual is receiving from a program provider, document such confirmation in the individual's record; and

(3) within three business days after confirming that the individual or LAR wants to receive a service through the CDS option that the individual is receiving from a program provider:

(A) explain to the individual or LAR that the individual may select an FMSA of the individual's or LAR's choice; and

(B) provide the individual or LAR the names and contact information of all FMSAs in the geographic location preferred by the individual or LAR.

(b) After the individual or LAR selects a FMSA, the service coordinator must coordinate with the individual, LAR, the transferring program provider and the receiving FMSA to determine a transfer effective date that is:

(1) not earlier than the date of the meeting described in subsection (c)(2) of this section; and

(2) agreed to by the service coordinator, the individual or LAR, and the receiving FMSA.

(c) On or before the transfer effective date, the service coordinator must:

(1) take action to complete HHSC Request for Transfer of Waiver Program Services form in accordance with the TxHmL Handbook;

(2) convene a meeting with the individual or LAR to develop a transfer IPC; and

(3) send the individual's IPC to the receiving FMSA and obtain the signature of the receiving FMSA on the IPC and Request for Transfer of Waiver Program Services form.

(d) Within 10 business days after the transfer effective date, the service coordinator must:

(1) complete data entry in the HHSC data system in accordance with the TxHmL Handbook after the activities described in subsection (c) of this section are completed; and

(2) send the transfer IPC and HHSC Request for Transfer of Waiver Program Services form to HHSC.

§262.503. Denial of a Request for Enrollment into the TxHmL Program.

(a) HHSC denies an individual's request for enrollment into the TxHmL Program if the individual does not meet the eligibility criteria described in §262.101 of this chapter (relating to Eligibility Criteria for TxHmL Program Services and CFC Services).

(b) If HHSC denies an individual's request for enrollment, HHSC sends written notice to the individual or LAR of the denial of the individual's request for enrollment into the TxHmL Program and includes in the notice the individual's right to request a fair hearing in accordance with §262.601 of this chapter (relating to Fair Hearing).

(c) HHSC sends a copy of the written notice to the individual's service coordinator and the program provider.

§262.504. Denial of TxHmL Program Services or CFC Services.

(a) HHSC denies a TxHmL Program service or CFC service on an individual's IPC, based on a review described in §262.303 of this chapter (relating to HHSC Review of an IPC) or §262.302 of this chapter (relating to Renewal and Revision of an Individual's IPC), if HHSC determines that the TxHmL Program service or CFC service does not meet the requirements described in §262.301(c) of this chapter (relating to IPC Requirements).

(b) If HHSC denies a TxHmL Program service or CFC service on the individual's IPC, HHSC:

(1) modifies the IPC in the HHSC data system; and

(2) sends written notice to the individual or LAR of the denial of the service and includes in the notice the individual's right to request a fair hearing in accordance with §262.601 of this chapter (relating to Fair Hearing).

(c) HHSC sends a copy of the written notice to the individual's service coordinator and the program provider.

§262.505. Suspension of TxHmL Program Services and CFC Services.

(a) HHSC suspends an individual's TxHmL Program services or CFC services if the individual is under a temporary admission to one of the following facilities:

(1) a hospital;

(2) an ICF/IID;

(3) a nursing facility;

(4) an assisted living facility licensed in accordance with Texas Health and Safety Code Chapter 247, Assisted Living Facilities;

(5) a residential child care facility licensed by HHSC unless it is an agency foster home;

(6) an inpatient chemical dependency treatment facility;

(7) a mental health facility;

(8) a residential facility operated by the Texas Workforce Commission; or

(9) a residential facility operated by the Texas Juvenile Justice Department, a jail, or a prison.

(b) If a service coordinator becomes aware that an individual who is receiving a service from a program provider is under a temporary admission, the service coordinator must, within one business day after becoming aware of the temporary admission, notify the individual's program provider of the temporary admission.

(c) If a program provider becomes aware that an individual is under a temporary admission, the program provider must, within one business day after becoming aware of the temporary admission, enter a suspension of the individual's TxHmL Program services and CFC services in the HHSC data system.

(d) If a program provider enters a suspension of the individual's TxHmL Program services and CFC services in the HHSC data system, the program provider must notify the individual's service coordinator of the suspension within one business day after the suspension is entered in the system.

(e) During a temporary admission, an individual is not considered to be residing in the facility.

(f) If an individual's program services are suspended, the service coordinator must, at least every 30 calendar days after the effective date of the suspension, review the individual's circumstances and document in the individual's record:

(1) the reasons for continuing the suspension if the individual is likely to remain in the facility;

(2) whether the individual anticipates resuming participation in the TxHmL Program after the suspension ends; and

(3) the anticipated date the individual will be discharged from the facility, if the individual is not likely to remain in the facility.

(g) If a service coordinator determines that an individual's suspension should be extended, the service coordinator must request that HHSC extend the suspension by completing and submitting the HHSC Request to Continue Suspension of Waiver Program Services form to HHSC before:

(1) the end of the first 270 calendar days of the temporary admission; or

(2) the end of a 30 calendar-day extension previously granted by HHSC.

(h) HHSC may extend an individual's suspension for 30 calendar days based on a service coordinator's request as described in subsection (g) of this section.

(i) A program provider must remove the entry of a suspension of the individual's TxHmL Program services and CFC services from the HHSC data system and resume the provision of services to the individual if the program provider becomes aware that the individual is discharged from the facility to which the individual has been under temporary admission.

§262.506. Reduction of TxHmL Program Services or CFC Services.

(a) HHSC proposes a reduction of a TxHmL Program service or CFC service on an individual's IPC, based on a review described in §262.303 of this chapter (relating to HHSC Review of an IPC) or §262.302 of this chapter (relating to Renewal and Revision of an Individual's IPC), if HHSC determines that the TxHmL Program service or CFC service does not meet the requirements described in §262.301(c) of this chapter (relating to IPC Requirements).

(b) If HHSC proposes a reduction of a TxHmL Program service or CFC service on the individual's IPC, HHSC sends written notice to the individual or LAR of the proposed reduction of the service and includes in the notice the individual's right to request a fair hearing in accordance with §262.601 of this chapter (relating to Fair Hearing).

(c) HHSC sends a copy of the written notice to the individual's service coordinator and the program provider.

(d) If the individual or LAR requests a fair hearing before the effective date of the reduction of a TxHmL Program service or CFC service, as specified in the written notice, the service is not reduced and the program provider must provide the service to the individual in the amount authorized in the current 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 TxHmL Program service or CFC service, HHSC modifies the IPC in the HHSC data system.

§262.507. Termination of TxHmL Program Services and CFC Services with Advance Notice.

(a) HHSC terminates an individual's TxHmL Program services and CFC services if:

(1) the individual does not meet the eligibility criteria described in §262.101(a)(1) - (7) and (c) of this chapter (relating to Eligibility Criteria for TxHmL Program Services and CFC Services); or

(2) the individual or LAR refuses to cooperate in the provision or planning of services and:

(A) the refusal is documented by the program provider and the service coordinator; and

(B) the service coordinator has explained to the individual or LAR, in writing, that the refusal may result in termination of TxHmL Program services and CFC services.

(b) If a service coordinator becomes aware that a situation described in subsection (a) of this section exists, the service coordinator must, as soon as practicable, convene a service planning team meeting to discuss the situation. If, after the meeting, the service coordinator determines that the situation cannot be resolved, the service coordinator must request that HHSC terminate the individual's services. To make this request, the service coordinator must complete HHSC Request for Termination of Services form and submit the form to HHSC.

(c) If the basis of a service coordinator's request to terminate the individual's services is the reason described in subsection (a)(2) of this section, the service coordinator must include the following information with the completed HHSC Request for Termination of Services form submitted to HHSC:

(1) a detailed description of how the individual or LAR refused to cooperate in the provision or planning of services;

(2) a copy of the documentation of the refusal by the service coordinator and program provider as required by subsection (a)(2)(A) of this section; and

(3) a copy of the written explanation provided to the individual or LAR that the refusal may result in termination of TxHmL Program services and CFC services, as required by subsection (a)(2)(B) of this section.

(d) If HHSC receives a completed HHSC Request for Termination of Services form and, if required, the information described in subsection (b) of this section from a service coordinator, HHSC reviews the form and the information. If HHSC approves the request, HHSC sends written notice to the individual or LAR of the proposal to terminate TxHmL Program services and CFC services. The notice includes the individual's right to request a fair hearing in accordance with §262.601 of this chapter (relating to Fair Hearing).

(e) If the individual or LAR requests a fair hearing before the effective date of the termination of TxHmL Program services and CFC services, as specified in the written notice, the program provider must provide services to the individual in the amounts authorized in the IPC while the appeal is pending

§262.508. Termination of TxHmL Program Services and CFC Services without Advance Notice.

(a) HHSC terminates an individual's TxHmL Program services and CFC services if any of the following situations exists:

(1) the individual is admitted to one of the facilities listed in §262.505(a)(1) - (9) of this subchapter (relating to Suspension of TxHmL Program Services and CFC Services):

(A) for more than 270 consecutive calendar days; and

(B) HHSC has not extended the individual's suspension in accordance with §262.505(h) of this subchapter;

(2) the service coordinator or program provider has factual information confirming the death of the individual;

(3) the service coordinator or program provider receives a clear written statement signed by the individual that the individual no longer wants TxHmL Program services;

(4) the individual's whereabouts are unknown, and the post office returns mail directed to the individual by the service coordinator or program provider without indicating a forwarding address; or

(5) HHSC establishes that the individual has been accepted for Medicaid services by another state.

(b) If a service coordinator becomes aware that a situation described in subsection (a) of this section exists, the service coordinator must request that HHSC terminate the individual's services. To make this request, the service coordinator must complete HHSC Request for Termination of Services form and submit the form to HHSC.

(c) If HHSC receives a form from a service coordinator requesting that HHSC terminate the individual's services, HHSC sends written notice to the individual or LAR of the termination of TxHmL Program services and CFC services. The notice includes the individual's right to request a fair hearing in accordance with §262.601 of this chapter (relating to Fair Hearing).

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 31, 2022.

TRD-202203400
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER G. HEARINGS

26 TAC §262.601, §262.602

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§262.601. Fair Hearing.

An applicant whose request for eligibility for the TxHmL Program is denied or is not acted upon with reasonable promptness, or an individual whose TxHmL Program services or CFC services have been terminated, suspended, denied, or reduced by HHSC receives notice of the right to request a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A (relating to Uniform Fair Hearing Rules).

§262.602. Program Provider's Right to Administrative Hearing.

A program provider may request an administrative hearing if HHSC takes or proposes to take the following action:

(1) vendor hold;

(2) contract termination;

(3) recoupment of payments made to the program provider; or

(4) denial of a program provider's claim for payment.

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 31, 2022.

TRD-202203401
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER H. LIDDA REQUIREMENTS

26 TAC §262.701

STATUTORY AUTHORITY

The new section 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§262.701. LIDDA Requirements for Providing Service Coordination in the TxHmL Program.

(a) A LIDDA must offer TxHmL Program services to an applicant in accordance with §262.103 of this chapter (relating to Process for Enrollment of Applicants).

(b) A LIDDA must process enrollments of individuals in the TxHmL Program in accordance with §262.103 of this chapter.

(c) A LIDDA must be objective in the process to assist an individual or LAR in the selection of a program provider or FMSA and train all LIDDA staff who may assist an individual or LAR in the process.

(d) A LIDDA must, upon the enrollment of an individual and annually thereafter, inform the individual or LAR orally and in writing of the following:

(1) the telephone number of the LIDDA to file a complaint;

(2) the toll-free telephone number of the HHSC IDD Ombudsman, 1-800-252-8154, to file a complaint; and

(3) the toll-free telephone number of DFPS, 1-800-647-7418, to report an allegation of abuse, neglect, or exploitation.

(e) A LIDDA must maintain for each individual for an IPC year:

(1) a copy of the IPC;

(2) the PDP and, if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form;

(3) a copy of the ID/RC Assessment;

(4) documentation of the activities performed by the service coordinator in providing service coordination; and

(5) any other pertinent information related to the individual.

(f) For an individual receiving TxHmL Program services and CFC services within a LIDDA's local service area, the LIDDA must provide the individual's program provider a copy of the individual's current PDP, IPC, and ID/RC Assessment.

(g) A LIDDA must ensure that a service coordinator is an employee of the LIDDA and meets the requirements of this subsection.

(1) A service coordinator must meet the minimum qualifications and LIDDA staff training requirements described in 40 TAC Chapter 2, Subchapter L (relating to Service Coordination for Individuals with an Intellectual Disability), except as described in paragraph (2) of this subsection.

(2) Notwithstanding 40 TAC §2.560(b) (relating to Staff Person Training), a service coordinator must complete a comprehensive non-introductory person-centered service planning training developed or approved by HHSC within six months after the service coordinator's date of hire, unless an extension of the six month timeframe is granted by HHSC.

(3) A service coordinator must receive training about the following within the first 90 calendar days after beginning service coordination duties:

(A) rules governing the TxHmL Program and CFC; and

(B) 40 TAC Chapter 41 (relating to Consumer Directed Services Option).

(h) A LIDDA must ensure that a service coordinator:

(1) initiates, coordinates, and facilitates the person-centered planning process to meet the desires and needs as identified by an individual and LAR in the individual's PDP, including:

(A) scheduling service planning team meetings; and

(B) documenting on the PDP whether, for each TxHmL Program service or CFC service identified on the PDP, the service is critical to meeting the individual's health and safety as determined by the service planning team;

(2) coordinates the development and implementation of the individual's PDP;

(3) coordinates and develops an individual's IPC based on the individual's PDP;

(4) coordinates and monitors the delivery of TxHmL Program services and CFC services and non-TxHmL Program and non-CFC services; and

(5) document whether an individual progresses toward desired outcomes identified on the individual's PDP from the individual's and LAR's perspectives.

(i) A LIDDA must inform an individual or LAR of the name of the individual's service coordinator and how to contact the service coordinator.

(j) A service coordinator must:

(1) assist the individual or LAR or actively involved person in exercising the legal rights of the individual;

(2) provide an individual, LAR, or family member with a written copy of the booklet, Your Rights in the Texas Home Living (TxHmL) Program, available on the HHSC website, and an oral explanation of the rights described in the booklet:

(A) at the time the individual enrolls in the TxHmL Program;

(B) when the booklet is revised;

(C) upon request of the individual, LAR, or family member; and

(D) if one of the following occurs:

(i) the individual becomes 18 years of age;

(ii) a guardian is appointed for the individual; or

(iii) a guardianship for the individual ends;

(3) document compliance with paragraph (2) of this subsection in the individual's record and include:

(A) the signature of the individual or LAR; and

(B) the signature of the service coordinator;

(4) ensure that the individual and LAR participate in developing a PDP and IPC that meet the individual's identified needs and service outcomes and that the individual's PDP is updated annually and if the individual's needs or outcomes change;

(5) if a behavioral support plan includes techniques that involve restriction of individual rights or intrusive techniques, discuss with the service planning team to determine whether the techniques will be approved by the service planning team;

(6) if notified by the program provider that an individual or LAR has refused a comprehensive nursing assessment and that the program provider has determined that it cannot ensure the individual's health, safety, and welfare in the provision of community support, day habilitation, in-home day habilitation, employment assistance, supported employment, respite, or CFC PAS/HAB:

(A) inform the individual or LAR of the consequences and risks of refusing the assessment, including that the refusal will result in the individual not receiving:

(i) nursing services; or

(ii) community support, day habilitation, in-home day habilitation, employment assistance, supported employment, respite, or CFC PAS/HAB, if the individual needs one of those services and the program provider has determined that it cannot ensure the

health, safety, and welfare of the individual in the provision of the service; and

(B) notify the program provider if the individual or LAR continues to refuse the assessment after the discussion with the service coordinator;

(7) inform the individual or LAR of decisions regarding denial, suspension, reduction, or termination of services and the individual's or LAR's right to request a fair hearing as described in §262.601 of this chapter (relating to Fair Hearing); and

(8) in accordance with §262.501 (relating to Process for Individual to Transfer to a Different Program Provider or FMSA), manage the process to transfer an individual's TxHmL Program services and CFC services from one program provider to another or transfer from one FMSA to another.

(k) When a service coordinator becomes aware that a change to an individual's PDP or IPC may be needed, the service coordinator must discuss the need for the change with the individual or LAR, the individual's program provider, and other appropriate persons.

(l) At least 30 calendar days before the expiration of an individual's IPC, the service coordinator must:

(1) update the individual's PDP with the individual's service planning team; and

(2) if the individual receives a TxHmL Program service or a CFC service from a program provider, submit to the program provider and the individual or LAR:

(A) the updated PDP; and

(B) if CFC PAS/HAB is included on the PDP, a copy of the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form.

(m) A service coordinator must:

(1) complete the HHSC TxHmL Service Coordination Notification form with the individual or LAR and provide a copy of the completed form to the individual or LAR:

(A) upon receipt of HHSC approval of the enrollment of the individual;

(B) if the form is revised;

(C) at the request of the individual or LAR; and

(D) if one of the following occurs:

(i) the individual becomes 18 years of age;

(ii) a guardian is appointed for the individual; or

(iii) a guardianship for the individual ends; and

(2) retain a copy of the completed form in the individual's record.

(n) A service coordinator must conduct:

(1) a pre-move site review for an applicant 21 years of age or older who is enrolling in the TxHmL Program from a nursing facility or as a diversion from admission to a nursing facility; and

(2) post-move monitoring visits for an individual 21 years of age or older who enrolled in the TxHmL Program from a nursing facility or has enrolled in the TxHmL Program as a diversion from admission to a nursing facility.

(o) A service coordinator must have contact with an individual in person, by videoconferencing, or telephone to provide service coordination during a month in which it is anticipated that the individual will not receive a TxHmL Program service unless:

(1) the individual's TxHmL Program services have been suspended; or

(2) the service coordinator had an in-person contact with the individual that month to comply with 40 TAC §2.556(d) (relating to LIDDA's Responsibilities).

(p) In addition to the requirements described in 40 TAC Chapter 2, Subchapter L (relating to Service Coordination for Individuals with an Intellectual Disability), a LIDDA must:

(1) comply with:

(A) this subchapter;

(B) 40 TAC Chapter 41; and

(C) 40 TAC Chapter 4, Subchapter L, (relating to Abuse, Neglect, and Exploitation in Local Authorities and Community Centers); and

(2) ensure that a rights protection officer, as required by 40 TAC §4.113 (relating to Rights Protection Officer at a State MR Facility or MRA), who receives a copy of an HHSC initial intake report or a final investigative report from an FMSA, in accordance with 40 TAC §41.702 (relating to Requirements Related to HHSC Investigations When an Alleged Perpetrator is a Service Provider) or 40 TAC §41.703 (relating to Requirements Related to HHSC Investigations When an Alleged Perpetrator is a Staff Person or a Controlling Person of an FMSA), gives a copy of the report to the individual's service coordinator.

(q) A service coordinator must:

(1) at least annually, in accordance with 40 TAC Chapter 41, Subchapter D (relating to Enrollment, Transfer, Suspension, and Termination):

(A) inform the individual or LAR of the individual's right to participate in the CDS option; and

(B) inform the individual or LAR that the individual or LAR may choose to have one or more services provided through the CDS option, as described in 40 TAC §41.108 (relating to Services Available Through the CDS Option); and

(2) document compliance with paragraph (1) of this subsection in the individual's record.

(r) If an individual or LAR chooses to participate in the CDS option, the service coordinator must:

(1) provide names and contact information to the individual or LAR of all FMSAs providing services in the LIDDA's local service area;

(2) document the individual's or LAR's choice of FMSA on HHSC Consumer Participation Choice form;

(3) document, in the individual's PDP, a description of the services provided through the CDS option; and

(4) develop with the individual or LAR and other members of the service planning team a transportation plan if an individual's PDP includes community support to be delivered through the CDS option.

(s) For an individual participating in the CDS option, a service coordinator must recommend that HHSC terminate the individual's participation in the CDS option if the service coordinator determines that:

(1) the individual's continued participation in the CDS option poses a significant risk to the individual's health, safety or welfare; or

(2) the individual, LAR or designated representative has not complied with 40 TAC Chapter 41, Subchapter B (relating to Responsibilities of Employers and Designated Representatives).

(t) To make a recommendation described in subsection (s) of this section, a service coordinator must submit the following documentation to HHSC:

(1) the services the individual receives through the CDS option;

(2) the reason why the recommendation is made;

(3) a description of the attempts to resolve the issues before making the recommendation; and

(4) any other supporting documentation, as appropriate.

(u) A service coordinator must do the following regarding responsibilities related to EVV:

(1) for an applicant who will receive a service that requires the use of EVV from the program provider or through the CDS option:

(A) orally explain the information in the HHSC Electronic Visit Verification Responsibilities and Additional Information form to the applicant or LAR;

(B) sign the HHSC Electronic Visit Verification Responsibilities and Additional Information form to attest to explaining the information and to providing a copy to the individual or LAR;

(C) provide the individual or LAR with a copy of the signed form;

(D) perform the activities described in subparagraph (A)-(C) of this paragraph before the individual's enrollment; and

(E) maintain the completed HHSC Electronic Visit Verification Responsibilities and Additional Information form in the individual's record;

(2) for an individual who will receive a service that requires the use of EVV from the program provider or who is transferring to another program provider or LIDDA and will receive a service that requires the use of EVV from the program provider or through the CDS option:

(A) orally explain the information in the HHSC Electronic Visit Verification Responsibilities and Additional Information form to the individual or LAR;

(B) sign the HHSC Electronic Visit Verification Responsibilities and Additional Information form to attest to explaining the information and to providing a copy to the individual or LAR;

(C) provide the individual or LAR with a copy of the signed form;

(D) perform the activities described in subparagraphs (A)-(C) of this paragraph on or before the effective date of the transfer to another program provider or LIDDA; and

(E) maintain the completed HHSC Electronic Visit Verification Responsibilities and Additional Information form in the individual's record; and

(3) for an individual who will receive a service that requires the use of EVV through the CDS option or who will transfer to another FMSA and is receiving a service requiring the use of EVV:

(A) orally explain the information in the HHSC Electronic Visit Verification Responsibilities and Additional Information form to the individual or LAR;

(B) sign the HHSC Electronic Visit Verification Responsibilities and Additional Information form to attest to explaining the information and to providing a copy to the individual or LAR;

(C) provide the individual or LAR with a copy of the signed form;

(D) perform the activities described in subparagraphs (A)-(C) of this paragraph before the individual receives the EVV required service through the CDS option or on or before the effective date of the transfer to another FMSA; and

(E) maintain the completed HHSC Electronic Visit Verification Responsibilities and Additional Information form in the individual's record.

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 31, 2022.

TRD-202203402
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER I. DECLARATION OF DISASTER

26 TAC §262.801

STATUTORY AUTHORITY

The new section 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§262.801. Exceptions to Certain Requirements During Declaration of Disaster.

(a) HHSC may allow program providers and service coordinators to use one or more of the exceptions described in subsections (c) - (j) of this section while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect. HHSC notifies program providers and LIDDAs:

(1) if it allows an exception to be used; and

(2) if an exception is allowed to be used, the date the exception must no longer be used, which may be before the declaration of a state of disaster expires.

(b) In this section "disaster area" means the area of the state specified in an executive order or proclamation described in subsection (a) of this section.

(c) Notwithstanding the definition of "implementation plan" in §262.3 of this chapter (relating to Definitions), the signature of an individual who resides in the disaster area is not required on the individual's implementation plan, if:

(1) the meeting required by §262.302(a)(8) of this chapter (relating to Renewal and Revision of an Individual's IPC) is conducted by videoconferencing or telephone;

(2) the individual or LAR orally agrees with the implementation plan; and

(3) the program provider documents the individual's or LAR's oral agreement on the implementation plan.

(d) Notwithstanding §262.8(b) of this chapter (relating to Comprehensive Nursing Assessment), the comprehensive nursing assessment completed by an RN is not required to be completed in person for an applicant or individual who resides in the disaster area, if the RN conducts the assessment as a telehealth service or by telephone, except as provided in subsection (e) of this section.

(e) Notwithstanding §262.103(k)(1)(A)(i)(I)(-a-) and (-b-) of this chapter (relating to Process for Enrollment of Applicants), a LIDDA is not required to conduct a standardized measure of intellectual functioning in person, and to conduct a standardized measure of adaptive abilities in person for an individual who resides in the disaster area, if the LIDDA conducts the standardized measures by videoconferencing.

(f) Notwithstanding §262.103(k)(1)(B)(i) of this chapter, a LIDDA is not required to conduct an ICAP assessment in person for an individual who resides in the disaster area if the LIDDA conducts the ICAP assessment by videoconferencing.

(g) Notwithstanding §262.302(a)(1)(C) and (a)(4) of this chapter, a service coordinator is not required to ensure that an individual who resides in the disaster area or LAR sign the PDP, if:

(1) the meeting required by §262.302(a)(1)(B) and (a)(3) of this chapter is conducted by videoconferencing or telephone;

(2) the service coordinator documents on the PDP the reason for and the topics discussed at the meeting;

(3) the individual or LAR orally agrees with the PDP; and

(4) the service coordinator documents the individual's or LAR's oral agreement on the PDP.

(h) Notwithstanding §262.302(a)(6)(B) of this chapter, a service coordinator is not required to ensure that an individual who resides in the disaster area or LAR signs and dates a renewal or revised IPC, if:

(1) the meeting required by §262.302(a)(1)(B) and (a)(3) of this chapter is conducted by videoconferencing or telephone;

(2) the service coordinator documents on the renewal or IPC the reason for and the topics discussed at the meeting;

(3) the individual or LAR orally agrees with the renewal or revised IPC; and

(4) the service coordinator documents the individual's or LAR's oral agreement on the renewal or the revised IPC.

(i) Notwithstanding §262.304(a)(1) of this chapter (relating to Service Limits), the service limit for adaptive aids for an individual who resides in the disaster area may be exceeded if:

(1) the requested adaptive aid that causes the service limit to be exceeded is:

(A) an adaptive aid that replaces an adaptive aid destroyed as a result of the disaster; or

(B) the repair of an adaptive aid that was damaged as a result of the disaster;

(2) the addition of the requested adaptive aid to the individual's IPC does not result in:

(A) the service limit of adaptive aids being exceeded by more than $5,000; or

(B) the individual's IPC cost limit for TxHmL program services being exceeded as described in §262.101(a)(4) of this chapter (relating to Eligibility Criteria for TxHmL Program Services and CFC Services);

(3) the program provider:

(A) includes the cost of the requested adaptive aid on the revised IPC; and

(B) submits to HHSC, within 180 days after the effective date of the order or proclamation described in subsection (a) of this section, a written request to HHSC to approve the requested adaptive aid that includes:

(i) a description of the adaptive aid that is replacing the adaptive aid destroyed as a result of the disaster, which may include pictures or other descriptive information from a catalog, web-site or brochure;

(ii) a description of the repair to an adaptive aid that was damaged as a result of the disaster;

(iii) one bid for the requested adaptive aid from a vendor that includes:

(I) the total cost of the requested adaptive aid; and

(II) the name, address and telephone number of the vendor who must not be a relative of the individual; and

(iv) a statement from the program provider that the adaptive aid is not available through a third party resource; and

(4) the requested adaptive aid is approved by HHSC.

(j) Notwithstanding §262.304(a)(3) of this chapter, the service limit for minor home modifications for an individual who resides in the disaster area may be exceeded if:

(1) the requested minor home modification that causes the service limit to be exceeded is:

(A) a minor home modification that replaces a minor home modification that was destroyed as a result of the disaster; or

(B) the repair of a minor home modification that was damaged as a result of the disaster;

(2) the addition of the requested minor home modification to the individual's IPC does not result in:

(A) the service limit of minor home modification being exceeded by more than $3,750; or

(B) the individual's IPC cost limit for TxHmL program services being exceeded as described in §262.101(a)(4) of this chapter;

(3) the program provider:

(A) includes the cost of the requested minor home modification on the revised IPC;

(B) submits to HHSC, within 180 days after the effective date of the order or proclamation described in subsection (a) of this section, a written request to HHSC to approve the requested minor home modification that includes:

(i) a description of the minor home modification that is replacing the minor home modification destroyed as a result of the disaster, which may include pictures or other descriptive information from a catalog, web-site or brochure;

(ii) a description of the repair to a minor home modification that was damaged as a result of the disaster;

(iii) one bid for the requested minor home modification from a vendor that includes:

(I) the total cost of the requested minor home modification; and

(II) the name, address and telephone number of the vendor who must not be a relative of the individual; and

(iv) a statement from the program provider that the minor home modification is not available through a third party resource; and

(4) the requested minor home modification is approved by HHSC.

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 31, 2022.

TRD-202203403
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

CHAPTER 263. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes in the Texas Administrative Code (TAC), Title 26, Part 1, new Chapter 263, Home and Community-based Services (HCS) Program and Community First Choice (CFC), Subchapters A - K, comprised of §§263.1 - 263.9; 263.101 - 263.108; 263.201; 263.301 - 263.304; 263.401; 263.501 - 263.503; 263.601; 263.701 - 263.708; 263.801; 263.802; 263.901 - 263.903; and 263.1000.

BACKGROUND AND PURPOSE

The HCS Program is a Medicaid waiver program approved by the Centers for Medicare & Medicaid Services (CMS) under §1915(c) of the Social Security Act. This waiver program provides community-based services and supports to an eligible individual as an alternative to services provided in an institutional setting. One purpose of the proposal is to move certain HCS Program rules from 40 TAC Chapter 9, Subchapter D to 26 TAC Chapter 263. The repeals of §§9.151, 9.152, 9.154 - 9.170, 9.186, and 9.189 - 9.192 in 40 TAC Chapter 9, Subchapter D, are proposed elsewhere in this issue of the *Texas Register.*

This rule proposal does not include program provider certification principles that are currently in §§9.173 - 9.180, and §§9.181 - 9.183 and reviewed through the survey process. Rules containing the certification standards for the HCS Program will be proposed in 26 TAC Chapter 565 in a future issue of the *Texas Register.*

Another purpose of the proposed new rules is to ensure that the HCS Program complies with the requirements in Title 42, Code of Federal Regulations (CFR), Chapter IV, Subchapter C, Part 441, Subpart G, §441.301(c)(1) - (5). In 2014, CMS amended this regulation to establish new requirements for Home and Community-based Services (HCBS) Medicaid Programs, including requirements for HCBS Program settings and person-centered planning. CMS has given states until March 2023 to be in full compliance with the requirements in 42 CFR §441.301(c)(1) - (5). The proposed new rules will also ensure compliance with the requirements in 42 CFR Chapter IV, Subchapter C, Part 441, Subpart K, §441.530, regarding Home and Community-Based Setting; §441.535, regarding Assessment of functional need; and §441.540, regarding the Person-centered service plan, for Community First Choice (CFC) services because CFC services are available in the HCS Program.

Additional purposes of the proposed new rules are described below.

The proposed new rules implement Texas Government Code §531.02161(b)(4) which requires HHSC to ensure that, if cost effective, clinically effective, and allowed by federal law, a Medicaid recipient has the option to receive certain services, including occupational therapy (OT), physical therapy (PT), and speech-language pathology as a telehealth service.

The proposed new rules require the initial HCS eligibility assessments to be conducted in person and the Community First Choice (CFC) personal assistance services/habilitation (PAS/HAB) assessment to be completed in person unless certain conditions exist in which case the assessment may be completed by telehealth, telephone, or video conferencing. These requirements help ensure the assessments are thorough and accurate.

The proposed new rules include provisions regarding the denial, suspension, reduction, or termination of an individual's HCS Program services to explain HHSC's process in taking one of these actions. The proposed new rules change the existing service coordination monitoring requirement from 90 days to 30 days during an individual's suspension.

The proposed new rules require a program provider and local intellectual and developmental disability authority (LIDDA) to submit a translation of non-English documentation submitted to HHSC. The purpose of the proposed new rule is to help ensure that HHSC's reviews of documentation are efficient.

The proposed new rules require a registered nurse (RN) to complete a comprehensive nursing assessment of an individual in person under specified circumstances. This requirement is included so that the entire comprehensive nursing assessment is completed when necessary to help ensure the health and safety of an individual.

The proposed new rules codify HHSC's current practice of increasing a level of need (LON) 1, 5, or 8 to the next LON because of an individual's high medical needs if the individual meets certain criteria. The proposed new rule also codifies current practice

related to individuals transferring to another program provider or choosing a different service delivery option in the HCS Program.

The proposed new rules provide that HHSC may allow program providers and service coordinators to use one or more of the exceptions specified in the rule while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect. This provision is added to help ensure that providers and service coordinators are able to provide services effectively during a disaster.

SECTION-BY-SECTION SUMMARY

New Subchapter A, General Provisions

Proposed new §263.1, Purpose, describes the purpose of the rules.

Proposed new §263.2, Application, describes the persons to whom Chapter 263 applies.

Proposed new §263.3, Definitions, defines the terms used in the new chapter including definitions for the following terms: "audio-only," "comprehensive nursing assessment," "delegated nursing task," "DID--Determination of intellectual disability," "DID report," "EVV--Electronic visit verification," "health maintenance activities," "in person or in-person," "platform," "professional therapies," "store and forward technology," "Supported Decision-Making Agreement," "synchronous audio-visual," "TAC--Texas Administrative Code," "telehealth service," "transfer IPC," and "videoconferencing."

Proposed new §263.4, Description of the HCS Program and CFC, provides descriptions of the HCS Program and CFC including provisions about waiver contract areas and the consumer directed services option.

Proposed new §263.5, Description of HCS Program Services, provides a description of the HCS Program services available through the HCS Program.

Proposed new §263.6, Description of CFC Services, provides a description of the CFC services available through the HCS Program and explains that individuals receiving host home/companion care, supervised living, or residential support may not receive a CFC service.

Proposed new §263.7, Requirement for Translation, requires program providers and LIDDAs to, when they submit documentation to HHSC containing information that is not in English, submit a translation of the information in English at the same time.

Proposed new §263.8, Comprehensive Nursing Assessment, requires an RN to complete the comprehensive nursing assessment for an applicant or individual who has nursing on their individual plan of care (IPC), using the HHSC Comprehensive Nursing Assessment form. The proposed new rule also specifies when a comprehensive nursing assessment must be completed in person, and when the comprehensive nursing assessment does not have to be completed in person.

Proposed new §263.9, Providing Physical Therapy, Occupational Therapy, and Speech and Language Pathology as a Telehealth Service, allows a service provider of PT, OT, or speech and language pathology to provide PT, OT, or speech and language pathology to an individual as a telehealth service except for certain activities that must be performed in person in accordance with the Texas Medicaid Provider Procedures Manual. The proposed new rule also describes the requirements for providing PT, OT, or speech and language pathology as a telehealth service, including obtaining the individual's or legally authorized representative's (LAR) consent before the provision of the telehealth service.

New Subchapter B, Eligibility, Enrollment, and Review

Proposed new §263.101, Eligibility Criteria for HCS Program Services and CFC Services, describes the eligibility criteria for HCS Program Services and CFC Services. The proposed rule is different from the current rule regarding eligibility criteria because the proposed rule specifically lists a hospital, an inpatient chemical dependency treatment facility, and a mental health facility as settings in which an individual cannot reside instead of using the phrase, "a facility licensed or subject to being licensed by the Department of State Health Services." In addition, the proposed rule is different from the current rule because the proposed rule does not include as a prohibited residential setting, a setting in which two or more dwellings create a distinguishable residential area. This restriction is included in proposed new §263.501, Requirements for Service Settings.

Proposed new §263.102, Calculation of Co-payment, describes the method for determining an individual's or couple's co-payment for sharing in the cost of HCS Program services because their income exceeds the maximum personal needs allowance.

Proposed new §263.103, HCS Interest List, describes how HHSC maintains the interest list for individuals interested in receiving services in the HCS Program. The proposed rule is different from the current rule in how HHSC assigns an interest list date to an applicant after the applicant's name is removed from the interest list in accordance with subsection (g)(1) - (4) and the applicant requests to be placed back on the list. In the current rule, if such an applicant makes the request within 90 days after their name was removed from the list, HHSC adds the applicant's name to the HCS interest list using the interest list date that was in effect at the time the applicant's name was removed from the list. In the proposed rule, HHSC adds the applicant's name to the HCS interest list in this situation using the interest list date that was in effect at the time the applicant's name was removed, only if the request to be placed back on the list is the applicant's first request. Further, if the applicant's request to be placed back on the list is made more than 90 days after their name was removed from the list and the request is the applicant's first request, the proposed rule provides that HHSC adds the applicant's name to the interest list using the interest list date that was in effect at the time the applicant's name was removed from the list, if HHSC determines that extenuating circumstances exist. If a request to be placed back on an interest by an applicant in these situations is not the applicant's first request, the proposed rule provides that the applicant's name is added back using the date of the request as the interest list date. The reason for these changes is to remove an incentive for an applicant to repeatedly decline a written offer of HCS Program services.

Proposed new §263.104, Process for Enrollment of Applicants, describes the process for offering an applicant enrollment and enrolling an applicant into the HCS Program.

Proposed new §263.105, LOC Determination, describes the process for a LIDDA to request a level of care (LOC) from HHSC for an applicant and for a program provider to request an LOC from HHSC for an individual.

Proposed new §263.106, LON Assignment, describes the process for requesting a level of need (LON) from HHSC for an

applicant and an individual and the LONs that may be assigned. The proposed rule also describes the criteria that must exist and the process for an individual's LON to be increased because of the individual's dangerous behavior or high medical needs.

Proposed new §263.107, HHSC Review of LON, describes the process by which HHSC reviews an LON.

Proposed new §263.108, Reconsideration of LON Assignment, describes the process by which a program provider may request a reconsideration by HHSC of an LON assignment, if the program provider disagrees with an LON assignment.

New Subchapter C, Person-Centered Planning

Proposed new §263.201, Person-Centered Planning Process, requires a service coordinator and program provider to ensure the person-centered planning process is led by an individual to the maximum extent possible and that the person-centered planning process be used to develop a person directed plan (PDP), implementation plan, initial IPC, renewal IPC, revised IPC, service backup plan, and transportation plan. The proposed new rule also describes the activities involved in the person-centered planning process.

New Subchapter D, Development and Review of an IPC

Proposed new §263.301, IPC Requirements, describes the requirements of an IPC.

Proposed new §263.302, Renewal and Revision of an IPC, describes the process for developing a renewal IPC and a revision IPC. The proposed rule includes several requirements that are not part of the current rule regarding renewal IPCs and revision IPCs. Specifically, the proposed rule requires the service planning team to complete the HHSC HCS/TxHmL CFC PAS/HAB Assessment form when revising the IPC to add CFC PAS/HAB or update the HHSC HCS/TxHmL CFC PAS/HAB Assessment form when revising the IPC to change the amount of CFC PAS/HAB. This requirement helps ensure a consistent method for determining the number of CFC PAS/HAB hours during an IPC revision. The proposed rule requires that the service planning team convene a meeting to update the PDP and develop a revised IPC if the addition, removal or change of a service results in the addition, removal, or change to an outcome in the PDP. If the change made to an existing service does not require the addition, removal, or a change to an outcome in the PDP, the proposed rule requires the service coordinator to document the reasons for the IPC revision. The proposed rule also requires the program provider to convene a meeting with the individual or LAR to revise the implementation plans for HCS Program services, and CFC services and transportation plan. The proposed rule requires the service coordinator to send a copy of the updated PDP and HHSC HCS/TxHmL CFC PAS/HAB Assessment form to the program provider, the individual or LAR and, if applicable, the financial management services agency (FMSA). The proposed rule provides that, for an individual who is receiving all service through the consumer directed services (CDS) option, the service coordinator is not required to comply with the requirement to review and agree or disagree with the IPC information entered in the HHSC data system.

Proposed new §263.303, HHSC Review of an IPC, describes HHSC's process for reviewing an IPC. The proposed rule provides that HHSC may review an IPC to determine if it meets the IPC requirements described in proposed §263.301(c), relating to IPC Requirements. In addition, the proposed rule codifies current practice that HHSC may deny or reduce an HCS or CFC service if an IPC does not meet requirements in §263.301(c).

Proposed new §263.304, Service Limits, lists the service limits for certain HCS Program services provided to an individual. The proposed rule includes several provisions that are not part of the current rule regarding service limits. Specifically, the proposed rule allows an individual to use $300 per IPC year for maintenance of a minor home modification (MHM) before reaching the lifetime limit for MHM. Under the current rule, the lifetime limit of $7,500 must be exhausted prior to the use of the $300 maintenance fee. This change gives the individual flexibility to use the MHM funds for maintenance. The proposed rule provides that the service limit is for respite and in-home respite combined. The proposed rule provides that the limit for day habilitation and in-home day habilitation is combined to clarify existing policy. The proposed rule also provides that a program provider may request authorization of a requisition fee for an adaptive aid that is in addition to the $10,000 service limit to codify current practice.

New Subchapter E, CDS Option

Proposed new §263.401, CDS Option, provides that if certain services are on an applicant's PDP, a service coordinator must perform specified activities including informing the applicant about the CDS option. The proposed rule also provides that if an applicant or individual chooses to receive a service through the CDS option, a service coordinator must perform specific activities including documenting the choice of FMSA. The proposed rule requires the service coordinator to provide information about the CDS option to individuals annually. The proposed rule describes the requirements regarding a recommendation by the service coordinator that HHSC terminate an individual's participation in the CDS option.

New Subchapter F, Requirements for Service Settings and Program Provider Owned or Controlled Residential Settings

Proposed new §263.501, Requirements for Service Settings, requires a program provider to ensure that a setting in which individual receives HCS Program and CFC services meet certain criteria including that it's based on the individual's preferences, and needs; it supports the individual's access to the greater community to the same degree as a person not enrolled in a Medicaid waiver program; it ensures the individual's rights of privacy, dignity and respect, and it optimizes an individual's independence in making life choices. In addition, the proposed rule requires that a setting in which an individual receives an HCS Program service or CFC service is not a setting presumed to have the qualities of an institution except that an HCS Program service or a CFC service may be provided in a setting that is presumed to have the qualities of an institution if CMS determines through a heightened scrutiny review that the setting does not have the qualities of an institution and does have the qualities of home and community-based settings.

Proposed new §263.502, Requirements for Program Provider Owned or Controlled Residential Settings, requires the program provider to ensure certain criteria in each residence in which residential support, supervised living, or host home/companion care is provided, including that an individual has privacy in the individual's bedroom, has an operable lock on an individual's bedroom door at no cost to the individual, and has the freedom and support to control the individual's schedule and activities that are not part of the implementation plan. The proposed rule also requires the program provider to notify the service coordinator if the pro-

gram provider becomes aware that a modification to the criteria is needed and requires a service coordinator given such notification to convene a service planning team meeting to update the PDP.

Proposed new §263.503, Residential Agreements, requires a program provider to have a residential agreement with an individual or LAR if the individual is living in a three-person residence or four-person residence, and to ensure that the individual or LAR has a residential agreement with the service provider of host home/companion care if the individual is living in a residence in which host home/companion care is provided. In addition, the proposed rule describes the required contents of the residential agreement and requires the program provider to give the individual or LAR at least three calendar days to review, request changes, and sign the residential agreement; and to provide a copy of the residential agreement to the individual or LAR. The proposed rule also describes the requirements for a program provider and service coordinator if an individual or LAR is delinquent in payment of room or board and the program provider wants to evict the individual. Further, the proposed rule describes the criteria that must exist before a program provider proceeds to evict an individual. The proposed rule describes the requirements for a program provider and service coordinator after an individual is evicted. Also, the proposed rule describes the required actions for a program provider or service coordinator if the program provider determines that the provision in the residential agreement regarding decoration of the individual's bedroom needs to be modified.

New Subchapter G, Reimbursement by HHSC

Proposed new §263.601, Program Provider Reimbursement, describes how a program provider is reimbursed for services provided in the HCS Program. The proposed rule describes the basis for payment of service by HHSC to a program provider and requires a program provider to submit a service claim that meets certain requirements including 40 TAC §49.311, relating to Claims Payment, and the HCS Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers. The proposed rule explains when a program provider may submit a claim for a service provided during the period of the individual's suspension or after termination of the service. The proposed rule requires a claim submitted for an adaptive aid that costs $500 or more or for a minor home modification that costs $1,000 or more to be supported by a written assessment from a licensed professional. The proposed rule describes reasons that HHSC does not pay for or recoups payments for a service, including a program provider not complying with 40 TAC §49.305, relating to Records; providing CFC PAS/HAB or in-home day habilitation to an individual with a residential type of "own/family home" or providing in-home respite and the service claim does not match the electronic visit verification (EVV) visit transaction. The proposed rule provides that HHSC conducts fiscal compliance reviews and describes the actions HHSC may take as a result of a review.

New Subchapter H, Transfer, Denials, Suspension, Reduction, and Termination

Proposed new §263.701, Process for Individual to Transfer to a Different Program Provider or FMSA, describes the process for an individual to transfer to a different program provider or FMSA.

Proposed new §263.702, Process for Individual to Receive a Service Through the CDS Option that the Individual is Receiving from a Program Provider, describes the process for an individual to transfer services received through the CDS option to a program provider.

Proposed new §263.703, Denial of a Request for Enrollment into the HCS Program, describes the basis and process for HHSC to deny an individual's request for enrollment into the HCS Program.

Proposed new §263.704, Denial of HCS Program Services or CFC Services, describes the basis and process for HHSC to deny an HCS Program Service or CFC Service.

Proposed new §263.705, Suspension of HCS Program Services and CFC Services, describes the basis and process for HHSC to suspend an individual's HCS Program services and CFC services.

Proposed new §263.706, Reduction of HCS Program Services or CFC Services, describes the basis and process for HHSC to reduce an individual's HCS Program service or CFC service.

Proposed new §263.707, Termination of HCS Program Services and CFC Services with Advance Notice, describes the basis and process for HHSC to terminate an individual's HCS Program Services and CFC Services when advance notice of the termination is required.

Proposed new §263.708, Termination of HCS Program Services and CFC Services Without Advance Notice, describes the basis and process for HHSC to terminate an individual's HCS Program Services and CFC Services when advance notice of the termination is not required.

New Subchapter I, Hearings

Proposed new §263.801, Fair Hearing, describes the requirement for applicants and individuals to receive a notice of the right to request a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A, relating to Uniform Fair Hearing Rules.

Proposed new §263.802, Program Provider's Right to Administrative Hearing, describes when a program provider may request an administrative hearing and that the program provider may receive an administrative hearing for a dispute involving a LON assignment only if reconsideration was requested by the program provider in accordance with proposed new §263.108.

New Subchapter J, LIDDA Requirements

Proposed new §263.901, LIDDA Requirements for Providing Service Coordination in the HCS Program, describes requirements for the LIDDA in the provision of service coordination to applicants and individuals. The proposed rule includes several provisions that are not part of the current rule regarding LIDDA requirements. Specifically, the proposed rule changes the timeframe requirement for a service coordinator to complete a comprehensive non-introductory person-centered service planning training from two years to within six months after the service coordinator's date of hire unless an extension of the six-month timeframe is granted by HHSC. The proposed rule describes when the service coordinator is required to provide an individual, LAR, or family member with the Your Rights In the Home and Community-based Services (HCS) Program booklet, and the HHSC HCS Rights Addendum form, and an oral explanation of the rights in the booklet and the form. The proposed rule requires the service coordinator to ensure that the updated finalized PDP is signed by the individual or LAR. In addition, the proposed rule requires the service coordinator to ensure the service planning team determines whether an individual who does not have a guardian would benefit from

having a guardian or a less restrictive alternative to a guardian. Further, the proposed rule requires the service coordinator to update an individual's PDP with specific information described in the rule, if a service coordinator is notified by the program provider that a modification to a program provider owned or controlled residential setting requirement is needed based on a specific assessed need of an individual. The proposed rule also describes the requirements for a service coordinator to inform applicants and individuals about responsibilities related to EVV.

Proposed new §263.902, Permanency Planning, describes the required activities a LIDDA must perform regarding permanency planning for an applicant under 22 years of age moving from a family setting and requesting supervised living or residential support.

Proposed new §263.903, Referral from HHSC to DFPS, provides that if HHSC is unable to locate a parent or LAR of an individual, HHSC refers the case to the Department of Family and Protective Services (DFPS).

New Subchapter K, Declaration of Disaster

Proposed new §263.1000, Exceptions to Certain Requirements During Declaration of Disaster, provides that HHSC may allow program providers and service coordinators to use one or more of the exceptions described in the rule while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect. The rule provides that HHSC notifies program providers and LIDDAs if it allows an exception to be used and the date an allowed exception must no longer be used. The proposed rule also defines "disaster area."

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, there will be an estimated additional cost to state government as a result of enforcing and administering the proposed rule that allows an individual to use $300 per IPC year for maintenance of a MHM before reaching the lifetime limit for MHMs.

The effect on state government for each year of the first five years the proposed rule is in effect is an estimated cost of $5,186 in fiscal year (FY) 2022, $5,186 in FY 2023, $5,186 in FY 2024, $5,186 in FY 2025, and $5,186 in FY 2026.

In addition, Trey Wood has determined that for each year of the first five years that the rules will be in effect, there may be additional costs to state government if an individual in a disaster area needs to exceed the service limits for adaptive aids and MHMs if an adaptive aid or MHM is damaged or destroyed as a result of the disaster. There may also be additional costs to state government if HHSC denies a residential service until an individual or LAR pays the amount of delinquent room or board, from preparing and sending written notices of the denial, and to pay the cost for conducting a fair hearing, if requested by the individual or LAR. However, HHSC lacks sufficient information to provide an estimate of these costs.

Trey Wood has also determined that for each year of the first five years that the rules will be in effect, there will be an additional cost to local government as a result of enforcing and administering the rules that require a LIDDA to conduct an inventory for client and agency planning, and certain standardized measures for completing a determination of intellectual disability in person. There will also be an additional cost to local government for administering the rules that require a LIDDA service coordinator to perform activities relating to an individual who becomes delinquent or does not pay room and board under a residential agreement as proposed. However, there are multiple complexities and uncertainties related to the fiscal impact of this requirements for HHSC to provide an estimate of these costs.

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 a new rule;

(6) the proposed rules will repeal 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

There will be no adverse economic effect on rural communities. No rural communities contract with HHSC to provide services in the HCS program.

HHSC does not have the data to estimate the number of small businesses or micro-businesses subject to the rule, however as of January 24, 2022, there are 583 HCS program providers. As of January 24, 2022, there are 610 HCS and TxHmL legal entities. Legal entities include program providers that may be contracted to be both HCS program providers and TxHmL program providers and program providers that are only contracted to be HCS program providers or TxHmL program providers.

HHSC did not consider any alternative methods that would achieve the purpose of the proposed new rules while minimizing the adverse impact on small businesses or micro-businesses because the rules requiring a program provider to have a residential agreement with each individual living in an HCS residential setting, and to install a lock on an individual's bedroom door if there is not one, are necessary for the HCS Program to comply with federal law and for HHSC to receive federal funds.

HHSC did not consider any alternative methods for the proposed new rule requiring a program provider or LIDDA to submit a translation of information in English if the program provider or LIDDA submits documentation to HHSC containing information that is not in English, because there is no alternative method that would achieve the purpose of ensuring that HHSC's reviews of the documentation submitted are efficient.

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 receive a source of federal funds or comply with federal law.

PUBLIC BENEFIT AND COSTS

Stephanie Stephens, State Medicaid Director, has determined that for each year of the first five years the rules are in effect, individuals will benefit from the implementation of federal regulations that help ensure an individual receives services that are person-centered and promote the autonomy of the individual and that are provided in a setting that is integrated in the greater community.

Trey Wood has also 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 because program providers will develop and implement a residential agreement with each individual who receives host home/companion care, residential support, or supervised living. Further, Program providers may incur court costs to evict an individual who fails to pay room or board and for attorney's fees arising out of any dispute relating to the residential agreement. In addition, HCS program providers may also incur a cost to purchase and install a lock on a bedroom door for an individual receiving host home/companion care, residential support, or supervised living, if the door does not currently have a lock; and to submit a translation of information in English if the program provider submits documentation to HHSC containing information that is not in English. However, HHSC lacks sufficient information to provide an estimate of these costs.

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 HEARING

A public hearing to receive comments on this proposal will be held via GoToWebinar on September 26, 2022, at 1:00 p.m. (central time). The link to register for the GoToWebinar meeting is https://attendee.gotowebinar.com/register/5797564706801514763.

Persons requiring further information, special assistance, or accommodations should contact Olu Oguntade at (512) 438-4478.

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 701 W. 51st Street, Austin, Texas 78751; or emailed to HHSRulesCoordinationOffice@hhs.texas.gov.

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 21R058" in the subject line.

SUBCHAPTER A. GENERAL PROVISIONS

26 TAC §§263.1 - 263.9

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§263.1. Purpose.

The purpose of this chapter is to describe certain policies, procedures, and requirements of the HCS Program.

§263.2. Application.

This chapter applies to:

(1) a program provider;

(2) a LIDDA;

(3) an applicant and the applicant's LAR; and

(4) an individual and the individual's LAR.

§263.3. 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 applicant or individual by a person, as determined by the applicant's or individual's service planning team or program provider, based on the person's:

(A) interactions with the applicant or individual;

(B) availability to the applicant or individual for assistance or support when needed; and

(C) knowledge of, sensitivity to, and advocacy for the applicant's or individual's needs, preferences, values, and beliefs.

(3) ADLs--Activities of daily living. Basic personal everyday activities, including tasks such as eating, toileting, grooming, dressing, bathing, and transferring.

(4) Agency foster home--This term has the meaning set forth in Texas Human Resources Code §42.002.

(5) ALF--Assisted living facility. A facility licensed in accordance with Texas Health and Safety Code Chapter 247, Assisted Living Facilities.

(6) Applicant--A Texas resident seeking services in the Home and Community-Based Services Program.

(7) Audio-only--An interactive, two-way audio communication platform that only uses sound.

(8) Auxiliary aid--A service or device that enables an individual with impaired sensory, manual, or speaking skills to participate in the person-centered planning process. An auxiliary aid includes interpreter services, transcription services, and a text telephone.

(9) Business day--Any day except a Saturday, Sunday, or national or state holiday listed in Texas Government Code §662.003(a) or (b).

(10) Calendar day--Any day, including weekends and holidays.

(11) CDS option--Consumer directed services option. A service delivery option as defined in 40 TAC §41.103 (relating to Definitions).

(12) CFC--Community First Choice.

(13) CFC ERS--CFC emergency response services.

(14) CFC FMS--The term used for financial management services on the individual plan of care (IPC) of an applicant or individual if the applicant will receive or the individual receives only CFC personal assistance services (PAS)/habilitiation (HAB) through the CDS option.

(15) CFC support consultation--The term used for support consultation on the IPC of an applicant or individual if the applicant will receive or the individual receives only CFC PAS/HAB through the CDS option.

(16) CMS--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.

(17) Competitive employment--Employment that pays an individual at least minimum wage if the individual is not self-employed.

(18) Comprehensive nursing assessment--A comprehensive physical and behavioral assessment of an individual, including the individual's health history, current health status, and current health needs, that is completed by a registered nurse (RN).

(19) Contract--A provisional contract or a standard contract.

(20) CRCG--Community resource coordination group. A local interagency group, composed of public and private agencies, that develops service plans for individuals whose needs can be met only through interagency coordination and cooperation. The group's role and responsibilities are described in the Memorandum of Understanding on Coordinated Services to Persons Needing Services from More Than One Agency, available on the Texas Health and Human Services Commission (HHSC) website.

(21) Delegated nursing task--A nursing task delegated by an RN to an unlicensed person in accordance with:

(A) 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); and

(B) 22 TAC Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).

(22) Designated Representative--This term has the meaning set forth in 40 TAC §41.103.

(23) DFPS--The Department of Family and Protective Services.

(24) DID--Determination of intellectual disability. This term has the meaning set forth in §304.102 of this title (relating to Definitions).

(25) DID report--Determination of intellectual disability report. This term has the meaning set forth in §304.102 of this title.

(26) Emergency--An unexpected situation in which the absence of an immediate response could reasonably be expected to result in a risk to the health and safety of an individual or another person.

(27) Emergency situation--An unexpected situation involving an individual's health, safety, or welfare, of which a person of ordinary prudence would determine that the legally authorized representative (LAR) should be informed, such as an individual:

(A) needing emergency medical care;

(B) being removed from the individual's residence by law enforcement;

(C) leaving the individual's residence without notifying a staff member or service provider and not being located; and

(D) being moved from the individual's residence to protect the individual (for example, because of a hurricane, fire, or flood).

(28) EVV--Electronic visit verification. This term has the meaning set forth in 1 TAC §354.4003 (relating to Definitions).

(29) 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.

(30) Family-based alternative--A family setting in which the family provider or providers are specially trained to provide support and in-home care for children with disabilities or children who are medically fragile.

(31) FMS--Financial management services.

(32) FMSA--Financial management services agency. As defined in 40 TAC §41.103, an entity that provides financial management services to an individual participating in the CDS option.

(33) Former military member--A person who served in the United States Army, Navy, Air Force, Marine Corps, Coast Guard, or Space Force:

(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.

(34) Four-person residence--A residence:

(A) that a program provider leases or owns;

(B) in which at least one person but no more than four persons receive:

(i) residential support;

(ii) supervised living;

(iii) a non-HCS Program service similar to residential support or supervised living (for example, services funded by DFPS or by a person's own resources); or

(iv) respite;

(C) that, if it is the residence of four persons, at least one of those persons receives residential support;

(D) that is not the residence of any persons other than a service provider, the service provider's spouse or person with whom the service provider has a spousal relationship, or a person described in subparagraph (B) of this paragraph; and

(E) that is not a setting described in §263.501(b) of this chapter (relating to Requirements for Service Settings).

(35) GRO--General residential operation. This term has the meaning set forth in Texas Human Resources Code §42.002.

(36) HCS--Home and Community-based Services. Services provided through the HCS Program operated by HHSC as authorized by CMS in accordance with §1915(c) of the Social Security Act.

(37) Health maintenance activities--This term has the meaning set forth in 22 TAC §225.4 (relating to Definitions).

(38) Health-related tasks--Specific tasks related to the needs of an individual, which can be delegated or assigned by a licensed health care professional under state law to be performed by a service provider of CFC PAS/HAB. This includes tasks delegated by an RN; health maintenance activities, 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.

(39) HHSC--The Texas Health and Human Services Commission.

(40) Hospital--A public or private institution licensed or exempt from licensure in accordance with Texas Health and Safety Code (THSC) Chapters 13, 241, 261, or 552.

(41) 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.

(42) ICAP--Inventory for Client and Agency Planning. An instrument designed to assess a person's needs, skills, and abilities.

(43) 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 in accordance with THSC Chapter 252; or

(B) certified by HHSC, including a state supported living center.

(44) 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.

(45) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. A form used by HHSC for level of care determination and level of need assignment.

(46) Implementation plan--A written document developed by a program provider for an individual that, for each HCS Program service and CFC service on the individual's IPC to be provided by the program provider, except for supported home living and CFC support management, includes:

(A) a list of outcomes identified in the person-directed plan that will be addressed using HCS Program services and CFC services;

(B) specific objectives to address the outcomes required by subparagraph (A) of this paragraph that are:

(i) observable, measurable, and outcome-oriented; and

(ii) derived from assessments of the individual's strengths, personal goals, and needs;

(C) a target date for completion of each objective;

(D) the number of units of HCS Program services and CFC services needed to complete each objective;

(E) the frequency and duration of HCS Program services and CFC services needed to complete each objective; and

(F) the signature and date of the individual, LAR, and the program provider.

(47) Individual--A person enrolled in the HCS Program.

(48) Initial IPC--The first IPC for an individual developed before the individual's enrollment into the HCS Program.

(49) Inpatient chemical dependency treatment facility--A facility licensed in accordance with THSC Chapter 464, Facilities Treating Persons with a Chemical Dependency.

(50) In person or in-person--Within the physical presence of another person who is awake. In person or in-person does not include using videoconferencing or a telephone.

(51) Intellectual disability--This term has the meaning set forth in §304.102 of this title.

(52) IPC--Individual plan of care. A written plan that:

(A) states:

(i) the type and amount of each HCS Program service and each CFC service, except for CFC support management, to be provided to the individual during an IPC year;

(ii) the services and supports to be provided to the individual through resources other than HCS Program services or CFC services, including natural supports, medical services, and educational services; and

(iii) if an individual will receive CFC support management; and

(B) is authorized by HHSC.

(53) IPC cost--Estimated annual cost of HCS Program services included on an IPC.

(54) IPC year--The effective period of an initial IPC and renewal IPC as described in this paragraph.

(A) Except as provided in subparagraph (B) of this paragraph, the IPC year for an initial and renewal IPC is a 365-calendar day period starting on the begin date of the initial or renewal IPC.

(B) If the begin date of an initial or renewal IPC is March 1 or later in a year before a leap year or January 1 - February 28 of a leap year, the IPC year for the initial or renewal IPC is a 366-calendar day period starting on the begin date of the initial or renewal IPC.

(C) A revised IPC does not change the begin or end date of an IPC year.

(55) LAR--Legally authorized representative. A person authorized by law to act on behalf of another person with regard to a matter described in this chapter, including a parent, guardian, or managing conservator of a minor; a guardian of an adult; an agent appointed under a power of attorney; or a representative payee appointed by the Social Security Administration. An LAR, such as an agent appointed under a power of attorney or representative payee appointed by the Social Security Administration, may have limited authority to act on behalf of a person.

(56) LIDDA--Local intellectual and developmental disability authority. An entity designated by the executive commissioner of HHSC, in accordance with THSC §533A.035.

(57) LOC--Level of care. A determination given to an applicant or individual as part of the eligibility determination process based on data submitted on the ID/RC Assessment.

(58) LON--Level of need. An assignment given by HHSC to an individual upon which reimbursement for host home/companion care, supervised living, residential support, in-home day habilitation, and day habilitation is based.

(59) Managed care organization--This term has the meaning set forth in Texas Government Code §536.001.

(60) MAO Medicaid--Medical Assistance Only Medicaid. A type of Medicaid by which an applicant or individual qualifies financially for Medicaid assistance but does not receive Supplemental Security Income (SSI) benefits.

(61) Medicaid HCBS--Medicaid home and community-based services. Medicaid services provided to an individual in an individual's home and community, rather than in a facility.

(62) Mental health facility--A facility licensed in accordance with THSC Chapter 577, Private Mental Hospitals and Other Mental Health Facilities.

(63) 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.

(64) Military member--A member of the United States military serving in the Army, Navy, Air Force, Marine Corps, Coast Guard, or Space Force 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.

(65) Natural supports--Unpaid persons, including family members, volunteers, neighbors, and friends, who voluntarily assist an individual to achieve the individual's identified goals.

(66) 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.

(67) Nursing facility--A facility licensed in accordance with THSC Chapter 242.

(68) PDP--Person-directed plan. A plan developed with an applicant or individual and LAR using an HHSC form that describes the supports and services necessary to achieve the desired outcomes identified by the applicant or individual and LAR and to ensure the applicant's or individual's health and safety.

(69) Performance contract--A written agreement between HHSC and a LIDDA for the performance of delegated functions, including those described in THSC §533A.035.

(70) Permanency planning--A philosophy and planning process that focuses on the outcome of family support for an applicant or individual under 22 years of age by facilitating a permanent living arrangement in which the primary feature is an enduring and nurturing parental relationship.

(71) 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.

(72) Platform--This term has the meaning set forth in Texas Government Code §531.001(4-d).

(73) Post-move monitoring visit--A visit conducted by the service coordinator in accordance with the Intellectual and Developmental Disability Preadmission Screening and Resident Review (IDD-PASRR) Handbook.

(74) Pre-enrollment minor home modifications assessment--An assessment performed by a licensed professional as required by the HCS Program Billing Requirements to determine the need for pre-enrollment minor home modifications.

(75) Pre-move site review--A review conducted by the service coordinator in accordance with HHSC's IDD PASRR Handbook.

(76) Professional therapies--Services that consist of the following:

(A) audiology;

(B) occupational therapy;

(C) physical therapy;

(D) speech and language pathology;

(E) behavioral support;

(F) cognitive rehabilitation therapy;

(G) dietary services; and

(H) social work.

(77) Program provider--A person, as defined in 40 TAC §49.102 (relating to Definitions), that has a contract with HHSC to provide HCS Program services, excluding an FMSA.

(78) Provisional contract--A contract that HHSC enters into with a program provider in accordance with 40 TAC §49.208 (relating to Provisional Contract Application Approval) that has a term of no more than three years, not including any extension agreed to in accordance with 40 TAC §49.208(e).

(79) Related condition--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 age 22;

(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.

(80) 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 HCS Program Billing Requirements.

(81) Renewal IPC--An IPC developed for an individual in accordance with §263.302(a) of this chapter (relating to Renewal and Revision of an IPC).

(82) Residential child care facility--This term has the meaning set forth in Texas Human Resources Code §42.002.

(83) Revised IPC--An initial IPC or a renewal IPC that is revised during an IPC year in accordance with §263.302(b) or (d) of this chapter to add a new HCS Program service or CFC service or change the amount of an existing service.

(84) RN--Registered nurse. A person licensed to practice professional nursing in accordance with Texas Occupations Code Chapter 301.

(85) Service backup plan--A plan that ensures continuity of critical program services if service delivery is interrupted.

(86) Service coordination--A service as defined in 40 TAC Chapter 2, Subchapter L (relating to Service Coordination for Individuals with an Intellectual Disability).

(87) Service coordinator--An employee of a LIDDA who provides service coordination to an individual.

(88) Service planning team--One of the following:

(A) for an applicant or individual other than one described in subparagraphs (B) or (C) of this paragraph, a planning team consisting of:

(i) an applicant or individual and LAR;

(ii) service coordinator; and

(iii) other persons chosen by the applicant or individual or LAR, for example, a staff member of the program provider, a family member, a friend, or a teacher;

(B) for an applicant 21 years of age or older who is residing in a nursing facility and enrolling in the HCS Program, a planning team consisting of:

(i) the applicant and LAR;

(ii) the service coordinator;

(iii) a staff member of the program provider;

(iv) providers of specialized services;

(v) a nursing facility staff person who is familiar with the applicant's needs;

(vi) other persons chosen by the applicant or LAR, for example, a family member, a friend, or a teacher; and

(vii) at the discretion of the LIDDA and with the approval of the individual or LAR, other persons who are directly involved in the delivery of services to persons with an intellectual or developmental disability; or

(C) for an individual 21 years of age or older who has enrolled in the HCS Program from a nursing facility or has enrolled in the HCS Program as a diversion from admission to a nursing facility, for 365 calendar days after enrollment, a planning team consisting of:

(i) the individual and LAR;

(ii) the service coordinator;

(iii) a staff member of the program provider;

(iv) other persons chosen by the individual or LAR, for example, a family member, a friend, or a teacher; and

(v) at the discretion of the LIDDA and with the approval of the individual or LAR, other persons who are directly involved in the delivery of services to persons with an intellectual or developmental disability.

(89) Service provider--A person, who may be a staff member, who directly provides an HCS Program service or CFC service to an individual.

(90) 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 member, volunteer, or controlling person, unless a consensual sexual relationship with an adult individual existed before the service provider, staff member, volunteer, or controlling person became a service provider, staff member, volunteer, or controlling person.

(91) Sexual activity--An activity that is sexual in nature, including kissing, hugging, stroking, or fondling with sexual intent.

(92) 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.

(93) Specialized services--This term has the meaning set forth in §303.102 of this title (relating to Definitions).

(94) Staff member--An employee or contractor of an HCS program provider.

(95) Standard contract--A contract that HHSC enters into with a program provider in accordance with 40 TAC §49.209 (relating to Standard Contract) that has a term of no more than five years, not including any extension agreed to in accordance with 40 TAC §49.209(d).

(96) 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.

(97) Store and forward technology--This term has the meaning set forth in Texas Occupations Code §111.001(2).

(98) Supported Decision-Making Agreement--This term has the meaning set forth in Texas Estates Code §1357.002(4).

(99) Synchronous audio-visual--An interactive, two-way audio and video communication platform that:

(A) allows a service to be provided to an individual in real time; and

(B) conforms to the privacy requirements under the Health Insurance Portability and Accountability Act.

(100) TAC--Texas Administrative Code. A compilation of state agency rules published by the Texas Secretary of State in accordance with Texas Government Code Chapter 2002, Subchapter C.

(101) TANF--Temporary Assistance for Needy Families.

(102) TAS--Transition assistance services.

(103) Telehealth service--This term has the meaning set forth in Texas Occupations Code §111.001.

(104) Temporary admission--A stay in a facility listed in §263.705(a) of this chapter (relating to Suspension of HCS Program Services and CFC Services) for 270 calendar days or less or, if an extension is granted in accordance with §263.705(h) of this chapter, a stay in such a facility for more than 270 calendar days.

(105) Three-person residence--A residence:

(A) that a program provider leases or owns;

(B) in which at least one person but no more than three persons receive:

(i) residential support;

(ii) supervised living;

(iii) a non-HCS Program service similar to residential support or supervised living (for example, services funded by DFPS or by a person's own resources); or

(iv) respite;

(C) that is not the residence of any person other than a service provider, the service provider's spouse or person with whom the service provider has a spousal relationship, or a person described in subparagraph (B) of this paragraph; and

(D) that is not a setting described in §263.501(b) of this chapter.

(106) THSC--Texas Health and Safety Code. Texas statutes relating to health and safety.

(107) Transfer IPC--An IPC that is developed in accordance with §263.701 of this chapter (relating to Process for Individual to Transfer to a Different Program Provider or FMSA) and §263.702 of this chapter (relating to Process for Individual to Receive a Service Through the CDS Option that the Individual is Receiving from a Program Provider) when an individual transfers to another program provider or chooses a different service delivery option.

(108) Transition plan--A written plan developed in accordance with §303.701 of this title (relating to Transition Planning for a Designated Resident) for an applicant residing in a nursing facility who is enrolling in the HCS Program.

(109) Transportation plan--A written plan based on person-directed planning and developed with an applicant or individual using the HHSC Individual Transportation Plan form available on the HHSC website. A transportation plan is used to document how supported home living will be delivered to support an individual's desired outcomes and purposes for transportation as identified in the PDP.

(110) Vendor hold--A temporary suspension of payments that are due to a program provider under a contract.

(111) 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.

(112) Videoconferencing--An interactive, two-way audio and video communication:

(A) used to conduct a meeting between two or more persons who are in different locations; and

(B) that conforms to the privacy requirements under the Health Insurance Portability and Accountability Act.

(113) Volunteer--A person who works for a program provider without compensation, other than reimbursement for actual expenses.

§263.4. Description of the HCS Program and CFC.

(a) The HCS Program is a Medicaid waiver program approved by CMS pursuant to §1915(c) of the Social Security Act. It provides community-based services and supports to eligible individuals as an alternative to the ICF/IID Program. The HCS Program is operated by HHSC.

(b) Enrollment in the HCS Program is limited to the number of individuals in specified target groups and to the geographic areas approved by CMS.

(c) HCS Program services described in §263.5 of this subchapter (relating to Description of HCS Program Services) and CFC services described in §263.6 of this subchapter (relating to Description of CFC Services) are selected for inclusion in an individual's IPC to ensure the individual's health, safety, welfare, and integration in the community. HCS Program services and CFC Services supplement rather than replace the individual's natural supports and other community services for which the individual may be eligible and prevent the individual's admission to an institutional setting.

(d) CFC is a state plan option governed by 42 CFR Chapter 441, Subpart K, regarding Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice).

(e) HHSC has grouped Texas counties into geographical areas, referred to as "local service areas," each of which is served by a LIDDA. HHSC has further grouped the local service areas into "waiver contract areas." A list of the counties included in each local service area and waiver contract area is available on the HHSC website.

(1) A program provider may provide HCS Program services and CFC services only to persons residing in the counties specified for the program provider in the HHSC automated enrollment and billing system.

(2) A program provider must have a separate contract for each waiver contract area served by the program provider.

(3) A program provider may have a contract to serve one or more local service areas within a waiver contract area, but the program provider must serve all of the counties within each local service area covered by the contract.

(4) A program provider may not have more than one contract per waiver contract area.

(f) A program provider must comply with all applicable state and federal laws, rules, and regulations.

(g) The CDS option is a service delivery option, described in 40 TAC Chapter 41 (relating to Consumer Directed Services Option), in which an individual or LAR employs and retains service providers and directs the delivery of a service through the CDS option, as described in 40 TAC §41.108 (relating to Services Available Through the CDS Option).

§263.5. Description of HCS Program Services.

(a) HCS Program services are described in this section and in Appendix C of the HCS Program waiver application approved by CMS and available on the HHSC website.

(1) Adaptive aids are devices, controls, or items that are necessary to address specific needs identified in an individual's service plan. Adaptive aids enable an individual to maintain or increase the ability to perform ADLs or the ability to perceive, control, or communicate with the environment in which the individual lives.

(2) Audiology is the provision of audiology as defined in the Texas Occupations Code Chapter 401.

(3) Speech and language pathology is the provision of speech-language pathology, as defined in the Texas Occupations Code Chapter 401.

(4) Occupational therapy is the practice of occupational therapy as described in the Texas Occupations Code Chapter 454.

(5) Physical therapy is the provision of physical therapy as defined in the Texas Occupations Code Chapter 453.

(6) Dietary services are the provision of nutrition services as defined in the Texas Occupations Code Chapter 701.

(7) Behavioral support is the provision of specialized interventions that:

(A) assist an individual to increase adaptive behaviors to replace or modify maladaptive or socially unacceptable behaviors that prevent or interfere with the individual's inclusion in home and family life or community life; and

(B) improve an individual's quality of life.

(8) Social work is the provision of social work as defined in Texas Occupations Code Chapter 505.

(9) Cognitive rehabilitation therapy is assistance to an individual in learning or relearning cognitive skills that have been lost or altered as a result of damage to brain cells/chemistry in order to enable the individual to compensate for the lost cognitive functions, including reinforcing, strengthening, or reestablishing previously learned patterns of behavior, or establishing new patterns of cognitive activity or compensatory mechanisms for impaired neurological systems.

(10) Day habilitation is assistance with acquiring, retaining, or improving self-help, socialization, and adaptive skills provided in a location other than the residence of an individual. Day habilitation does not include in-home day habilitation.

(11) In-home day habilitation is assistance with acquiring, retaining, or improving self-help, socialization, and adaptive skills provided in an individual's residence.

(12) Dental treatment is:

(A) emergency dental treatment;

(B) preventive dental treatment;

(C) therapeutic dental treatment; and

(D) orthodontic dental treatment, excluding cosmetic orthodontia.

(13) Minor home modifications are physical adaptations to an individual's home to address specific needs identified by an individual's service planning team and include pre-enrollment minor home modifications which are modifications completed before an applicant is discharged from a nursing facility, an ICF/IID, or a GRO and before the effective date of the applicant's enrollment in the HCS Program.

(14) Licensed vocational nursing is the provision of licensed vocational nursing, as defined in the Texas Occupations Code Chapter 301.

(15) Registered nursing is the provision of professional nursing, as defined in the Texas Occupations Code Chapter 301.

(16) Specialized registered nursing is the provision of registered nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(17) Specialized licensed vocational nursing is the provision of licensed vocational nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(18) Supported home living is transportation of an individual with a residential type of "own/family home."

(19) Host home/companion care is residential assistance from a service provider who lives in the same residence as the individual and in a residence that the program provider does not lease or own.

(20) Supervised living is residential assistance provided in a three-person residence or four-person residence in which service providers are present in the residence and are able to respond to the needs of individuals during normal sleeping hours.

(21) Residential support is residential assistance provided in a three-person residence or four-person residence in which service providers are present and awake in the residence whenever an individual is present in the residence.

(22) Respite is temporary relief for an unpaid caregiver in a location other than the individual's home for an individual who has a residential type of "own/family home."

(23) In-home respite is temporary relief for an unpaid caregiver in the individual's home for an individual who has a residential type of "own/family home."

(24) Employment assistance is assistance to help an individual locate paid employment in the community.

(25) Supported employment is assistance, 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.

(26) TAS is assistance to an applicant in setting up a household in the community before being discharged from a nursing facility,

an ICF/IID, or a GRO and before enrolling in the HCS Program and consists of:

(A) for an applicant whose initial IPC does not include residential support, supervised living, or host home/companion care:

(i) paying security deposits required to lease a home, including an apartment, or to establish utility services for a home;

(ii) purchasing essential furnishings for a home, including a table, a bed, chairs, window blinds, eating utensils, and food preparation items;

(iii) paying for expenses required to move personal items, including furniture and clothing, into a home;

(iv) paying for services to ensure the health and safety of the applicant in a home, including pest eradication, allergen control, or a one-time cleaning before occupancy; and

(v) purchasing essential supplies for a home, including toilet paper, towels, and bed linens; and

(B) for an applicant whose initial IPC includes residential support, supervised living, or host home/companion care:

(i) purchasing bedroom furniture;

(ii) purchasing personal linens for the bedroom and bathroom; and

(iii) paying for allergen control.

(b) The services described in this subsection are for an individual who is receiving at least one HCS Program service through the CDS option.

(1) FMS is a service defined in 40 TAC §41.103 (relating to Definitions).

(2) Support consultation is a service defined in 40 TAC §41.103.

§263.6. Description of CFC Services.

(a) CFC services are described in this subsection and in the Medicaid State Plan approved by CMS and available on the HHSC website.

(1) CFC PAS/HAB:

(A) 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.

(2) CFC support management provides training to an individual or LAR on how to select, manage, and dismiss an unlicensed service provider of CFC PAS/HAB, as described in the HCS Handbook, if:

(A) the individual is receiving CFC PAS/HAB; and

(B) the individual or LAR requests to receive CFC support management.

(3) CFC ERS consists of backup systems and supports used to ensure continuity of services and supports, including electronic devices and an array of available technology, personal emergency response systems, and other mobile communication devices and is provided only to an individual who:

(A) lives alone, who is alone for significant parts of the day, or has no regular caregiver for extended periods of time; and

(B) would otherwise require extensive routine supervision.

(b) CFC PAS/HAB and CFC ERS are not available to an individual who is receiving:

(1) host home/companion care;

(2) supervised living; or

(3) residential support.

§263.7. Requirement for Translation.

If a program provider or LIDDA submits documentation to HHSC containing information that is not in English, the program provider or LIDDA must, at the same time, submit a translation of the information in English.

§263.8. Comprehensive Nursing Assessment.

(a) An RN must complete a comprehensive nursing assessment:

(1) of an applicant in person, if the applicant's initial IPC includes a sufficient number of RN nursing units for the program provider's RN to perform a comprehensive nursing assessment as described in §263.104(k)(9) of this chapter (relating to Process for Enrollment of Applicants); and

(2) of an individual in person:

(A) when the health status of the individual changes;

(B) at least annually if a nursing service is on the individual's renewal IPC;

(C) before an unlicensed service provider performs a delegated nursing task; and

(D) if the RN who completed the most recent comprehensive nursing assessment of the individual is no longer providing a nursing service to the individual, except as provided in subsection (b) of this section.

(b) The comprehensive nursing assessment required to be completed in accordance with subsection (a)(2)(D) of this section does not have to be completed in person if an unlicensed service provider is not performing a delegated nursing task or a health maintenance activity for the individual.

(c) An RN must document a comprehensive nursing assessment required by subsection (a) of this section using the HHSC Comprehensive Nursing Assessment form.

§263.9. Providing Physical Therapy, Occupational Therapy, and Speech and Language Pathology as a Telehealth Service.

(a) Except as described in subsection (c) of this section, a service provider of physical therapy, occupational therapy, or speech and language pathology may provide physical therapy, occupational therapy, or speech and language pathology to an individual as a telehealth service.

(b) If a service provider of physical therapy, occupational therapy, or speech and language pathology provides physical therapy, occupational therapy, or speech and language pathology to an individual as a telehealth service, a program provider must ensure that the service provider:

(1) uses a synchronous audio-visual platform to interact with the individual, supplemented with or without asynchronous store and forward technology;

(2) does not use an audio-only platform to provide the service; and

(3) before providing the telehealth service:

(A) obtains the written informed consent of the individual or LAR to provide the service; or

(B) obtains the individual or LAR's oral consent to receive the telehealth service and documents the oral consent in the individual's record.

(c) A program provider must ensure that a service provider of physical therapy, occupational therapy, or speech and language pathology performs services in person, as required by the Texas Medicaid Provider Procedures Manual. Such services include:

(1) a service that requires a physical agent modality or hands-on therapy, such as a paraffin bath, aquatic therapy, manual therapy, massage, and ultrasound;

(2) orthotic management and training, initial encounter and subsequent encounters;

(3) prosthetic management or training for an upper or lower extremity, initial encounter and subsequent encounters;

(4) a wheelchair assessment and training; and

(5) a complex rehabilitation technology assessment.

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 September 1, 2022.

TRD-202203442

Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER B. ELIGIBILITY, ENROLLMENT, AND REVIEW

26 TAC §§263.101 - 263.108

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§263.101. Eligibility Criteria for HCS Program Services and CFC Services.

(a) An applicant or individual is eligible for HCS Program services if the applicant or individual:

(1) meets the financial eligibility criteria as described in Appendix B of the HCS Program waiver application approved by CMS and available on the HHSC website;

(2) meets one of the following criteria:

(A) based on a DID and as determined by HHSC in accordance with §263.105 of this subchapter (relating to LOC Determination), qualifies for an ICF/IID LOC I, as defined in §261.238 of this title (relating to ICF/MR Level of Care I Criteria);

(B) as determined by HHSC in accordance with §263.105 of this subchapter, qualifies for an ICF/IID LOC I as defined in §261.238 of this title or ICF/IID LOC VIII, as defined in §261.239 of this title (relating to ICF/MR Level of Care VIII Criteria), and has been determined by HHSC:

(i) to have an intellectual disability or a related condition;

(ii) to need specialized services; and

(iii) to be inappropriately placed in a Medicaid certified nursing facility based on an annual resident review conducted in accordance with the requirements of Chapter 303 of this title (relating to Preadmission Screening and Resident Review (PASRR); or

(C) meets the following criteria:

(i) based on a DID and as determined by HHSC in accordance with §261.237 of this title (relating to Level of Care) qualifies for one of the following levels of care:

(I) an ICF/IID LOC I as defined in §261.238 of this title; or

(II) an ICF/IID LOC VIII as defined in §261.239 of this title;

(ii) meets one of the following:

(I) resides in a nursing facility immediately before enrolling in the HCS Program; or

(II) is at imminent risk of entering a nursing facility as determined by HHSC; and

(iii) is offered HCS Program services designated for a member of the reserved capacity group "Individuals with a level of care I or VIII residing in a nursing facility" included in Appendix B of the HCS Program waiver application approved by CMS and available on the HHSC website;

(3) has an IPC cost that does not exceed:

(A) $167,468 for an applicant or individual with an LON 1, LON 5, or LON 8;

(B) $168,615 for an applicant or individual with an LON 6; or

(C) $305,877 for an applicant or individual with an LON 9;

(4) is not enrolled in another waiver program and is not receiving a service that may not be received if the individual is enrolled in the HCS Program as identified in the Mutually Exclusive Services table in Appendix II of the HCS Handbook available on the HHSC website;

(5) does not reside in:

(A) a hospital;

(B) an ICF/IID;

(C) a nursing facility;

(D) an ALF;

(E) a residential child care facility licensed by HHSC unless it is an agency foster home;

(F) an inpatient chemical dependency treatment facility;

(G) a mental health facility;

(H) a residential facility operated by the Texas Workforce Commission; or

(I) a residential facility operated by the Texas Juvenile Justice Department, a jail, or a prison; and

(6) requires the provision of:

(A) at least one HCS Program service per month or a monthly monitoring visit by a service coordinator as described in §263.901(e)(40) of this chapter (relating to LIDDA Requirements for Providing Service Coordination in the HCS Program); and

(B) at least one HCS Program service per IPC year.

(b) For applicants or individuals with spouses who live in the community, the income and resource eligibility requirements are determined according to the spousal impoverishment provisions in §1924 of the Social Security Act and as specified in the Medicaid State Plan.

(c) Except as provided in subsection (d) of this section, an applicant or individual is eligible for a CFC service under this chapter if the applicant or 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 host home/companion care, supervised living, or residential support.

(d) To be eligible for a CFC service under this chapter, an applicant or individual receiving MAO Medicaid must, in addition to meeting the eligibility criteria described in subsection (c) of this section, receive an HCS Program service at least monthly, as required by 42 CFR §441.510(d), which may not be met by a monthly monitoring visit by a service coordinator as described in §263.901(e)(40) of this chapter.

§263.102. Calculation of Co-payment.

(a) Individuals and eligible couples determined to be financially eligible based on the special institutional income limit may be required to share in the cost of HCS Program services. The method for determining the individual's or couple's co-payment is described in subsections (b) and (c) of this section and documented on the HHSC Waiver Program Co-Pay Worksheet.

(b) The co-payment amount as determined by HHSC is the individual's or couple's remaining income after all allowable expenses have been deducted. The co-payment amount is applied only to the cost of HCS Program services specified on each individual's IPC. The co-payment must not exceed the cost of services actually delivered. The co-payment must be paid by the individual or couple, authorized representative, or trustee directly to the program provider in accordance with the HHSC determination. When calculating the co-payment amount for an individual or a couple whose income exceeds the maximum personal needs allowance, the following are deducted:

(1) the cost of the individual's or couple's maintenance needs, which must be equivalent to the special institutional income limit for eligibility under the Texas Medicaid program;

(2) the cost of the maintenance needs of the individual's or couple's dependent children, which is an amount equivalent to the TANF basic monthly grant for children or a spouse with children, using the recognizable needs amounts in the TANF Budgetary Allowances Chart; and

(3) the costs incurred for medical or remedial care that are necessary but are not subject to payment by Medicare, Medicaid, or any other third party, which include the costs of health insurance premiums, deductibles, and co-insurance.

(c) When calculating the co-payment amount for individuals with community spouses, HHSC determines the amount of the recipient's income applicable to payment in accordance with §1924 of the Social Security Act and 42 CFR §435.726.

§263.103. HCS Interest List.

(a) A LIDDA must maintain an up-to-date interest list of applicants interested in receiving HCS Program services for whom the LIDDA is the applicant's designated LIDDA in the HHSC data system.

(b) A person may request that an applicant's name be added to the HCS interest list by contacting the LIDDA serving the Texas county in which the applicant or person resides.

(c) If a request is made in accordance with subsection (b) of this section for an applicant who resides in Texas, a LIDDA must add the applicant's name to the HCS interest list using the date the LIDDA receives the request as the HCS interest list date.

(d) For an applicant under 22 years of age who is residing in an ICF/IID or nursing facility located in Texas, HHSC adds the applicant's name to the HCS interest list using the date of admission to the ICF/IID or nursing facility as the HCS interest list date.

(e) For an applicant determined diagnostically or functionally ineligible during the enrollment process for the Community Living Assistance and Support Services (CLASS) Program, Deaf-Blind with Multiple Disabilities (DBMD) Program, or Medically Dependent Children Program (MDCP):

(1) if the applicant's name is not on the HCS interest list, at the request of the applicant or LAR, HHSC adds the applicant's name to the HCS interest list using the applicant's interest list date for the program for which the applicant was determined ineligible as the HCS interest list date;

(2) if the applicant's name is on the HCS interest list and the applicant's interest list date for the program for which the applicant was determined ineligible is earlier than the applicant's HCS interest list date, at the request of the applicant or LAR, HHSC changes the applicant's HCS interest list date to the applicant's interest list date for the program for which the applicant was determined ineligible; or

(3) if the applicant's name is on the HCS interest list and the applicant's HCS interest list date is earlier than the applicant's interest list date for the program for which the applicant was determined ineligible, HHSC does not change the applicant's HCS interest list date.

(f) This subsection applies to an applicant who was enrolled in MDCP and, because the applicant did not meet the LOC criteria for medical necessity for nursing facility care or did not meet the age requirement of being under 21 years of age, was determined ineligible for MDCP after November 30, 2019.

(1) At the request of the applicant or LAR, HHSC adds the applicant's name to the HCS interest list:

(A) using the MDCP interest list date as the HCS interest list date, if the applicant's name is not on the HCS interest list but it was previously on the HCS interest list; or

(B) using the date HHSC receives the request as the HCS interest list date, if the applicant's name is not on the HCS interest list and it never has been on the HCS interest list.

(2) At the request of the applicant or LAR, HHSC changes the HCS interest list date to the MDCP interest list date if the applicant's MDCP interest list date is earlier than the applicant's HCS interest list date.

(g) HHSC or the LIDDA removes an applicant's name from the HCS interest list if:

(1) the applicant or LAR requests in writing that the applicant's name be removed from the HCS interest list, unless the applicant is under 22 years of age and residing in an ICF/IID or nursing facility;

(2) the applicant moves out of Texas, unless the applicant is a military family member living outside of Texas:

(A) while the military member is on active duty; or

(B) for less than one year after the former military member's active duty ends;

(3) the applicant declines an offer of HCS Program services or, as described in §263.104(f) of this subchapter (relating to Process for Enrollment of Applicants), an offer of HCS Program services is withdrawn, unless:

(A) the applicant is a military family member living outside of Texas:

(i) while the military member is on active duty, or

(ii) for less than one year after the former military member's active duty ends; or

(B) the applicant is under 22 years of age and residing in an ICF/IID or nursing facility;

(4) the applicant is a military family member living outside of Texas for more than one year after the former military member's active duty ends;

(5) the applicant is deceased; or

(6) HHSC has denied the applicant enrollment in the HCS Program and the applicant or LAR has had an opportunity to exercise the applicant's right to appeal the decision in accordance with §263.801 of this chapter (relating to Fair Hearing) and did not appeal the decision or appealed and did not prevail.

(h) If HHSC or the LIDDA removes an applicant's name from the HCS interest list in accordance with subsection (g)(1) - (4) of this section, the LIDDA receives an oral or written request from a person to add the applicant's name to the HCS interest list within 90 calendar days after the name was removed, and the request is the applicant's first request:

(1) the LIDDA must notify HHSC of the request; and

(2) HHSC:

(A) adds the applicant's name to the HCS interest list using the HCS interest list date that was in effect at the time the applicant's name was removed from the HCS interest list; and

(B) notifies the applicant or LAR in writing that the applicant's name has been added to the HCS interest list in accordance with subparagraph (A) of this paragraph.

(i) If HHSC or the LIDDA removes an applicant's name from the HCS interest list in accordance with subsection (g)(1) - (4) of this section, the LIDDA receives an oral or written request from a person to add the applicant's name to the HCS interest list more than 90 calendar days after the name was removed, and the request is the applicant's first request:

(1) one of the following occurs:

(A) the LIDDA adds the applicant's name to the HCS interest list using the date the LIDDA receives the oral or written request as the HCS interest list date; or

(B) if HHSC determines that extenuating circumstances exist, HHSC adds the applicant's name to the HCS interest list using the HCS interest list date that was in effect at the time the applicant's name was removed from the HCS interest list as the HCS interest list date; and

(2) HHSC notifies the applicant or LAR in writing that the applicant's name has been added to the HCS interest list in accordance with paragraph (1) of this subsection.

(j) If HHSC or the LIDDA removes an applicant's name from the HCS interest list in accordance with subsection (g)(1) - (4) of this section, the LIDDA receives an oral or written request from a person to add the applicant's name to the HCS interest list, and the request is not the applicant's first request:

(1) the LIDDA adds the applicant's name to the HCS interest list using the date the LIDDA receives the oral or written request as the HCS interest list date; and

(2) HHSC notifies the applicant or LAR in writing that the applicant's name has been added to the HCS interest list in accordance with paragraph (1) of this subsection.

(k) If HHSC or the LIDDA removes an applicant's name from the HCS interest list in accordance with subsection (g)(6) of this section

and the LIDDA subsequently receives an oral or written request from a person to add the applicant's name to the HCS interest list:

(1) the LIDDA must add the applicant's name to the HCS interest list using the date the LIDDA receives the oral or written request as the HCS interest list date; and

(2) HHSC notifies the applicant or LAR in writing that the applicant's name has been added to the HCS interest list in accordance with paragraph (1) of this subsection.

§263.104. Process for Enrollment of Applicants.

(a) HHSC notifies a LIDDA, in writing, when the opportunity for enrollment in the HCS Program becomes available in the LIDDA's local service area and directs the LIDDA to offer enrollment to an applicant:

(1) whose interest list date, assigned in accordance with §263.103 of this subchapter (relating to HCS Interest List), is earliest on the statewide interest list for the HCS Program maintained by HHSC; or

(2) who is a member of a target group identified in the HCS Program waiver application approved by CMS.

(b) Except as provided in subsection (c) of this section, a LIDDA must offer enrollment in the HCS Program in writing and deliver it to the applicant or LAR by United States mail or by hand delivery.

(c) A LIDDA must offer enrollment in the HCS Program to an applicant described in subsection (a)(2) of this section in accordance with HHSC's procedures.

(d) A LIDDA must include in a written offer that is made in accordance with subsection (a)(1) of this section:

(1) a statement that:

(A) if the applicant or LAR does not respond to the offer of enrollment in the HCS Program within 30 calendar days after the LIDDA's written offer, the LIDDA withdraws the offer; and

(B) if the applicant is currently receiving services from the LIDDA that are funded by general revenue and the applicant or LAR declines the offer of enrollment in the HCS Program, the LIDDA terminates those services funded by general revenue that are similar to services provided in the HCS Program; and

(2) the HHSC Deadline Notification form, which is available on the HHSC website.

(e) If an applicant or LAR responds to an offer of enrollment in the HCS Program, a LIDDA must:

(1) provide the applicant, LAR, and, if the LAR is not a family member, at least one family member if possible, both an oral and written explanation of the services and supports for which the applicant may be eligible, including the ICF/IID Program, both state supported living centers and community-based facilities, waiver programs authorized under §1915(c) of the Social Security Act, and other community-based services and supports, using the HHSC Explanation of Services and Supports document, which is available on the HHSC website;

(2) provide the applicant and LAR both an oral and a written explanation of all HCS Program services and CFC services using the HHSC Understanding Program Eligibility and Services form, which is available on the HHSC website; and

(3) give the applicant or LAR the HHSC Waiver Program Verification of Freedom of Choice form, which is available on the HHSC website, to document the applicant's choice between the HCS Program or the ICF/IID Program.

(f) A LIDDA must withdraw an offer of enrollment in the HCS Program made to an applicant or LAR if:

(1) within 30 calendar days after the LIDDA's offer made to the applicant or LAR in accordance with subsection (a)(1) of this section, the applicant or LAR does not respond to the offer of enrollment in the HCS Program;

(2) within seven calendar days after the applicant or LAR receives the HHSC Waiver Program Verification of Freedom of Choice form from the LIDDA in accordance with subsection (e)(3) of this section, the applicant or LAR does not use the form to document the applicant's choice, the HCS Program or the ICF/IID Program;

(3) within 30 calendar days after the applicant or LAR receives the contact information for all program providers in the LIDDA's local service area in accordance with subsection (j)(3) of this section, the applicant or LAR does not document the choice of a program provider using the HHSC Documentation of Provider Choice form, which is available on the HHSC website;

(4) the applicant or LAR does not complete the necessary activities to finalize the enrollment process and HHSC has approved the withdrawal of the offer; or

(5) the applicant has moved out of the State of Texas.

(g) If a LIDDA withdraws an offer of enrollment in the HCS Program made to an applicant, the LIDDA must notify the applicant or LAR of such action, in writing, by certified United States mail.

(h) If an applicant is currently receiving services from a LIDDA that are funded by general revenue and the applicant or LAR declines the offer of enrollment in the HCS Program, the LIDDA must terminate those services funded by general revenue that are similar to services provided in the HCS Program.

(i) If a LIDDA terminates an applicant's services in accordance with subsection (h) of this section, the LIDDA must notify the applicant or LAR of the termination, in writing, by certified United States mail and provide an opportunity for a review in accordance with 40 TAC §2.46 (relating to Notification and Appeals Process).

(j) If an applicant or LAR accepts the offer of enrollment in the HCS Program, the LIDDA must compile and maintain information necessary to process the applicant's request for enrollment.

(1) If the applicant's financial eligibility for the HCS Program must be established, the LIDDA must initiate, monitor, and support the processes necessary to obtain a financial eligibility determination.

(2) The LIDDA must complete an ID/RC Assessment in accordance with §263.105 of this subchapter (relating to LOC Determination) and §263.106 of this subchapter (relating to LON Assignment).

(A) The LIDDA must:

(i) do one of the following:

(I) conduct a DID in accordance with §304.401 of this title (relating to Conducting a Determination of Intellectual Disability) except that the following activities must be conducted in person:

(-a-) a standardized measure of the individual's intellectual functioning using an appropriate test based on the characteristics of the individual; and

(-b-) a standardized measure of the individual's adaptive abilities and deficits reported as the individual's adaptive behavior level; or

(II) review and endorse a DID report in accordance with §304.403 of this title (relating to Review and Endorsement of a Determination of Intellectual Disability Report); and

(ii) determine whether the applicant has been diagnosed by a licensed physician as having a related condition.

(B) The LIDDA must:

(i) conduct an ICAP assessment in person; and

(ii) recommend an LON assignment to HHSC in accordance with §263.106 of this subchapter.

(C) The LIDDA must enter the information from the completed ID/RC Assessment and electronically submit the information to HHSC for approval in accordance with §263.105(a) of this subchapter and §263.106(a) of this subchapter and, if applicable, submit supporting documentation as required by §263.107(c) of this subchapter (relating to HHSC Review of LON).

(3) The LIDDA must provide names and contact information to the applicant or LAR for all program providers in the LIDDA's local service area.

(4) The LIDDA must assign a service coordinator who, together with other members of the applicant's service planning team, must:

(A) develop a PDP;

(B) if CFC PAS/HAB is included on the PDP, complete the HHSC HCS/TxHmL CFC PAS/HAB Assessment form, which is available on the HHSC website, to determine the number of CFC PAS/HAB hours the applicant needs; and

(C) develop an initial IPC in accordance with §263.301(c) of this chapter (relating to IPC Requirements).

(5) The CFC PAS/HAB Assessment form required by paragraph (4)(B) of this subsection must be completed in person with the individual unless the following conditions are met in which case the form may be completed by videoconferencing or telephone:

(A) the service coordinator gives the individual the opportunity for completing the form in person in lieu of completing it by videoconferencing or telephone and the individual agrees to the form being completed by videoconferencing or telephone; and

(B) the individual receives appropriate in-person support during the completion of the form by videoconferencing or telephone.

(6) A service coordinator must discuss the CDS option with the applicant or LAR in accordance with §263.401(a) and (b) of this chapter (relating to CDS Option).

(k) A service coordinator must:

(1) arrange for meetings and visits with potential program providers as requested by an applicant or LAR;

(2) review the initial IPC with potential program providers as requested by the applicant or LAR;

(3) ensure that the applicant's or LAR's choice of a program provider is documented on the HHSC Documentation of Provider Choice form and that the form is signed by the applicant or LAR;

(4) negotiate and finalize the initial IPC and the date services will begin with the selected program provider, consulting with HHSC if necessary to reach agreement with the selected program provider on the content of the initial IPC and the date services will begin;

(5) determine whether the applicant meets the following criteria:

(A) is being discharged from a nursing facility, an ICF/IID, or a GRO; and

(B) anticipates needing TAS;

(6) if the service coordinator determines that the applicant meets the criteria described in paragraph (5) of this subsection:

(A) complete, with the applicant or LAR and the selected program provider, the HHSC Transition Assistance Services (TAS) Assessment and Authorization form, which is available on the HHSC website, in accordance with the form's instructions, which includes:

(i) identifying the TAS the applicant needs; and

(ii) estimating the monetary amount for each transition assistance service identified, which must be within the service limit described in §263.304(a)(6) of this chapter (relating to Service Limits);

(B) submit the completed form to HHSC to determine if TAS is authorized;

(C) send the form authorized by HHSC to the selected program provider; and

(D) include the TAS and the monetary amount authorized by HHSC on the applicant's initial IPC;

(7) determine whether an applicant meets the following criteria:

(A) is being discharged from a nursing facility, an ICF/IID, or a GRO;

(B) has not met the maximum service limit for minor home modifications as described in §263.304 (a)(3)(A) of this chapter; and

(C) anticipates needing pre-enrollment minor home modifications and a pre-enrollment minor home modifications assessment;

(8) if the service coordinator determines that an applicant meets the criteria described in paragraph (7) of this subsection:

(A) complete, with the applicant or LAR and selected program provider, the HHSC Home and Community-based Services (HCS) Program Pre-enrollment MHM Authorization Request form, which is available on the HHSC website, in accordance with the form's instructions, which includes:

(i) identifying the pre-enrollment minor home modifications the applicant needs;

(ii) identifying the pre-enrollment minor home modifications assessments conducted by the program provider; and

(iii) based on documentation provided by the program provider as required by the HCS Program Billing Requirements, stating the cost of:

(I) the pre-enrollment minor home modifications identified on the form, which must be within the service limit described in §263.304(a)(3)(A) of this chapter; and

(II) the pre-enrollment minor home modifications assessments conducted;

(B) submit the completed form to HHSC to determine if pre-enrollment minor home modification and pre-enrollment minor home modifications assessments are authorized;

(C) send the form authorized by HHSC to the selected program provider; and

(D) include the pre-enrollment minor home modifications, pre-enrollment minor home modifications assessments, and the monetary amount for these services authorized by HHSC on the applicant's initial IPC;

(9) if an applicant or LAR chooses a program provider to deliver supported home living, nursing, host home/companion care, residential support, supervised living, respite, employment assistance, supported employment, in-home day habilitation, day habilitation, or CFC PAS/HAB, ensure that the initial IPC includes a sufficient number of RN nursing units for the program provider's RN to perform a comprehensive nursing assessment unless:

(A) nursing services are not on the IPC and the applicant or LAR and selected program provider have determined that no nursing tasks will be performed by an unlicensed service provider as documented on the HHSC Nursing Task Screening Tool form; or

(B) an unlicensed service provider will perform a nursing task and a physician has delegated the task as a medical act under Texas Occupations Code Chapter 157, as documented by the physician;

(10) if an applicant or LAR refuses to include on the initial IPC a sufficient number of RN nursing units for the program provider's RN to perform a comprehensive nursing assessment as required by paragraph (9) of this subsection:

(A) inform the applicant or LAR that the refusal:

(i) will result in the applicant not receiving nursing services from the program provider; and

(ii) if the applicant needs host home/companion care, residential support, supervised living, supported home living, respite, employment assistance, supported employment, in-home day habilitation, day habilitation, or CFC PAS/HAB from the program provider, will result in the individual not receiving that service unless:

(I) the program provider's unlicensed service provider does not perform nursing tasks in the provision of the service; and

(II) the program provider determines that it can ensure the applicant's health, safety, and welfare in the provision of the service; and

(B) document the refusal of the RN nursing units on the initial IPC for a comprehensive nursing assessment by the program provider's RN in the applicant's record;

(11) ensure that the applicant or LAR signs and dates the initial IPC in person, electronically, by fax, or by United States mail;

(12) ensure that the selected program provider signs and dates the initial IPC, demonstrating agreement that the services will be provided to the applicant;

(13) sign and date the initial IPC, which indicates that the service coordinator agrees that the requirements described in §263.301(c) of this chapter have been met;

(14) using the HHSC Understanding Program Eligibility and Services form, which is available on the HHSC website, provide an oral and written explanation to the applicant or LAR:

(A) of the eligibility requirements for HCS Program services as described in §263.101(a) of this subchapter (relating to Eligibility Criteria for HCS Program Services and CFC Services);

(B) if the applicant's PDP includes CFC services:

(i) of the eligibility requirements for CFC services as described in §263.101(c) of this subchapter to applicants who do not receive MAO Medicaid; and

(ii) of the eligibility requirements for CFC services as described in §263.101(d) of this subchapter to applicants who receive MAO Medicaid;

(C) that HCS Program services may be terminated if:

(i) the individual no longer meets the eligibility criteria described in §263.101(a) of this subchapter; or

(ii) the individual or LAR requests termination of HCS Program services; and

(D) if the applicant's PDP includes CFC services, that CFC services may be terminated if:

(i) the individual no longer meets the eligibility criteria described in §263.101(c) or (d) of this subchapter; or

(ii) the individual or LAR requests termination of CFC services.

(l) A LIDDA must conduct permanency planning in accordance with §263.902(a) of this chapter (relating to Permanency Planning).

(m) After an initial IPC is finalized and signed in accordance with subsection (k) of this section, the LIDDA must:

(1) enter the information from the initial IPC in the HHSC data system and electronically submit it to HHSC;

(2) keep the original initial IPC in the individual's record;

(3) ensure the information from the initial IPC entered in the HHSC data system and electronically submitted to HHSC contains information identical to the information on the initial IPC; and

(4) submit other required enrollment information to HHSC.

(n) HHSC notifies the applicant or LAR, the selected program provider, the FMSA, if applicable, and the LIDDA of its approval or denial of the applicant's enrollment. When the enrollment is approved, HHSC authorizes the applicant's enrollment in the HCS Program through the HHSC data system and issues an enrollment letter to the applicant that includes the effective date of the applicant's enrollment in the HCS Program.

(o) Before the applicant's service begin date, the LIDDA must provide to the selected program provider and FMSA, if applicable:

(1) copies of all enrollment documentation and associated supporting documentation, including relevant assessment results and recommendations;

(2) the completed ID/RC Assessment;

(3) the initial IPC;

(4) the applicant's PDP; and

(5) if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form.

(p) Except for the provision of TAS, pre-enrollment minor home modifications, and a pre-enrollment minor home modifications assessment, the selected program provider must not initiate services until notified of HHSC's approval of the applicant's enrollment.

(q) The selected program provider and the individual or LAR must develop:

(1) an implementation plan for:

(A) HCS Program services, except for supported home living, that is based on the individual's PDP and IPC; and

(B) CFC services, except for CFC support management, that is based on the individual's PDP, IPC, and if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form; and

(2) a transportation plan, if supported home living is included on the PDP.

(r) A LIDDA must retain in an applicant's record:

(1) the HHSC Waiver Program Verification of Freedom of Choice form;

(2) the HHSC Documentation of Provider Choice form, if applicable;

(3) the HHSC Deadline Notification form; and

(4) any other correspondence related to the offer of enrollment in the HCS Program.

§263.105. LOC Determination.

(a) A LIDDA must request an LOC from HHSC for an applicant in accordance with this subsection.

(1) The LIDDA must complete an ID/RC Assessment for an applicant that:

(A) includes the LOC recommended by a person qualified to perform an initial evaluation of LOC in accordance with Appendix B of the HCS Program waiver application approved by CMS; and

(B) is signed and dated in accordance with the instructions for completing the ID/RC Assessment.

(2) The LIDDA must enter information from the completed ID/RC Assessment in the HHSC data system and electronically submit the information to HHSC.

(3) The LIDDA must ensure that the information entered in the HHSC data system and electronically submitted to HHSC is identical to the information on the completed ID/RC Assessment.

(4) The LIDDA must send a copy of the completed ID/RC Assessment and supporting documentation to HHSC, as requested by HHSC.

(b) A program provider must request an LOC for an individual from HHSC in accordance with this subsection.

(1) No more than 60 calendar days before the expiration date of an individual's ID/RC Assessment, a program provider must:

(A) complete an ID/RC Assessment that:

(i) includes the LOC recommended by a person qualified to perform a reevaluation of LOC in accordance with Appendix B of the HCS Program waiver application approved by CMS; and

(ii) is signed and dated by the program provider in accordance with the instructions for completing the ID/RC Assessment; and

(B) enter information from the completed ID/RC Assessment in the HHSC data system and electronically submit the information.

(2) A program provider must:

(A) ensure that the information entered and electronically submitted in the HHSC data system is identical to the information on the completed ID/RC Assessment;

(B) within three calendar days after entering and electronically submitting the information in the HHSC data system, provide the service coordinator with a copy of the completed ID/RC Assessment; and

(C) send a copy of the completed ID/RC Assessment and supporting documentation to HHSC, as requested by HHSC.

(3) If the program provider enters information from a completed ID/RC Assessment in the HHSC data system and electronically submits the information on a date that is more than 180 calendar days after the expiration date of the previous ID/RC Assessment, the program provider must:

(A) send to HHSC a copy of the completed ID/RC Assessment by a method, as instructed by HHSC, that:

(i) includes the recommended LOC; and

(ii) is signed and dated by the program provider in accordance with the instructions for completing the ID/RC Assessment;

(B) within three calendar days after sending the completed ID/RC Assessment to HHSC, provide the service coordinator with a copy of the completed ID/RC Assessment; and

(C) submit documentation supporting the ID/RC Assessment to HHSC, as requested by HHSC.

(c) For an LOC requested in accordance with subsection (b) of this section, within seven calendar days after a program provider enters information from a completed ID/RC Assessment in the HHSC data system and electronically submits the information, the service coordinator or a LIDDA representative other than the service coordinator must:

(1) review the information entered in the HHSC data system and electronically submitted, to determine if the information in the HHSC data system is identical to the information on the completed ID/RC Assessment the service coordinator received from the program provider;

(2) enter in the HHSC data system:

(A) the service coordinator's name and date of review; and

(B) one of the following:

(i) that the service coordinator agrees with the ID/RC Assessment, if the information in the HHSC data system is identical to the completed ID/RC Assessment; or

(ii) that the service coordinator disagrees with the ID/RC Assessment, if the information in the HHSC data system is not identical to the completed ID/RC Assessment; and

(3) if the service coordinator or a LIDDA representative other than the service coordinator enters in the HHSC data system that

the service coordinator disagrees with the ID/RC Assessment, notify HHSC and the program provider of the service coordinator's disagreement in accordance with HHSC's instructions.

(d) For an LOC requested in accordance with subsection (b) of this section, HHSC considers a service coordinator's agreement or disagreement with an ID/RC Assessment in making an LOC determination.

(e) Information on an ID/RC Assessment must be supported by current data obtained from standardized evaluations and formal assessments that measure physical, emotional, social, and cognitive factors. A signed and dated ID/RC Assessment and documentation supporting the recommended LOC must be maintained in an individual's record.

(f) When HHSC receives a request for an LOC in accordance with subsection (a) or (b) of this section, HHSC determines if an applicant or individual qualifies for an LOC required by §263.101(a)(2) of this subchapter (relating to Eligibility Criteria for HCS Program Services and CFC Services).

(g) HHSC approves an LOC or sends a written notification:

(1) to the applicant, individual, or LAR that the applicant or individual is not eligible for HCS Program services or CFC services and provides the applicant, individual, or LAR with an opportunity to request a fair hearing in accordance with §263.801 of this chapter (relating to Fair Hearing);

(2) to the LIDDA that the LOC has been denied; and

(3) to the program provider using the HHSC data system that the LOC has been denied, if the applicant has selected a program provider or an individual is receiving services from a program provider.

(h) An LOC determination is valid for a period of time as described in this subsection.

(1) Except as provided in paragraph (2) of this subsection, an LOC determination is valid for a 365-calendar day period starting on the begin date of the ID/RC Assessment.

(2) If the begin date of the ID/RC Assessment is March 1 or later in a year before a leap year or January 1-February 28 of a leap year, the LOC determination is valid for a 366-calendar day period starting on the begin date of the ID/RC Assessment.

(i) An ID/RC Assessment submitted in accordance with subsection (b) of this section is effective on the date after the individual's previous ID/RC Assessment expires.

(j) If the LON of an individual receiving HCS Program services changes from a LON 5, LON 8, LON 6, or LON 9 to a LON 1, HHSC notifies the LIDDA of the change using the HHSC HCS Level of Care Redetermination Cover Sheet form.

(1) The LIDDA must, within 30 business days after receiving the notification:

(A) conduct a DID in accordance with §304.401 of this title (relating to Conducting a Determination of Intellectual Disability);

(B) complete the LIDDA section of the HHSC HCS Level of Care Redetermination Cover Sheet form, and return the form to HHSC; and

(C) submit a copy of the results of the new DID and any other pertinent information regarding the reassessment of the individual to HHSC.

(2) If the LIDDA is unable to complete the requirements described in paragraph (1) of this subsection within the 30-business day timeframe, the LIDDA must notify HHSC of the reasons for the delay.

(3) HHSC reviews the information submitted by the LIDDA regarding the redetermination and notifies the LIDDA and the HCS program provider of the review decision using the HHSC HCS Level of Care Redetermination Cover Sheet form.

(k) For an individual who is receiving all services through the CDS option and, therefore, does not have a program provider, the service coordinator:

(1) must perform the functions of the program provider described in subsection (b) of this section; and

(2) is not required to comply with subsection (c) of this section.

§263.106. LON Assignment.

(a) A LIDDA must request an LON for an applicant from HHSC at the time an applicant is enrolled into the HCS Program. The LON is requested by entering the information from a completed ID/RC Assessment, that includes the recommended LON and is signed and dated by the service coordinator, in the HHSC data system and electronically submitting the information to HHSC. The electronically submitted ID/RC Assessment must contain information identical to the information on the signed and dated ID/RC Assessment.

(b) A program provider must request an LON for an individual from HHSC in accordance with this subsection.

(1) Before the expiration of an ID/RC Assessment, the program provider must enter the information from the completed ID/RC Assessment in the HHSC data system and electronically submit the information to HHSC that includes the recommended LON and is signed and dated by the program provider.

(2) The program provider must ensure the information from the completed ID/RC Assessment entered in the HHSC data system and electronically submitted contains information that is identical to the information on the signed and dated ID/RC Assessment.

(3) The program provider must, within three calendar days after submission, provide the service coordinator with a copy of the signed and dated ID/RC Assessment.

(4) If applicable, the program provider must submit supporting documentation to HHSC as required by §263.107(c) of this chapter (relating to HHSC Review of LON).

(c) For an LON requested in accordance with subsection (b) of this section, within seven calendar days after the program provider enters the information from the completed ID/RC Assessment in the HHSC data system and electronically submits the information:

(1) the service coordinator or a LIDDA representative other than the service coordinator must review the ID/RC Assessment in HHSC data system and enter in the HHSC data system:

(A) the service coordinator's name and date; and

(B) whether the service coordinator agrees or disagrees with how the ID/RC Assessment was entered in the HHSC data system; and

(2) if the service coordinator disagrees with how the ID/RC Assessment was entered in the HHSC data system, the service coordinator and program provider must resolve the disagreement.

(d) If the service coordinator disagrees with the ID/RC Assessment for a reason other than how the ID/RC Assessment was entered in the HHSC data system, the service coordinator must notify the individual, LAR, HHSC, and the program provider of the service coordinator's disagreement in accordance with HHSC instructions.

(e) The service coordinator's agreement or disagreement is considered in HHSC review of an ID/RC Assessment submitted in accordance with subsection (b) of this section.

(f) The program provider must maintain documentation supporting the recommended LON in the individual's record.

(g) HHSC assigns an LON to an individual based on the individual's ICAP service level score, information reported on the individual's ID/RC Assessment, and required supporting documentation. Documentation supporting a recommended LON must be submitted to HHSC in accordance with HHSC guidelines.

(h) HHSC assigns one of five LONs as follows:

(1) an intermittent LON (LON 1) is assigned if the individual's ICAP service level score equals 7, 8, or 9;

(2) a limited LON (LON 5) is assigned if the individual's ICAP service level score equals 4, 5, or 6;

(3) an extensive LON (LON 8) is assigned if the individual's ICAP service level score equals 2 or 3;

(4) a pervasive LON (LON 6) is assigned if the individual's ICAP service level score equals 1; and

(5) regardless of an individual's ICAP service level score, a pervasive plus LON (LON 9) is assigned if the individual meets the criteria set forth in subsection (j) of this section.

(i) An LON 1, 5, or 8, determined in accordance with subsection (g) of this section, is increased to the next LON by HHSC, due to an individual's dangerous behavior, if supporting documentation submitted to HHSC proves that:

(1) the individual exhibits dangerous behavior that could cause serious physical injury to the individual or others;

(2) a written behavior support plan has been implemented that meets HHSC guidelines and is based on ongoing written data, targets the dangerous behavior with individualized objectives, and specifies intervention procedures to be followed when the behavior occurs;

(3) more service providers are needed and available than would be needed if the individual did not exhibit dangerous behavior;

(4) service providers are constantly prepared to physically prevent the dangerous behavior or intervene when the behavior occurs; and

(5) the individual's ID/RC Assessment is correctly scored with a "1" in the "Behavior" section.

(j) HHSC assigns an LON 9 if supporting documentation submitted to HHSC proves that:

(1) the individual exhibits extremely dangerous behavior that could be life threatening to the individual or to others;

(2) a written behavior support plan has been implemented that meets HHSC guidelines and is based on ongoing written data, targets the extremely dangerous behavior with individualized objectives, and specifies intervention procedures to be followed when the behavior occurs;

(3) management of the individual's behavior requires a service provider to exclusively and constantly supervise the individual during the individual's waking hours, which must be at least 16 hours per day;

(4) the service provider assigned to supervise the individual has no other duties during such assignment; and

(5) the individual's ID/RC Assessment is correctly scored with a "2" in the "Behavior" section.

(k) An LON 1, 5, or 8, determined in accordance with subsection (g) of this section, is increased to the next LON by HHSC, due to an individual's high medical needs, if:

(1) the individual has an ID/RC Assessment reflecting a frequency code of "6" in the "Nursing" section;

(2) a completed HHSC Level of Need (LON) Review/Increase Cover Sheet form is submitted to HHSC; and

(3) supporting documentation described in subsection (l) of this section submitted to HHSC with the cover sheet form proves that the individual requires 181 minutes or more per week of:

(A) a nursing service listed in §263.5(a)(14) - (17) of this chapter (relating to Description of HCS Program Services) provided in person;

(B) in-person nursing services provided by another source; or

(C) a combination of the nursing services described in subparagraphs (A) and (B) of this paragraph.

(l) The following supporting documentation must be submitted to HHSC as described in subsection (k)(3) of this section:

(1) a completed HHSC Medical Increase Worksheet - HCS Program Only form, identifying:

(A) a description of the ongoing medical condition requiring the individual to receive 181 minutes or more of in-person nursing services per week;

(B) a description of the in-person treatments that need to be provided to the individual and the in-person nursing tasks that need to be performed for the individual;

(C) the frequency of a nursing task that needs to be performed and the amount of time required to complete the nursing task; and

(D) if applicable, extenuating circumstances that may contribute to the individual's need to receive 181 minutes or more of in-person nursing services per week;

(2) the individual's most current:

(A) implementation plan for the nursing services listed in §263.5(a)(14) - (17) of this chapter that are provided in person;

(B) ICAP assessment booklet and computer scoring sheet;

(C) PDP; and

(D) comprehensive nursing assessment;

(3) nursing notes of all in-person nursing services provided to the individual within the immediate 30 days before the date the ID/RC Assessment is electronically submitted to HHSC;

(4) service planning notes relating to the individual's ongoing medical issues completed within the immediate 365 days before the ID/RC Assessment is electronically submitted to HHSC;

(5) any professional assessments that discuss the changes in the individual's medical condition or changes in needed medical interventions completed within the immediate 365 days before the date the ID/RC Assessment is electronically submitted; and

(6) other documents evidencing that the individual requires 181 minutes or more of in-person nursing services per week, such as:

(A) focused or quarterly nursing assessments;

(B) physician's orders;

(C) medication administration records; and

(D) treatment sheets, if used.

(m) A program provider must conduct an ICAP assessment in accordance with this subsection.

(1) A program provider must conduct an ICAP assessment of an individual:

(A) within three years after the individual's enrollment and every third year thereafter;

(B) if changes in the individual's functional skills or behavior occur that are not expected to be of short duration or cyclical in nature; or

(C) if the individual's skills and behavior are inconsistent with the individual's assigned LON.

(2) If the results of an ICAP assessment demonstrate that the individual's LON assignment may not be accurate, the program provider must submit a completed ID/RC Assessment to HHSC recommending a revision of the individual's LON assignment.

§263.107. HHSC Review of LON.

(a) HHSC may review a recommended or assigned LON at any time to determine if it is appropriate. If HHSC reviews an LON, documentation supporting the LON must be submitted to HHSC in accordance with HHSC's request. HHSC may modify an LON and recoup or deny payment based on its review.

(b) Before assigning an LON, HHSC reviews documentation supporting the recommended LON if:

(1) an LON is requested that is an increase from the individual's current LON;

(2) an LON 9 is requested in accordance with §263.106(j) of this subchapter (relating to LON Assignment);

(3) an LON is requested in accordance with §263.106(i) of this subchapter; or

(4) an LON is requested in accordance with §263.106(k) and (l) of this subchapter.

(c) Documentation supporting a recommended LON described in subsection (b) of this section must be submitted to HHSC and received by HHSC within seven calendar days after electronically submitting the recommended LON.

(1) Within 21 calendar days after receiving the supporting documentation, HHSC:

(A) requests additional documentation;

(B) electronically approves the recommended LON; or

(C) provides written notification that the recommended LON has been denied.

(2) HHSC reviews any additional documentation submitted in accordance with HHSC's request and:

(A) electronically approves the recommended LON; or

(B) provides written notification that the recommended LON has been denied to the program provider and the service coordinator.

§263.108. Reconsideration of LON Assignment.

(a) If a program provider disagrees with an LON assignment, the program provider may request that HHSC reconsider the assignment.

(b) The program provider may receive reconsideration only if the program provider submitted documentation supporting the recommended LON as required by §263.107(c) of this subchapter (relating to HHSC Review of LON).

(c) To request reconsideration of an LON assignment, the program provider must submit a written request for reconsideration to HHSC within 10 calendar days after receipt of the notification from HHSC that the recommended LON was denied. A program provider may send HHSC documentation, in addition to that required by §263.107(c) of this subchapter, to support the request for reconsideration of an LON assignment.

(d) Within 21 calendar days after receipt of a request for reconsideration, HHSC electronically approves the recommended LON or sends written notification that the recommended LON has been denied to the program provider and the service coordinator. A written notification that the recommended LON has been denied gives the program provider the right to request an administrative hearing in accordance §263.802 of this chapter (relating to Program Provider's Right to Administrative Hearing).

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 September 1, 2022.

TRD-202203443
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER C. PERSON-CENTERED PLANNING

26 TAC §263.201

STATUTORY AUTHORITY

The new section 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§263.201. Person-Centered Planning Process.

(a) Person-centered planning is a process that empowers an applicant or individual to plan the applicant's or individual's services and supports to achieve desired outcomes.

(b) The service coordinator and program provider must ensure the person-centered planning process is led by an individual to the maximum extent possible. An individual's LAR has a participatory role, as needed and as defined by the individual, unless State law confers decision-making authority to the LAR.

(c) The person-centered planning process must be used to develop a PDP, implementation plan, initial IPC, renewal IPC, revised IPC, service backup plan, and transportation plan.

(d) The person-centered planning process must:

(1) include people chosen by an applicant, individual, or LAR;

(2) provide the information and support the applicant or individual needs to lead the planning process and make informed choices and decisions;

(3) occur at a time and location convenient to the applicant or individual and LAR;

(4) consider the applicant's or individual's cultural preferences;

(5) provide information in plain language to the applicant or individual in a manner that is accessible to:

(A) the applicant or individual through the provision of an auxiliary aid at no cost to the applicant or individual in accordance with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act; and

(B) the applicant or individual with limited English proficiency through the provision of language services at no cost to the applicant or individual, including oral interpretation and written translations;

(6) use strategies for solving conflict or disagreement within the person-centered planning process;

(7) provide information to the individual or LAR to allow the individual or LAR to make informed decisions including:

(A) a written and oral description of the services available in the HCS Program; and

(B) the name and qualifications of the individual's service providers, in writing; and

(8) inform the individual or LAR that the individual or LAR may request revisions to the PDP, implementation plan, initial IPC, renewal IPC, revised IPC, service backup plan, and transportation plan at any time by communicating the request to the service coordinator or the program provider.

(e) A program provider must participate in a service planning team meeting if requested by the individual or LAR.

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 September 1, 2022.

TRD-202203444

Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER D. DEVELOPMENT AND REVIEW OF AN IPC

26 TAC §§263.301 - 263.304

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§263.301. IPC Requirements.

(a) An IPC must be based on the PDP and specify:

(1) the type and amount of each HCS Program service and CFC service to be provided to an individual during an IPC year;

(2) the services and supports to be provided to the individual through resources other than HCS Program services or CFC services during an IPC year, including natural supports, medical services, day activity, and educational services;

(3) if an individual will receive CFC support management; and

(4) if there are any HCS Program services or CFC services identified on the PDP as critical, requiring a service backup plan.

(b) If an applicant's or individual's IPC includes only CFC PAS/HAB to be delivered through the CDS option, a service coordinator must include in the IPC:

(1) CFC FMS instead of FMS; and

(2) if the applicant or individual will receive support consultation, CFC support consultation instead of support consultation.

(c) The type and amount of each HCS Program service and CFC service in an IPC:

(1) must be necessary to protect the individual's health and welfare in the community;

(2) must not be available to the individual through any other source, including the Medicaid State Plan, other governmental programs, private insurance, or the individual's natural supports;

(3) must be the most appropriate type and amount to meet the individual's needs;

(4) must be cost effective;

(5) must be necessary to enable community integration and maximize independence;

(6) if an adaptive aid or minor home modification, must:

(A) be included on HHSC's approved list in the *HCS Program Billing Requirements;* and

(B) be within the service limit described in §263.304 of this subchapter (relating to Service Limits);

(7) if an adaptive aid costing $500 or more, must be supported by a written assessment from a licensed professional specified by HHSC in the *HCS Program Billing Requirements;*

(8) if a minor home modification costing $1,000 or more, must be supported by a written assessment from a licensed professional specified by HHSC in the *HCS Program Billing Requirements;*

(9) if dental treatment, must be within the service limit described in §263.304 of this subchapter;

(10) if respite, must be within the service limit described in §263.304 of this subchapter;

(11) if TAS, must be:

(A) supported by a Transition Assistance Services (TAS) Assessment and Authorization form authorized by HHSC; and

(B) within the service limit described in §263.304(a)(6)(A) or (B) of this subchapter;

(12) if pre-enrollment minor home modifications, must be:

(A) supported by a written assessment from a licensed professional if required by the *HCS Program Billing Requirements;*

(B) supported by a Home and Community-based Services (HCS) Program Pre-enrollment MHM Authorization Request form authorized by HHSC;

(C) within the service limit described in §263.304(a)(3)(A) of this subchapter;

(13) if a pre-enrollment minor home modifications assessment, must be supported by a Home and Community-based Services (HCS) Program Pre-enrollment MHM Authorization Request form authorized by HHSC; and

(14) if CFC PAS/HAB, must be supported by the HHSC HCS/TxHmL CFC PAS/HAB Assessment form.

§263.302. Renewal and Revision of an IPC.

(a) Renewal of an IPC. At least annually and before the expiration of an individual's IPC, an individual's IPC must be renewed in accordance with this subsection and HHSC's instructions.

(1) At least 60 but no more than 90 calendar days before the expiration of an individual's IPC, the service coordinator must:

(A) notify the service planning team that the individual's PDP must be reviewed and updated;

(B) convene a meeting of the service planning team to:

(i) review and update the individual's PDP; and

(ii) if CFC PAS/HAB is included on the PDP, complete the HHSC HCS/TxHmL CFC PAS/HAB Assessment form to determine the number of CFC PAS/HAB hours the individual needs; and

(C) use the HHSC Understanding Program Eligibility and Services form to provide the individual or LAR both an oral and written explanation of:

(i) the eligibility requirements for the HCS Program as described in §263.101(a) of this chapter (relating to Eligibility Criteria for HCS Program Services and CFC Services);

(ii) if the individual's PDP includes CFC services:

(I) the eligibility requirements for CFC services as described in §263.101(c) of this chapter to individuals who do not receive MAO Medicaid; and

(II) the eligibility requirements for CFC services as described in §263.101(d) of this chapter to individuals who receive MAO Medicaid;

(iii) all HCS Program services and CFC services as described in §263.4 of this chapter (relating to Description of the HCS Program and CFC);

(iv) the reason HCS Program services and CFC services may be suspended as described in §263.705(a) of this chapter (relating to Suspension of HCS Program Services and CFC Services); and

(v) the reason HCS Program services and CFC services may be terminated as described in §263.707 of this chapter (relating to Termination of HCS Program Services and CFC Services with Advance Notice) and §263.708 of this chapter (relating to Termination of HCS Program Services and CFC Services Without Advance Notice).

(2) The HHSC HCS/TxHmL CFC PAS/HAB Assessment form required by paragraph (1)(B)(ii) of this subsection must be completed in person with the individual unless the following conditions are met, in which case the form may be completed by videoconferencing or telephone:

(A) the service coordinator gives the individual the opportunity for completing the form in person in lieu of completing it by videoconferencing or telephone and the individual agrees to the form being completed by videoconferencing or telephone; and

(B) the individual receives appropriate in-person support during the completion of the form by videoconferencing or telephone.

(3) The service coordinator, within 10 calendar days after the PDP is updated, must send a copy of the following to the program provider, the individual or LAR and, if applicable, the FMSA:

(A) the updated PDP; and

(B) if CFC PAS/HAB is included on the PDP, a copy of the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form.

(4) The program provider must ensure that a meeting between the service planning team and the program provider occurs at least 30 but no more than 60 calendar days before the expiration of the individual's IPC to:

(A) review the PDP and, if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form; and

(B) develop the renewal IPC that meets the requirements described in §263.301(c) of this subchapter (relating to IPC Requirements), including completion of the CDS option portion of the renewal IPC, if applicable, and the non-HCS Program services and non-CFC services.

(5) The program provider must convene a meeting with the individual or LAR to develop, before the effective date of the renewal IPC:

(A) an implementation plan for:

(i) HCS Program services, except for supported home living, that is based on the individual's PDP and renewal IPC; and

(ii) CFC services, except for CFC support management, that is based on the individual's PDP, and renewal IPC, and if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form; and

(B) a transportation plan, if supported home living is included on the PDP.

(6) Within seven calendar days after development of the renewal IPC as required by paragraph (4) of this subsection, the program provider must comply with the requirements in subsection (e)(1) of this section.

(7) Within seven calendar days after the program provider enters the information from the renewal IPC in the HHSC data system and electronically submits the information to HHSC as required by subsection (e)(1)(C) of this section, the service coordinator must comply with the requirements in subsection (e)(2) of this section.

(8) The program provider must provide HCS Program services and CFC services in accordance with:

(A) an implementation plan that is based on:

(i) the individual's PDP;

(ii) the renewal IPC; and

(iii) if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form; and

(B) a transportation plan, if supported home living is included on the PDP.

(b) Revisions to an IPC. Except as provided in subsection (f) of this section, a service coordinator or a program provider may determine whether an individual's IPC needs to be revised to add a new HCS Program service or CFC service or change the amount of an existing service.

(1) The service coordinator must notify the program provider if the service coordinator determines that the IPC needs to be revised.

(2) The program provider must notify the service coordinator if the program provider determines that the IPC needs to be revised.

(3) Within 14 calendar days after the notification required by paragraph (1) or (2) of this subsection:

(A) if the IPC needs to be revised to add CFC PAS/HAB, the service planning team must complete the HHSC HCS/TxHmL CFC PAS/HAB Assessment form in order to determine the number of CFC PAS/HAB hours the individual needs;

(B) if the IPC needs to be revised to change the amount of CFC PAS/HAB, the service planning team must update the HHSC HCS/TxHmL CFC PAS/HAB Assessment form to reflect the amount of CFC PAS/HAB needed to meet the individual needs;

(C) the service coordinator must send a copy of the completed or updated HHSC HCS/TxHmL CFC PAS/HAB Assessment form to the program provider for review;

(D) if a new service is being added or a current service is being removed from the IPC or the amount of a service is being increased or decreased and requires the addition of, removal of, or a change to an outcome in the PDP:

(i) the service coordinator must convene a meeting with the service planning team to update the PDP; and

(ii) the service planning team and the program provider must convene a meeting to develop a revised IPC;

(E) if the amount of an existing service is being increased or decreased or a requisition fee is added or removed and does not require the addition of, removal of, or a change to an outcome in the PDP:

(i) the program provider must develop a revised IPC; and

(ii) the service coordinator must document the reasons for the IPC revision;

(F) the program provider must convene a meeting with the individual or LAR to revise:

(i) the implementation plan for:

(I) HCS Program services, except for supported home living, that is based on the individual's PDP and revised IPC; and

(II) CFC services, except for CFC support management, that is based on the individual's PDP, revised IPC, and if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form; and

(ii) the transportation plan, if supported home living is modified on the PDP or IPC; and

(G) the program provider must comply with the requirements in subsection (e)(1) of this section.

(4) The CFC PAS/HAB Assessment form required by paragraph (3)(A) of this subsection must be completed in person with the individual unless the following conditions are met, in which case the form may be completed by videoconferencing or telephone:

(A) the service coordinator gives the individual the opportunity for completing the form in person in lieu of completing it by videoconferencing or telephone and the individual agrees to the form being completed by videoconferencing or telephone; and

(B) the individual receives appropriate in-person support during the completion of the form by videoconferencing or telephone.

(5) The service coordinator, within 10 calendar days after the PDP is updated, must send a copy of the following to the program provider, the individual or LAR and, if applicable, the FMSA:

(A) the updated PDP; and

(B) if CFC PAS/HAB was updated on the PDP, a copy of the updated HHSC HCS/TxHmL CFC PAS/HAB Assessment form.

(6) Within seven calendar days after the program provider enters the information from the revised IPC in the HHSC data system and electronically submits the information to HHSC as required by subsection (e)(1)(C) of this section, the service coordinator must comply with the requirements in subsection (e)(2) of this section.

(7) The program provider must provide HCS Program services and CFC services in accordance with:

(A) an implementation plan that is based on:

(i) the individual's PDP;

(ii) the revised IPC; and

(iii) if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form; and

(B) the revised transportation plan, if revised in accordance with paragraph (3)(F)(ii) of this subsection.

(c) Revision of an IPC before delivery of services. Except as provided by subsection (d) of this section, if an individual's service planning team and program provider determine that the IPC must be revised to add a new HCS Program service or CFC service or change the amount of an existing service, the program provider must revise the IPC in accordance with subsection (b) of this section before the delivery of a new or increased service.

(d) Emergency provision of services and revision of an IPC.

(1) If an emergency necessitates the provision of an HCS Program service or CFC service to ensure the individual's health and safety and the service is not on the IPC or exceeds the amount on the IPC, the program provider may provide the service before revising the IPC. The program provider must, within one business day after providing the service:

(A) document:

(i) the circumstances that necessitated providing the new HCS Program service or CFC service or the increase in the amount of the existing HCS Program service or CFC service; and

(ii) the type and amount of the service provided;

(B) notify the service coordinator of the emergency provision of the service and that the IPC must be revised; and

(C) upon request, provide a copy of the documentation required by subparagraph (A) of this paragraph to the service coordinator.

(2) Within seven calendar days after providing the service:

(A) the service planning team and the program provider must develop a revised IPC;

(B) the service planning team must update the PDP and, if appropriate, complete the HHSC HCS/TxHmL CFC PAS/HAB Assessment form if adding CFC PAS/HAB to the IPC, or update the HHSC HCS/TxHmL CFC PAS/HAB Assessment form if changing the amount of CFC PAS/HAB on the IPC;

(C) the program provider must:

(i) revise the implementation plan that is based on the individual's PDP and revised IPC; and

(ii) develop or revise a transportation plan, if supported home living is added to or modified on the PDP or IPC; and

(D) the program provider must comply with the requirements in subsection (e)(1) of this section.

(3) Within seven calendar days after the program provider enters the information from the revised IPC in the HHSC data system and electronically submits the information to HHSC as required by subsection (e)(1)(C) of this section, the service coordinator must comply with the requirements in subsection (e)(2) of this section.

(4) The program provider must provide HCS Program services and CFC services in accordance with:

(A) an implementation plan that is based on the individual's PDP and the revised IPC; and

(B) the transportation plan developed or revised in accordance with paragraph (2)(C)(ii) of this subsection.

(e) Submitting a renewal and revised IPC to HHSC. A renewal or revised IPC must be submitted to HHSC in accordance with this subsection.

(1) A program provider must:

(A) sign and date the renewal or revised IPC;

(B) ensure that the individual or LAR signs and dates the renewal or revised IPC in person, electronically, by fax, or by United States mail;

(C) after the renewal or revised IPC is signed and dated, enter information from the renewal or revised IPC in the HHSC data system and electronically submit the information to HHSC;

(D) ensure that the information entered in the HHSC data system and electronically submitted is identical to the information on the original signed and dated renewal or revised IPC;

(E) within three calendar days after entering the information in the HHSC data system and electronically submitting the information, ensure the service coordinator receives a copy of the original signed and dated renewal or revised IPC; and

(F) keep the original signed and dated renewal or revised IPC in the individual's record.

(2) The service coordinator must review the information entered and submitted in the HHSC data system from the original signed and dated renewal or revised IPC and:

(A) enter the service coordinator's name and date in the HHSC data system; and

(B) enter in the HHSC data system whether the service coordinator agrees or disagrees that the requirements described in §263.301(c) of this subchapter have been met.

(3) If the service coordinator disagrees with how the IPC was entered in the HHSC data system, the service coordinator and program provider must resolve the disagreement.

(4) If the service coordinator disagrees with the IPC for a reason other than how the IPC was entered in the HHSC data system, the service coordinator must notify the individual, LAR, HHSC and the program provider of the service coordinator's disagreement in accordance with HHSC instructions.

(f) Revision of an IPC to include CFC support management. If an individual or LAR requests CFC support management during an IPC year, the service coordinator or the program provider must revise the IPC as described in the HCS Handbook.

(g) Renewal and revision of an IPC when all services are through the CDS option. For an individual who is receiving all services through the CDS option and, therefore, does not have a program provider, the service coordinator must:

(1) perform the functions of the program provider described in this section; and

(2) is not required to comply with subsection (e)(2) of this section.

§263.303. HHSC Review of an IPC.

(a) HHSC may review an IPC to determine if the type and amount of HCS Program services and CFC services specified in the IPC meet the requirements described in §263.301(c) of this subchapter (relating to IPC Requirements).

(1) If an IPC submitted to HHSC exceeds 100 percent of the estimated annualized average per capita cost for ICF/IID Program services, a LIDDA or program provider must immediately submit documentation supporting the IPC to HHSC, including a copy of the signed and dated IPC, the PDP, the implementation plans for the services on the IPC, and assessments. A LIDDA or program provider must submit additional documentation as requested by HHSC.

(2) If requested by HHSC for an IPC other than one described in paragraph (1) of this subsection:

(A) a LIDDA must submit documentation supporting an initial IPC to HHSC; and

(B) a LIDDA or program provider must submit documentation supporting a renewal or revised IPC to HHSC.

(b) HHSC considers a service coordinator's agreement or disagreement that a renewal or revised IPC meets the requirements described in §263.301(c) of this subchapter, as required by §263.302(e)(3) of this subchapter (relating to Renewal and Revision of an IPC), in its review of an IPC.

(c) Based on a review of an IPC, HHSC may deny or reduce an HCS Program service or a CFC service in accordance with §263.704 of this chapter (relating to Denial of HCS Program Services or CFC Services) and §263.706 of this chapter (relating to Reduction of HCS Program Services or CFC Services).

§263.304. Service Limits.

(a) The following limits apply to an individual's HCS Program services:

(1) for adaptive aids, $10,000 during an IPC year;

(2) for dental treatment, $2,000 during an IPC year;

(3) for minor home modifications and pre-enrollment minor home modifications combined:

(A) $7,500 during the time the individual is enrolled in the HCS Program, which may be paid in one or more IPC years; and

(B) a maximum of $300 for repair and maintenance during an IPC year;

(4) for respite and in-home respite combined, 300 hours during an IPC year;

(5) for day habilitation and in-home day habilitation combined, 260 units during an IPC year; and

(6) for TAS:

(A) $2,500 if the applicant's initial IPC does not include residential support, supervised living, or host home/companion care; or

(B) $1,000 if the applicant's initial IPC includes residential support, supervised living, or host home/companion care.

(b) An individual may receive TAS only once in the individual's lifetime.

(c) A program provider may request, in accordance with the *HCS Program Billing Requirements,* authorization of a requisition fee:

(1) for dental treatment that is in addition to the $2,000 service limit described in subsection (a)(2) of this section;

(2) for a minor home modification that is in addition to the $7,500 service limit described in subsection (a)(3)(A) of this section; or

(3) for an adaptive aid that is in addition to the $10,000 service limit described in subsection (a)(1) of this section.

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 September 1, 2022.

TRD-202203445
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER E. CDS OPTION

26 TAC §263.401

STATUTORY AUTHORITY

The new section 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§263.401. CDS Option.

(a) If supported home living, respite, nursing, employment assistance, supported employment, cognitive rehabilitation therapy, or CFC PAS/HAB is included in an applicant's PDP, and the applicant's PDP does not include residential support, supervised living, or host home/companion care, the service coordinator must:

(1) inform the applicant or LAR of the applicant's right to participate in the CDS option or discontinue participation in the CDS option at any time, except as provided in 40 TAC §41.405(a) (relating to Suspension of Participation in the CDS Option);

(2) inform the applicant or LAR that the applicant or LAR may choose to have supported home living, respite, nursing, employment assistance, supported employment, cognitive rehabilitation therapy, or CFC PAS/HAB provided through the CDS option;

(3) provide the applicant or LAR a copy of the HHSC Consumer Directed Services Option Overview form, the HHSC Consumer Directed Services Responsibilities form, and the HHSC Employee Qualification Requirements form, which are found at the HHSC website and which contain information about the CDS option, including a description of FMS and support consultation;

(4) provide an oral explanation of the information contained in the HHSC Consumer Directed Services Option Overview form, the HHSC Consumer Directed Services Responsibilities form, and the HHSC Employee Qualification Requirements form to the applicant or LAR; and

(5) provide the applicant or LAR the opportunity to choose to participate in the CDS option and document the applicant's or LAR's choice on the HHSC Consumer Participation Choice form, which is available on the HHSC website.

(b) If an applicant or LAR chooses to participate in the CDS option, the service coordinator must:

(1) provide names and contact information to the applicant or LAR regarding all FMSAs providing services in the LIDDA's local service area;

(2) document the applicant's or LAR's choice of FMSA on the Consumer Participation Choice form;

(3) document, in the individual's PDP, a description of the service provided through the CDS option; and

(4) document, in the individual's PDP, whether the service is critical to meeting the individual's health and safety as determined by the service planning team.

(c) For an individual who is receiving supported home living, respite, nursing, employment assistance, supported employment, cognitive rehabilitation therapy, or CFC PAS/HAB, and is not receiving residential support, supervised living, or host home/companion care, the service coordinator must, at least annually:

(1) inform the individual or LAR of the individual's right to participate in the CDS option or discontinue participation in the CDS option at any time;

(2) provide the individual or LAR a copy of the Consumer Directed Services Option Overview, Consumer Directed Services Responsibilities, and Employee Qualification Requirements forms, which are available on the HHSC website and which contain information about the CDS option, including FMS and support consultation;

(3) provide an oral explanation of the information contained in the Consumer Directed Services Option Overview, Consumer Directed Services Responsibilities and Employee Qualification Requirements forms to the individual or LAR; and

(4) provide the individual or LAR the opportunity to choose to participate in the CDS option and document the individual's choice on the Consumer Participation Choice form, which is available on the HHSC website.

(d) If an individual or LAR chooses to participate in the CDS option, the service coordinator must:

(1) provide names and contact information to the individual or LAR regarding all FMSAs providing services in the LIDDA's local service area;

(2) document the individual's or LAR's choice of FMSA on the Consumer Participation Choice form;

(3) document, in the individual's PDP, a description of the service provided through the CDS option;

(4) document, in the individual's PDP, whether the service is critical to meeting the individual's health and safety as determined by the service planning team; and

(5) notify the program provider of the individual's or LAR's decision to participate in the CDS option.

(e) The service coordinator must document in the individual's PDP that the information described in subsections (c) and (d)(1) of this section was provided to the individual or LAR.

(f) If an individual's PDP includes supported home living to be delivered through the CDS option, the service coordinator must develop, with the individual or LAR and other members of the service planning team, a transportation plan.

(g) For an individual participating in the CDS option, the service coordinator must recommend that HHSC terminate the individual's participation in the CDS option (that is, terminate FMS and support consultation) if the service coordinator determines that:

(1) the individual's continued participation in the CDS option poses a significant risk to the individual's health or safety; or

(2) the individual or LAR has not complied with 40 TAC Chapter 41, Subchapter B (relating to Responsibilities of Employers and Designated Representatives).

(h) If the service coordinator makes a recommendation in accordance with subsection (g) of this section, the service coordinator must:

(1) document:

(A) a description of the service recommended for termination;

(B) the reasons why termination is recommended; and

(C) a description of the attempts to resolve the issues before recommending termination;

(2) obtain other supporting documentation, as appropriate; and

(3) if the individual receives a service from the program provider, notify the program provider that the IPC needs to be revised.

(i) Within seven calendar days after notification in accordance with subsection (h)(3) of this section:

(1) the service planning team and the program provider must comply with the requirements described in §263.302(d)(2)(A) - (D) of this chapter (relating to Renewal and Revision of an IPC); and

(2) the service coordinator must send the documentation described in subsection (h)(1) and (2) of this section to 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.

Filed with the Office of the Secretary of State on September 1, 2022.

TRD-202203446
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER F. REQUIREMENTS FOR SERVICE SETTINGS AND PROGRAM PROVIDER OWNED OR CONTROLLED RESIDENTIAL SETTINGS

26 TAC §§263.501 - 236.503

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§263.501. Requirements for Service Settings.

(a) A program provider must ensure that a setting in which an individual receives a HCS Program service or a CFC service:

(1) is based on the needs and preferences of the individual as documented in the individual's PDP;

(2) is integrated in and supports the individual's access to the greater community to the same degree as a person not enrolled in a Medicaid waiver program, including opportunities for the individual:

(A) to seek employment and work in a competitive integrated setting;

(B) engage in community life; and

(C) control personal resources;

(3) ensures the individual's rights of privacy, dignity and respect, and freedom from coercion and restraint; and

(4) optimizes, not regiments, individual initiative, autonomy, and independence in making life choices, including choices regarding daily activities, physical environment, and with whom to interact.

(b) Except as provided in subsection (c) of this section, a program provider must ensure that HCS Program services and CFC services are not provided in a setting that is presumed to have the qualities of an institution. A setting is presumed to have the qualities of an institution if the setting:

(1) is located in a building that is also a publicly or privately operated facility that provides inpatient institutional treatment;

(2) is located in a building on the grounds of, or immediately adjacent to, a public institution; or

(3) has the effect of isolating individuals from the broader community of persons not receiving Medicaid HCBS.

(c) A program provider may provide an HCS Program service or a CFC service to an individual in a setting that is presumed to have the qualities of an institution as described in subsection (b) of this section, if CMS determines through a heightened scrutiny review that the setting:

(1) does not have the qualities of an institution; and

(2) does have the qualities of home and community-based settings.

§263.502. Requirements for Program Provider Owned or Controlled Residential Settings.

(a) In each residence in which a program provider provides residential support, supervised living, or host home/companion care, the program provider must ensure that, except as provided in subsection (b) of this section:

(1) an individual has privacy in the individual's bedroom;

(2) an individual has the option not to share a bedroom with a roommate;

(3) an individual sharing a bedroom has a choice of roommates;

(4) a lock is installed on the individual's bedroom door at no cost to the individual and that:

(A) the lock is operable by the individual; and

(B) only the individual, a roommate of the individual, and staff designated by the program provider have keys to the individual's bedroom door;

(5) an individual can furnish and decorate the individual's bedroom; and

(6) while in the residence, an individual has the freedom and support:

(A) to control the individual's schedule and activities that are not part of the implementation plan; and

(B) to have access to food at any time.

(b) If a program provider becomes aware that a modification to a requirement described in subsection (a)(1) - (6) of this section is needed based on a specific assessed need of an individual, the program provider must:

(1) notify the service coordinator of the needed modification; and

(2) provide the service coordinator the information described in §263.901(e)(21) of this chapter relating to (LIDDA Requirements for Providing Service Coordination in the HCS Program) as requested by the service coordinator.

(c) If a service coordinator receives a notification as described in subsection (b) of this section, the service coordinator must convene a service planning team meeting to update the PDP as described §263.901(e)(21) of this chapter.

(d) After the service planning team updates the PDP as required by subsection (c) of this section, the program provider may implement the modifications.

§263.503. Residential Agreements.

(a) During a service planning team meeting to develop or update an individual's PDP, a service coordinator must inform an individual or LAR of the following if the individual is interested in receiving residential assistance:

(1) that the residential setting options available in the HCS Program consist of:

(A) a residence in which the individual receives host home/companion care;

(B) a three-person residence in which the individual receives residential support or supervised living; or

(C) a four-person residence in which the individual receives residential support or supervised living;

(2) that if the individual or LAR selects a residence described in paragraph (1) of this subsection, the individual or LAR will be responsible for paying room and board in accordance with a residential agreement described in subsections (b) and (c) of this section;

(3) that if the individual or LAR does not pay room or board as required by a residential agreement, the individual's program provider or service provider of host home/companion care may evict the individual in accordance with the residential agreement and state law; and

(4) that if an individual is evicted by a program provider or service provider of host home/companion care and the individual or LAR has not paid the delinquent room or board, HHSC will deny the individual residential support, supervised living, or host home/companion care until the individual or LAR pays the delinquent room or board.

(b) An individual's program provider must ensure that:

(1) an individual living in a three-person residence or four-person residence or LAR has a written residential agreement with the program provider; and

(2) an individual living in a residence in which host home/companion care is provided or LAR has a written residential agreement with the service provider of host home/companion care if the individual does not own the residence or lease the residence from another person.

(c) The residential agreement required by subsection (b) of this section must include:

(1) the physical address of the residence;

(2) the name of the individual;

(3) if a three-person residence or four-person residence, the name of the program provider;

(4) if a residence in which host home/companion care is provided, the name of the service provider of host home/companion care;

(5) the beginning date of the residential agreement;

(6) the date the residential agreement expires;

(7) a provision that:

(A) the program provider or service provider of host home/companion care and the individual or LAR agree that the residential agreement is a "lease" under Texas Property Code Chapter 92 and that they are subject to state law governing residential tenancies, including Texas Property Code Chapters 24, 91, and 92 and Texas Rules of Civil Procedure Rule 510; and

(B) to the extent allowed by law, in the event of a conflict or inconsistency between any provision of the residential agreement and any provision of state statutory law, including Texas Property Code Chapters 91 and 92, the provision in the residential agreement governs;

(8) a provision that the individual or LAR is not waiving any right or remedy provided to tenants under state law and is not agreeing to any notice period that is shorter than the notice period to which tenants are entitled under state law;

(9) the amount the individual or LAR is paying for room or a description of other consideration for room, if the individual is paying in kind in lieu of a monetary amount;

(10) the amount the individual or LAR is paying for board or a description of other consideration for board, if the individual is paying in kind in lieu of a monetary amount;

(11) the day of the month that the amount for room and board is due, which will not be before the day of the month that an individual receives a primary source of income, such as supplemental security income and social security disability insurance;

(12) the amount of a late fee, which may be charged only once per month and will not exceed 10 percent of the amount for room and board, that the program provider or host home/companion care service provider may charge the individual or LAR if room and board is not paid by the day it is due;

(13) a provision that allows the individual or LAR to terminate the residential agreement before its expiration date without any obligation under the residential agreement except an obligation that accrued before the date of termination, if the individual permanently moves from the residence for any reason, including transferring to a different program provider;

(14) a provision that the program provider or service provider of host home/companion care agrees to refund to the individual or LAR an amount for board paid to the program provider or service provider for the days that the individual was temporarily away from the residence for at least one 24-hour period using the following formula to determine the daily amount for board (the monthly amount for board Ã· the number of days in the month);

(15) a provision that the program provider or service provider of host home/companion care agrees to refund to the individual or LAR an amount for room and board paid to the program provider or services provider for the days that the individual was away from the residence because the individual permanently moved from the residence using the following formula to determine the daily amount for room and board (the monthly amount for room and board Ã· the number of days in the month);

(16) a provision that the individual may furnish and decorate the individual's bedroom;

(17) a provision that the program provider or service provider of host home/companion care agrees to be responsible for all repairs to the residence resulting from normal wear and tear, as defined in Texas Property Code §92.001;

(18) a provision that allows eviction of the individual only if:

(A) the individual or LAR fails to pay room or board, which does not include any late fee; or

(B) the individual's HCS Program services and CFC services are terminated;

(19) a provision that the program provider or service provider of host home/companion care will, before giving the individual or LAR a notice to vacate, give the individual or LAR a notice of proposed eviction that allows the individual or LAR at least 60 calendar days to pay the delinquent room or board;

(20) a provision that if the individual or LAR pays the delinquent room or board within the period required by paragraph (19) of this subsection, the program provider or service provider of host home/companion care will not give the individual or LAR a notice to vacate or otherwise proceed to evict the individual;

(21) a provision that the program provider or service provider of host home/companion care will not demand the entire balance of the unpaid room or board owed under the residential agreement if the individual or LAR violates the residential agreement;

(22) a provision that the program provider or service provider of host home/companion care and the individual or LAR are not entitled to reimbursement for attorney's fees arising out of any dispute relating to the residential agreement; and

(23) the signature of the individual or the LAR.

(d) The program provider must:

(1) give the individual or LAR at least three calendar days to review, request changes, and sign the residential agreement;

(2) ensure the residential agreement is fully executed before the individual begins living in a three-person residence, four-person residence, or a residence in which host home/companion care is provided, except that an individual may begin living in one of these residences before a residential agreement is fully executed in the event of an emergency;

(3) if an individual begins living in a three-person residence, four-person residence, or a residence in which host home/companion care is provided before a residential agreement is fully executed because of an emergency, as allowed by paragraph (2) of this subsection:

(A) document the details of the emergency; and

(B) ensure the residential agreement is fully executed within seven calendar days after the individual begins living in the residence; and

(4) provide one copy of the residential agreement to the individual or LAR within three calendar days after the date the residential agreement is fully executed.

(e) If a program provider becomes aware that a modification to subsection (c)(16) of this section is needed based on a specific assessed need of an individual, the program provider must:

(1) notify the service coordinator of the needed modification; and

(2) provide the service coordinator the information described in §263.901(e)(21) of this chapter relating to (LIDDA Requirements for Providing Service Coordination in the HCS Program) as requested by the service coordinator.

(f) If a service coordinator receives a notification as described in subsection (e) of this section, the service coordinator must convene a meeting of the service planning team to update the PDP in accordance with §263.901(e)(21) of this chapter.

(g) After the service planning team updates the PDP as required by §263.901(e)(21) of this chapter, the program provider may implement the modification.

(h) If an individual or LAR is delinquent in payment of room or board and the program provider or service provider wants to evict the individual, the program provider must:

(1) notify the service coordinator that the individual or LAR is delinquent in the payment of room or board under the residential agreement and that the program provider or service provider wants to evict the individual;

(2) after providing the notification required by paragraph (1) of this subsection, meet with the individual or LAR, including the representative payee if one has been appointed by the Social Security Administration, and the service coordinator to discuss the alleged nonpayment of room or board and possible eviction; and

(3) if the program provider or service provider intends to proceed to evict the individual at the meeting required by paragraph (2) of this subsection:

(A) give the individual or LAR a written notice of proposed eviction that allows the individual or LAR at least 60 calendar days to pay the delinquent room or board; and

(B) provide the service coordinator with a copy of the written notice of proposed eviction.

(i) If the individual or LAR pays the delinquent room or board within the period required by subsection (h)(3) of this section, the program provider or service provider of host home/companion care must not give the individual or LAR a notice to vacate or otherwise proceed to evict the individual.

(j) If the individual or LAR does not pay the delinquent room or board within the period required by subsection (h)(3) of this section, the program provider:

(1) must report the failure to pay to one of the following as appropriate:

(A) the Social Security Administration;

(B) the probate court that appointed the individual's guardian; or

(C) DFPS as an allegation of the LAR's exploitation of the individual;

(2) must meet with the individual or LAR and the service coordinator to discuss alternative living settings for the individual; and

(3) if the program provider or service provider wants to proceed to evict the individual, the program provider must:

(A) give the individual or LAR a written notice to vacate the residence in accordance with the residential agreement and state law; and

(B) send a copy of the written notice described in subparagraph (A) of this paragraph to the individual's service coordinator within one business day after the individual or LAR is given the notice.

(k) If an individual is evicted by a program provider or service provider of host home/companion care and the individual or LAR has not paid the delinquent room or board, the service coordinator must convene a meeting or meetings to update the PDP and revise the IPC as described in §263.302(b)(3)(D) of this chapter (relating to Renewal and Revision of an IPC). If the individual or LAR wants to keep residential support, supervised living, or host home/companion care on the individual's IPC, the service coordinator must inform the individual or LAR at the meeting or meetings that HHSC will deny residential support, supervised living, or host home/companion care, if included on the individual's IPC, until the individual pays the delinquent room or board.

(l) If a program provider evicts an individual who has an LAR and the LAR fails to arrange an alternative living setting for the individual, the program provider must report the LAR's failure to DFPS as neglect of the individual and notify the service coordinator that such report was made.

(m) If an individual pays the delinquent room or board, a program provider must, within one business day after the payment, notify the individual's service coordinator that the individual is no longer delinquent.

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 September 1, 2022.

TRD-202203447
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER G. REIMBURSEMENT BY HHSC

26 TAC §263.601

STATUTORY AUTHORITY

The new sections 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 ser-

vices by the health and human services agencies, and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§263.601. Program Provider Reimbursement.

The following requirements apply to program provider reimbursement.

(1) HHSC pays a program provider as described in this paragraph.

(A) HHSC pays for supported home living, professional therapies, nursing, respite, in-home respite, employment assistance, supported employment, and CFC PAS/HAB in accordance with the reimbursement rate for the specific service.

(B) HHSC pays for host home/companion care, residential support, supervised living, in-home day habilitation and day habilitation in accordance with the individual's LON and the reimbursement rate for the specific service.

(C) HHSC pays for adaptive aids, minor home modifications, and dental treatment based on the actual cost of the item and, if requested, a requisition fee in accordance with the HCS Program Billing Requirements available on the HHSC website.

(D) HHSC pays:

(i) for TAS based on a Transition Assistance Services (TAS) Assessment and Authorization form authorized by HHSC and the actual cost of the TAS as evidenced by purchase receipts required by the HCS Program Billing Requirements; and

(ii) if requested, a TAS service fee in accordance with the HCS Program Billing Requirements.

(E) HHSC pays for pre-enrollment minor home modifications and a pre-enrollment minor home modifications assessment based on a Home and Community-based Services (HCS) Program Pre-enrollment MHM Authorization Request form authorized by HHSC and the actual cost of the pre-enrollment minor home modifications and a pre-enrollment minor home modifications assessment, as evidenced by documentation required by the HCS Program Billing Requirements.

(F) Subject to the requirements in the HCS Program Billing Requirements, HHSC pays for TAS, pre-enrollment minor home modifications, and a pre-enrollment minor home modifications assessment regardless of whether the applicant enrolls with the program provider.

(G) HHSC pays for CFC ERS based on the actual cost of the service, not to exceed the reimbursement rate ceiling for CFC ERS.

(2) To be paid for the provision of a service, a program provider must submit a service claim that meets the requirements in 40 TAC §49.311 (relating to Claims Payment) and the HCS Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers.

(3) If an individual's HCS Program services or CFC services are suspended or terminated a program provider must not submit a claim for services provided during the period of the individual's suspension or after the termination, except that the program provider may submit a claim for the first day of the individual's suspension or termination for the following services:

(A) in-home day habilitation;

(B) day habilitation;

(C) supported home living;

(D) in-home respite;

(E) respite;

(F) employment assistance;

(G) supported employment;

(H) professional therapies;

(I) nursing; and

(J) CFC PAS/HAB.

(4) If a program provider submits a claim for an adaptive aid that costs $500 or more or for a minor home modification that costs $1,000 or more, the claim must be supported by a written assessment from a licensed professional specified by HHSC in the HCS Program Billing Requirements and other documentation as required by the HCS Program Billing Requirements.

(5) HHSC does not pay a program provider for:

(A) a service or recoups any payments made to the program provider for a service if:

(i) except for an individual receiving TAS, pre-enrollment minor home modifications, or a pre-enrollment minor home modifications assessment, the individual receiving the service is, at the time the service was provided, ineligible for the HCS Program or Medicaid benefits, or was an inpatient of a hospital, nursing facility, or ICF/IID;

(ii) except for TAS, pre-enrollment minor home modifications, and a pre-enrollment minor home modifications assessment:

(I) the service is provided to an individual during a period of time for which there is not a signed, dated, and authorized IPC for the individual;

(II) the service is provided during a period of time for which there is not a signed and dated ID/RC Assessment for the individual;

(III) the service is provided during a period of time for which the individual did not have an LOC determination;

(IV) the service is not provided in accordance with a signed, dated, and authorized IPC meeting the requirements set forth in §263.301(c) of this chapter (relating to IPC Requirements);

(V) the service is not provided in accordance with the individual's PDP or implementation plan;

(VI) the service is provided before the individual's enrollment date into the HCS Program; or

(VII) the service is not included on the signed, dated, and authorized IPC of the individual in effect at the time the service was provided, except as permitted by §263.302(d) of this chapter (relating to Renewal and Revision of an IPC);

(iii) the service is not provided in accordance with the HCS Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers;

(iv) the service is not documented in accordance with the HCS Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers;

(v) the program provider does not comply with 40 TAC §49.305 (relating to Records);

(vi) the claim for the service was not prepared and submitted in accordance with the HCS Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers;

(vii) the claim for the service does not meet the requirements in 40 TAC §49.311 (relating to Claims Payment) or the HCS Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers;

(viii) the program provider does not have the documentation described in paragraph (3) of this section;

(ix) HHSC determines that the service would have been paid for by a source other than the HCS Program if the program provider had submitted to the other source a proper, complete, and timely request for payment for the service;

(x) the service is provided by a service provider who does not meet the qualifications to provide the service as described in the HCS Program Billing Requirements or the CFC Billing Requirements for HCS and TxHmL Program Providers;

(xi) the service was paid at an incorrect LON because the information entered in the HHSC data system from a completed ID/RC Assessment is not identical to the information on the completed ID/RC Assessment; or

(xii) the service was not provided;

(B) supervised living or residential support, if the program provider provides the supervised living or residential support service in a residence in which four individuals or other persons receiving similar services live without HHSC's approval as described in rules governing the HCS Program;

(C) employment assistance, if before including the employment assistance on an individual's IPC, the program provider does not ensure and maintain documentation in the individual's record that employment assistance is not available to the individual under a program funded under §110 of the Rehabilitation Act of 1973 or under a program funded under the Individuals with Disabilities Education Act (20 U.S.C. §1401 *et seq.*);

(D) supported employment, if before including the supported employment on an individual's IPC, the program provider does not ensure and maintain documentation in the individual's record that supported employment is not available to the individual under a program funded under the Individuals with Disabilities Education Act (20 U.S.C. §1401 *et seq.*);

(E) host home/companion care, residential support, or supervised living, if the host home/companion care, residential support, or supervised living is provided on the day of the individual's suspension or termination of HCS Program services;

(F) TAS, if the TAS, is not provided in accordance with a Transition Assistance Services (TAS) Assessment and Authorization form authorized by HHSC;

(G) pre-enrollment minor home modifications and a pre-enrollment minor home modifications assessment, if the pre-enrollment minor home modifications and a pre-enrollment minor home modifications assessment, is not provided in accordance with a Home and Community-based Services (HCS) Program Pre-enrollment MHM Authorization Request form authorized by HHSC;

(H) a CFC service, if the CFC service, is provided to an individual receiving host home/companion care, supervised living, or residential support;

(I) supported home living, if the supported home living, is not provided in accordance with a transportation plan and §263.5(a)(18) of this chapter (relating to Description of HCS Program Services); or

(J) CFC PAS/HAB, in-home day habilitation provided to an individual with a residential type of "own/family home," or in-home respite, if the CFC PAS/HAB, in-home day habilitation, or in-home respite, does not match the EVV visit transaction as required by 1 TAC §354.4009(a)(4) (relating to Requirements for Claims Submission and Approval).

(6) A program provider must refund to HHSC any overpayment made to the program provider within 60 calendar days after the program provider's discovery of the overpayment or receipt of a notice of such discovery from HHSC, whichever is earlier.

(7) Except as provided in paragraph (8) of this section, if HHSC approves an LOC requested in accordance with §263.105(b)(3) of this chapter (relating to LOC Determination), HHSC pays a program provider for services provided to an individual for a period of not more than 180 calendar days after the individual's previous ID/RC Assessment expires.

(8) If HHSC determines that a program provider submitted an ID/RC Assessment more than 180 calendar days after the expiration date of the previous ID/RC Assessment, because of circumstances beyond the program provider's control, HHSC may pay the program provider for a period of more than 180 calendar days after the date the individual's previous ID/RC Assessment expired.

(9) HHSC conducts provider fiscal compliance reviews to determine whether a program provider is in compliance with:

(A) this chapter;

(B) the HCS Program Billing Requirements;

(C) the CFC Billing Requirements for HCS and TxHmL Program Providers;

(D) 40 TAC §§49.301 - 49.313; and

(E) the program provider's Community Services Contract-Provider Agreement.

(10) HHSC conducts provider fiscal compliance reviews in accordance with the Provider Fiscal Compliance Review Protocol set forth in the HCS Program Billing Requirements and the CFC Billing Requirements for HCS and TxHmL Program Providers. As a result of a provider fiscal compliance review, HHSC may:

(A) recoup payments from a program provider; and

(B) based on the amount of unverified claims, require a program provider to develop and submit, in accordance with HHSC's instructions, a corrective action plan that improves the program provider's billing practices.

(11) A corrective action plan required by HHSC in accordance with paragraph (10)(B) of this subsection must:

(A) include:

(i) the reason the corrective action plan is required;

(ii) the corrective action to be taken;

(iii) the person responsible for taking each corrective action; and

(iv) a date by which the corrective action will be completed that is no later than 90 calendar days after the date the program provider is notified the corrective action plan is required;

(B) be submitted to HHSC within 30 calendar days after the date the program provider is notified the corrective action plan is required; and

(C) be approved by HHSC before implementation.

(12) Within 30 calendar days after HHSC receives a corrective action plan, HHSC notifies the program provider if HHSC approves the corrective action plan or if the plan requires changes.

(13) If HHSC requires a program provider to develop and submit a corrective action plan in accordance with paragraph (10)(B) of this subsection and the program provider requests an administrative hearing for the recoupment in accordance with §263.802 of this chapter (relating to Program Provider's Right to Administrative Hearing), the program provider is not required to develop or submit a corrective action plan while a hearing decision is pending. HHSC notifies the program provider if the requirement to submit a corrective action plan or the content of such a plan changes based on the outcome of the hearing.

(14) If a program provider does not submit a corrective action plan or complete a required corrective action within the time frames described in paragraph (11) of this subsection, HHSC may impose a vendor hold on payments due to the program provider until the program provider takes the corrective action.

(15) If a program provider does not submit a corrective action plan or complete a required corrective action within 30 calendar days after the date a vendor hold is imposed in accordance with paragraph (14) of this subsection, HHSC may terminate the contract.

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 September 1, 2022.

TRD-202203448
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER H. TRANSFER, DENIALS, SUSPENSION, REDUCTION, AND TERMINATION

26 TAC §§263.701 - 263.708

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§263.701. Process for Individual to Transfer to a Different Program Provider or FMSA.

(a) If a service coordinator receives information that an individual or LAR wants to transfer to a different program provider or FMSA, the service coordinator must:

(1) document the date the information was received in the individual's record;

(2) if the information was received by a person other than the individual or LAR, within three business days after the information was received:

(A) contact the individual or LAR to confirm whether the individual wants to transfer to a different program provider or FMSA; and

(B) if the service coordinator confirms that the individual or LAR wants to transfer, document such confirmation in the individual's record; and

(3) within three business days after confirming that the individual or LAR wants to transfer:

(A) explain to the individual or LAR that the individual may transfer to a program provider or FMSA of the individual's or LAR's choice whose enrollment has not reached its service capacity in the HHSC data system; and

(B) provide the individual or LAR the names and contact information of all program providers or FMSAs in the geographic location preferred by the individual or LAR.

(b) After the individual or LAR selects a different program provider or FMSA, the service coordinator must coordinate with the individual, LAR, the transferring program provider or FMSA and the receiving program provider or FMSA to determine a transfer effective date that is:

(1) not earlier than the date of the meeting described in subsection (c)(2) of this section; and

(2) agreed to by the service coordinator, the individual or LAR, and the receiving program provider.

(c) On or before the transfer effective date, the service coordinator must:

(1) take action to complete the HHSC Request for Transfer of Waiver Program Services form in accordance with the HCS Handbook;

(2) convene a meeting with the individual or LAR and the receiving program provider or receiving FMSA to develop a transfer IPC;

(3) send the individual's IPC, ID/RC, and PDP to the receiving program provider or the receiving FMSA;

(4) if the individual is transferring to a different program provider, request the following records of the individual from the transferring program provider;

(A) pertinent medication records and medical information;

(B) Medicaid card;

(C) Medicare information, if applicable;\

(D) the ICAP booklet and summary sheet;

(E) trust fund/financial records and any money due the individual;

(F) behavior support plan, if applicable;

(G) guardianship information, if applicable; and

(H) any other pertinent information to ensure health and safety or continuity of services;

(5) within two business days after receipt of the records requested in accordance with paragraph (4) of this subsection, send the records to the receiving program provider; and

(6) if, within three business days after requesting that the program provider provide records as described in paragraph (4) of this subsection, the service coordinator does not receive all of the records requested, notify HHSC that the records were not received.

(d) If an individual was evicted by a program provider or service provider of host home/companion care and the individual or LAR has not paid the delinquent room or board, but wants to include residential support, supervised living, or host home/companion care on the individual's IPC, the service coordinator must inform the individual or LAR at the meeting described in subsection (c)(2) of this section that HHSC will deny residential support, supervised living, or host home/companion care, if included on the individual's IPC, until the individual pays the delinquent room or board.

(e) Within 10 business days after the transfer effective date, the service coordinator must:

(1) complete data entry into the HHSC data system in accordance with the HCS Handbook after the activities described in subsection (c) of this section are completed; and

(2) send the transfer IPC and HHSC Request for Transfer of Waiver Program Services form to HHSC.

§263.702. Process for Individual to Receive a Service Through the CDS Option that the Individual is Receiving from a Program Provider.

(a) If a service coordinator receives information that an individual or LAR wants to receive a service through the CDS option that the individual is receiving from a program provider, the service coordinator must:

(1) document the date the information was received in the individual's record;

(2) if the information was received by a person other than the individual or LAR, within three business days after the information was received:

(A) contact the individual or LAR to confirm whether the individual wants to receive a service through the CDS option that the individual is receiving from a program provider; and

(B) if the service coordinator confirms that the individual or LAR wants to receive a service through the CDS option that the individual is receiving from a program provider, document such confirmation in the individual's record; and

(3) within three business days after confirming that the individual or LAR wants to receive a service through the CDS option that the individual is receiving from a program provider:

(A) explain to the individual or LAR that the individual may select an FMSA of the individual's or LAR's choice; and

(B) provide the individual or LAR the names and contact information of all FMSAs in the geographic location preferred by the individual or LAR.

(b) After the individual or LAR selects a FMSA, the service coordinator must coordinate with the individual, LAR, the transferring program provider and the receiving FMSA to determine an transfer effective date that is:

(1) not earlier than the date of the meeting described in subsection (c)(2) of this section; and

(2) agreed to by the service coordinator, the individual or LAR, and the receiving FMSA.

(c) On or before the transfer effective date, the service coordinator must:

(1) take action to complete the HHSC Request for Transfer of Waiver Program Services form in accordance with the HCS Handbook;

(2) convene a meeting with the individual or LAR to develop a transfer IPC; and

(3) send the individual's IPC to the receiving FMSA and obtain the signature of the receiving FMSA on the IPC and the HHSC Request for Transfer of Waiver Program Services form.

(d) Within 10 business days after the transfer effective date, the service coordinator must:

(1) complete data entry in the HHSC data system in accordance with the HCS Handbook after the activities described in subsection (c) of this section are completed; and

(2) send the transfer IPC and the HHSC Request for Transfer of Waiver Program Services form to HHSC.

§263.703. Denial of a Request for Enrollment into the HCS Program.

(a) HHSC denies an individual's request for enrollment into the HCS Program if the individual does not meet the eligibility criteria described in §263.101 of this chapter (relating to Eligibility Criteria for HCS Program Services and CFC Services).

(b) If HHSC denies an individual's request for enrollment, HHSC sends written notice to the individual or LAR of the denial of the individual's request for enrollment into the HCS Program and includes in the notice the individual's right to request a fair hearing in accordance with §263.801 of this chapter (Fair Hearing).

(c) HHSC sends a copy of the written notice to the individual's service coordinator and the program provider.

§263.704. Denial of HCS Program Services or CFC Services.

(a) HHSC denies an HCS Program service or CFC service on an individual's IPC, based on a review described in §263.303 of this chapter (relating to HHSC Review of an IPC) or §263.302 of this chapter (relating to Renewal and Revision of an IPC), if HHSC determines that the HCS Program service or CFC service does not meet the requirements described in §263.301(c) of this chapter (relating to IPC Requirements).

(b) HHSC denies residential support, supervised living, or host home/companion care on an individual's IPC if:

(1) the individual was evicted from:

(A) a three-person residence;

(B) a four-person residence; or

(C) a residence in which host home/companion care is provided; and

(2) the individual has not paid the delinquent room or board.

(c) If HHSC denies an HCS Program service or CFC service on the individual's IPC, HHSC:

(1) modifies the IPC in the HHSC data system; and

(2) sends written notice to the individual or LAR of the denial of the service and includes in the notice the individual's right to request a fair hearing in accordance with §263.801 of this chapter (Fair Hearing).

(d) HHSC sends a copy of the written notice to the individual's service coordinator and the program provider.

§263.705. Suspension of HCS Program Services and CFC Services.

(a) HHSC suspends an individual's HCS Program services and CFC services if the individual is under a temporary admission to one of the following facilities:

(1) a hospital;

(2) an ICF/IID;

(3) a nursing facility;

(4) an ALF;

(5) a residential child care facility licensed by HHSC unless it is an agency foster home;

(6) an inpatient chemical dependency treatment facility;

(7) a mental health facility;

(8) a residential facility operated by the Texas Workforce Commission; or

(9) a residential facility operated by the Texas Juvenile Justice Department, a jail, or a prison.

(b) If a service coordinator becomes aware that an individual who is receiving a service from a program provider is under a temporary admission, the service coordinator must, within one business day after becoming aware of the temporary admission, notify the individual's program provider of the temporary admission.

(c) If a program provider becomes aware that an individual is under a temporary admission, the program provider must, within one business day after becoming aware of the temporary admission, enter a suspension of the individual's HCS Program services and CFC services in the HHSC data system.

(d) If a program provider enters a suspension of the individual's HCS Program services and CFC services in the HHSC data system, the program provider must notify the individual's service coordinator of the suspension within one business day after the suspension is entered in the system.

(e) During a temporary admission, an individual is not considered to be residing in the facility.

(f) If an individual's program services are suspended, the service coordinator must, at least every 30 calendar days after the effective date of the suspension, review the individual's circumstances and document in the individual's record:

(1) the reasons for continuing the suspension if the individual is likely to remain in the facility;

(2) whether the individual anticipates resuming participation in the HCS Program after the suspension ends; and

(3) the anticipated date the individual will be discharged from the facility, if the individual is not likely to remain in the facility.

(g) If a service coordinator determines that an individual's suspension should be extended, the service coordinator must request that HHSC extend the suspension by completing and submitting the HHSC Request to Continue Suspension of Waiver Program Services form to HHSC before:

(1) the end of the first 270 calendar days of the temporary admission; or

(2) the end of a 30 calendar-day extension previously granted by HHSC.

(h) HHSC may extend an individual's suspension for 30 calendar days based on a service coordinator's request as described in subsection (g) of this section.

(i) A program provider must remove the entry of a suspension of the individual's HCS Program services and CFC services from the HHSC data system and resume the provision of services to the individual if the program provider becomes aware that the individual is discharged from the facility to which the individual has been under temporary admission.

§263.706. Reduction of HCS Program Services or CFC Services.

(a) HHSC proposes a reduction of an HCS Program service or CFC service on an individual's IPC, based on a review described in §263.303 of this chapter (relating to HHSC Review of an IPC) or §263.302 of this chapter (relating to Renewal and Revision of an IPC), if HHSC determines that the HCS Program service or CFC service does not meet the requirements described in §263.301(c) of this chapter (relating to IPC Requirements).

(b) If HHSC proposes a reduction of an HCS Program service or CFC service on the individual's IPC, HHSC sends written notice to the individual or LAR of the proposed reduction of the service and includes in the notice the individual's right to request a fair hearing in accordance with §263.801 of this chapter (Fair Hearing).

(c) HHSC sends a copy of the written notice to the individual's service coordinator and the program provider.

(d) If the individual or LAR requests a fair hearing before the effective date of the reduction of an HCS Program service or CFC service, as specified in the written notice, the service is not reduced and the program provider must provide the service to the individual in the amount authorized in the current 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 an HCS Program service or CFC service, HHSC modifies the IPC in the HHSC data system.

§263.707. Termination of HCS Program Services and CFC Services with Advance Notice.

(a) HHSC terminates an individual's HCS Program services and CFC services if the individual does not meet the eligibility criteria described in §263.101(a)(1) - (4), §263.101(a)(6), §263.101(c), and (d) of this chapter (relating to Eligibility Criteria for HCS Program Services and CFC Services).

(b) If a service coordinator becomes aware that a situation described in subsection (a) of this section exists, the service coordinator must, as soon as practicable, convene a service planning team meeting to discuss the situation. If after the meeting, the service coordinator determines that the situation cannot be resolved, the service coordinator must request that HHSC terminate the individual's services. To make this request, the service coordinator must complete HHSC Request for Termination of Services form and submit the form to HHSC.

(c) If HHSC receives a form from a service coordinator requesting that HHSC terminate the individual's services, HHSC sends

written notice to the individual or LAR of the proposal to terminate HCS Program services and CFC services. The notice includes the individual's right to request a fair hearing in accordance with §263.801 of this chapter (relating to Fair Hearing).

(d) If the individual or LAR requests a fair hearing before the effective date of the termination of HCS Program services and CFC services, as specified in the written notice, the program provider must provide services to the individual in the amounts authorized in the IPC while the appeal is pending.

§263.708. Termination of HCS Program Services and CFC Services Without Advance Notice.

(a) HHSC terminates an individual's HCS Program services and CFC services if any of the following situations exists:

(1) the individual is admitted to one of the facilities listed in §263.705(a)(1) - (9) of this subchapter (relating to Suspension of HCS Program Services and CFC Services):

(A) for more than 270 consecutive calendar days; and

(B) HHSC has not extended the individual's suspension in accordance with §263.705(h) of this subchapter;

(2) the service coordinator or program provider has factual information confirming the death of the individual;

(3) the service coordinator or program provider receives a clear written statement signed by the individual that the individual no longer wants HCS Program services;

(4) the individual's whereabouts are unknown, and the post office returns mail directed to the individual by the service coordinator or program provider without indicating a forwarding address; or

(5) HHSC establishes that the individual has been accepted for Medicaid services by another state.

(b) If a service coordinator becomes aware that a situation described in subsection (a) of this section exists, the service coordinator must request that HHSC terminate the individual's services. To make this request, the service coordinator must complete HHSC Request for Termination of Services form and submit the form to HHSC.

(c) If HHSC receives a form from a service coordinator requesting that HHSC terminate the individual's services, HHSC sends written notice to the individual or LAR of the termination of HCS Program services and CFC services. The notice includes the individual's right to request a fair hearing in accordance with §263.801 of this chapter (relating to Fair Hearing).

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 September 1, 2022.

TRD-202203449
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER I. HEARINGS

26 TAC §263.801, §263.802

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§263.801. Fair Hearing.

An applicant whose request for eligibility for the HCS Program is denied or is not acted upon with reasonable promptness, or an individual whose HCS Program services or CFC services have been terminated, suspended, denied, or reduced by HHSC, receives notice of the right to request a fair hearing in accordance with 1 TAC Chapter 357, Subchapter A (relating to Uniform Fair Hearing Rules).

§263.802. Program Provider's Right to Administrative Hearing.

(a) A program provider may request an administrative hearing if HHSC takes or proposes to take the following action:

(1) vendor hold;

(2) contract termination;

(3) recoupment of payments made to the program provider; or

(4) denial of a program provider's claim for payment, including denial of a retroactive LOC and denial of a recommended LON.

(b) If the basis of an administrative hearing requested under this section is a dispute regarding an LON assignment, the program provider may receive an administrative hearing only if reconsideration was requested by the program provider in accordance with §263.108 of this chapter (relating to Reconsideration of LON Assignment).

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 September 1, 2022.

TRD-202203450
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER J. LIDDA REQUIREMENTS

26 TAC §§263.901 - 263.903

STATUTORY AUTHORITY

The new sections 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new sections affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§263.901. LIDDA Requirements for Providing Service Coordination in the HCS Program.

(a) In addition to the requirements described in 40 TAC Chapter 2, Subchapter L (relating to Service Coordination for Individuals with an Intellectual Disability), a LIDDA must:

(1) comply with:

(A) this chapter;

(B) 40 TAC Chapter 41 (relating to Consumer Directed Services Option); and

(C) 40 TAC Chapter 4, Subchapter L (relating to Abuse, Neglect, and Exploitation in Local Authorities and Community Centers); and

(2) ensure that a rights protection officer required by 40 TAC §4.113 (relating to Rights Protection Officer at a State MR Facility or MRA), who receives a copy of an HHSC initial intake report or a final investigative report from an FMSA in accordance with 40 TAC §41.702 (relating to Requirements Related to HHSC Investigations When an Alleged Perpetrator is a Service Provider) or 40 TAC §41.703 (relating to Requirements Related to HHSC Investigations When an Alleged Perpetrator is a Staff Person or a Controlling Person of an FMSA), gives a copy of the report to the individual's service coordinator.

(b) A LIDDA must ensure that a service coordinator is an employee of the LIDDA and meets the requirements of this subsection.

(1) A service coordinator must meet the minimum qualifications and LIDDA staff training requirements described in 40 TAC Chapter 2, Subchapter L except as described in paragraph (2) of this subsection.

(2) Notwithstanding 40 TAC §2.560(b)(2)(B) (relating to Staff Person Training), a service coordinator must complete a comprehensive non-introductory person-centered service planning training developed or approved by HHSC within six months after the service coordinator's date of hire, unless an extension of the six month timeframe is granted by HHSC.

(3) A service coordinator must receive training about the following within the first 90 calendar days after beginning service coordination duties:

(A) rules governing the HCS Program and CFC; and

(B) 40 TAC Chapter 41.

(c) A LIDDA must have a process for receiving and resolving complaints from a program provider related to the LIDDA's provision of service coordination or the LIDDA's process to enroll an applicant in the HCS Program.

(d) If, as a result of monitoring, the service coordinator identifies a concern with the implementation of the PDP, the LIDDA must ensure that the concern is communicated to the program provider and attempts are made to resolve the concern. The LIDDA may refer an unresolved concern to HHSC by calling the HHSC IDD Ombudsman toll-free telephone number at 1-800-252-8154.

(e) A service coordinator must:

(1) assist an individual, LAR, or actively involved person in exercising the legal rights of the individual;

(2) provide an individual, LAR, or family member with the booklet Your Rights In the Home and Community-based Services (HCS) Program, available on the HHSC website, and the HHSC HCS Rights Addendum form, and an oral explanation of the rights in the booklet and the form:

(A) upon the individual's enrollment in the HCS Program;

(B) upon revision of the booklet or the form;

(C) upon request; and

(D) if one of the following occurs:

(i) the individual becomes 18 years of age;

(ii) a guardian is appointed for the individual; or

(iii) a guardianship for the individual ends;

(3) document the provision of the information required by paragraph (2) of this subsection, and ensure that the documentation is signed by:

(A) the individual or LAR; and

(B) the service coordinator;

(4) ensure that, upon enrollment of an individual and annually thereafter, the individual or LAR is informed orally and in writing of the following:

(A) the telephone number of the LIDDA to file a complaint;

(B) the toll-free telephone number of the HHSC IDD Ombudsman, 1-800-252-8154, to file a complaint; and

(C) the toll-free telephone number of DFPS, 1-800-647-7418, to report an allegation of abuse, neglect, or exploitation;

(5) maintain for an individual for an IPC year:

(A) a copy of the IPC;

(B) the PDP and, if CFC PAS/HAB is included on the PDP, the completed HHSC HCS/TxHmL CFC PAS/HAB Assessment form;

(C) a copy of the ID/RC Assessment;

(D) documentation of the activities performed by the service coordinator in providing service coordination; and

(E) any other pertinent information related to the individual;

(6) initiate, coordinate, and facilitate the person-centered planning process to meet the goals and outcomes identified by an individual and LAR in the individual's PDP, including scheduling service planning team meetings;

(7) to meet the needs of an individual as those needs are identified, develop for the individual a full range of services and resources using:

(A) providers for services other than HCS Program services and CFC services; and

(B) advocates or other actively involved persons;

(8) ensure that the PDP for an applicant or individual:

(A) is developed, reviewed, and updated in accordance with:

(i) §263.104(j)(4)(A) of this chapter (relating to Process for Enrollment of Applicants);

(ii) §263.302 of this chapter (relating to Renewal and Revision of an IPC); and

(iii) 40 TAC §2.556 (relating to LIDDA's Responsibilities); and

(B) document, for each HCS Program service, other than supervised living and residential support, and for each CFC service, whether the service is critical to the individual's health and safety as determined by the service planning team;

(9) ensure that the updated finalized PDP is signed by the individual or LAR;

(10) participate in the development, renewal, and revision of an individual's IPC in accordance with §263.104 and §263.302 of this chapter;

(11) ensure the service planning team participates in the renewal and revision of the IPC for an individual in accordance with §263.302 of this chapter and ensure the service planning team completes other responsibilities and activities as described in this chapter;

(12) notify the service planning team if the service coordinator receives notification from the program provider that:

(A) an individual's behavior requires the implementation of a behavior support plan; or

(B) based on an annual review by the program provider, an individual's behavior support plan needs to continue;

(13) if a change to an individual's PDP is needed, other than as required by §263.302 of this chapter:

(A) communicate the need for the change to the individual or LAR, the program provider, and other appropriate persons;

(B) update the PDP as necessary; and

(C) within 10 calendar days after the PDP is updated, send a copy of the updated PDP to the program provider, the individual or LAR and, if applicable, the FMSA;

(14) provide an individual's program provider a copy of the individual's current PDP;

(15) monitor the provision of HCS Program services, CFC services, and non-HCS Program and non-CFC services to an individual;

(16) document whether an individual or LAR perceives that the individual is progressing toward desired outcomes identified on the individual's PDP;

(17) together with the program provider, ensure the coordination and compatibility of HCS Program services and CFC services with non-HCS Program and non-CFC services, including, in coordination with the program provider, assisting an individual in obtaining a neurobehavioral or neuropsychological assessment and plan of care from one of the following professionals:

(A) a psychologist licensed in accordance with Texas Occupations Code Chapter 501;

(B) a speech-language pathologist licensed in accordance with Texas Occupations Code Chapter 401; or

(C) an occupational therapist licensed in accordance with Texas Occupations Code Chapter 454;

(18) for an individual who has had a guardian appointed, determine, at least annually, if the letters of guardianship are current;

(19) if individual does not have a guardian:

(A) ensure that the service planning team determines whether the individual would benefit from having a guardian or a less restrictive alternative to a guardian;

(B) if the service planning team determines that the individual would benefit from having a less restrictive alternative to a guardian such as a supported decision making agreement, take appropriate actions to implement such an alternative; and

(C) if the service planning team determines that the individual would benefit from having a guardian, make a referral to the appropriate court if:

(i) the individual would not benefit from a less restrictive alternative to a guardian; or

(ii) the individual would benefit from having a less restrictive alternative to a guardian but implementing such an alternative is not feasible;

(20) immediately notify the program provider if the service coordinator becomes aware that an emergency necessitates the provision of an HCS Program service or a CFC service to ensure the individual's health or safety and the service is not on the IPC or exceeds the amount on the IPC;

(21) if notified by the program provider that a requirement described in §263.503(c)(16) of this chapter (relating to Residential Agreements) or §263.502(a)(1) -(6) of this chapter (relating to Requirements for Program Provider Owned or Controlled Residential Settings) needs to be modified, update the individual's PDP to include the following:

(A) a description of the specific and individualized assessed need that justifies the modification;

(B) a description of the positive interventions and supports that were tried but did not work;

(C) a description of the less intrusive methods of meeting the need that were tried but did not work;

(D) a description of the condition that is directly proportionate to the specific assessed need;

(E) a description of how data will be routinely collected and reviewed to measure the ongoing effectiveness of the modification;

(F) the established time limits for periodic reviews to determine if the modification is still necessary or can be terminated;

(G) the individual's or LAR's signature evidencing informed consent to the modification; and

(H) the program provider's assurance that the modification will cause no harm to the individual;

(22) if notified by the program provider that an individual or LAR has refused a comprehensive nursing assessment and that the program provider has determined it cannot ensure the individual's health, safety, and welfare in the provision of host home/companion care, residential support, supervised living, supported home living, respite, employment assistance, supported employment, in-home day habilitation, day habilitation, or CFC PAS/HAB:

(A) inform the individual or LAR of the consequences and risks of refusing the assessment, including that the refusal will result in the individual's not receiving:

(i) nursing services; or

(ii) host home/companion care, residential support, supervised living, supported home living, respite, employment assis-

tance, supported employment, in-home day habilitation, day habilitation, or CFC PAS/HAB, if the individual needs one of those services and the program provider has determined that it cannot ensure the health and safety of the individual in the provision of the service; and

(B) notify the program provider if the individual or LAR continues to refuse the assessment after the discussion with the service coordinator;

(23) if the service coordinator determines that HCS Program services or CFC services provided for an individual should be terminated, including for a reason described in §263.104(k)(14)(C) or (D) of this chapter:

(A) document a description of:

(i) the situation that resulted in the service coordinator's determination that services should be terminated; and

(ii) the attempts by the service coordinator to resolve the situation;

(B) send a written recommendation to terminate the individual's HCS Program services or CFC services to HHSC and include the documentation required by subparagraph (A) of this paragraph; and

(C) provide a copy of the written recommendation and the documentation required by subparagraph (A) of this paragraph to the program provider;

(24) if an individual requests termination of all HCS Program services or all CFC services, within ten calendar days after the individual's request:

(A) inform the individual or LAR of:

(i) the individual's option to transfer to another program provider;

(ii) the consequences of terminating HCS Program services and CFC services; and

(iii) possible service resources upon termination, including CFC services through a managed care organization; and

(B) submit documentation to HHSC that:

(i) states the reason the individual is making the request; and

(ii) demonstrates that the individual or LAR was provided the information required by subparagraph (A)(ii) and (iii) of this paragraph;

(25) be objective in assisting an individual or LAR in selecting a program provider or FMSA;

(26) at the time of assignment and as changes occur, ensure that an individual and LAR and program provider are informed of the name of the individual's service coordinator and how to contact the service coordinator;

(27) unless contraindications are documented with justification by the service planning team, ensure that a school-age individual receives educational services in a six-hour-per-day program, five days per week, provided by the local school district and that no individual receives educational services at a state supported living center or at a state center;

(28) unless contraindications are documented with justification by the service planning team, ensure that a pre-school-age individual receives an early childhood education with appropriate activities and services, including small group and individual play with peers without disabilities;

(29) unless contraindications are documented with justification by the service planning team, ensure that an individual who is 18 years or older has opportunities to participate in day activities of the individual's or LAR's choice that promote achievement of PDP outcomes;

(30) unless contraindications are documented with justification by the service planning team, ensure that each individual is offered choices and opportunities for accessing and participating in community activities and experiences available to peers without disabilities;

(31) assist an individual to meet as many of the individual's needs as possible by using generic community services and resources in the same way and during the same hours as these generic services are used by the community at large;

(32) for an individual receiving host home/companion care, residential support, or supervised living, ensure that the individual or LAR is involved in planning the individual's residential relocation, except in a case of an emergency;

(33) if the program provider notifies the service coordinator that the program provider is unable to locate the parent or LAR to assist the LIDDA in conducting permanency planning or if notified by the LIDDA that the LIDDA is unable to locate the parent or LAR in accordance with §263.902(b)(2)(H) of this subchapter (relating to Permanency Planning):

(A) make reasonable attempts to locate the parent or LAR by contacting a person identified by the parent or LAR in the contact information described in paragraph (35)(A) and (B) of this subsection; and

(B) notify HHSC, no later than 30 calendar days after the date the service coordinator determines the service coordinator is unable to locate the parent or LAR, of the determination and request that HHSC initiate a search for the parent or LAR;

(34) if the service coordinator determines that a parent's or LAR's contact information described in paragraph (35)(A) of this subsection is no longer current:

(A) make reasonable attempts to locate the parent or LAR by contacting a person identified by the parent or LAR in the contact information described in paragraph (35)(B) of this subsection; and

(B) notify HHSC, no later than 30 calendar days after the date the service coordinator determines the service coordinator is unable to locate the parent or LAR, of the determination and request that HHSC initiate a search for the parent or LAR;

(35) request from and encourage the parent or LAR of an individual under 22 years of age requesting or receiving supervised living or residential support to provide the service coordinator with the following information:

(A) the parent's or LAR's:

(i) name;

(ii) address;

(iii) telephone number;

(iv) driver license number and state of issuance or personal identification card number issued by the Department of Public Safety; and

(v) place of employment and the employer's address and telephone number;

(B) name, address, and telephone number of a relative of the individual or other person whom HHSC or the service coordinator may contact in an emergency situation, a statement indicating the relationship between that person and the individual, and at the parent's or LAR's option:

(i) that person's driver license number and state of issuance or personal identification card number issued by the Department of Public Safety; and

(ii) the name, address, and telephone number of that person's employer; and

(C) a signed acknowledgement of responsibility stating that the parent or LAR agrees to:

(i) notify the service coordinator of any changes to the contact information submitted; and

(ii) make reasonable efforts to participate in the individual's life and in planning activities for the individual;

(36) within three business days after initiating supervised living or residential support to an individual under 22 years of age:

(A) provide the information listed in subparagraph (B) of this paragraph to the following:

(i) the CRCG for the county in which the individual's LAR lives (see the HHSC website for a listing of CRCG chairpersons by county); and

(ii) the local school district for the area in which the individual's residence is located, if the individual is at least three years of age, or the early childhood intervention (ECI) program for the county in which the individual's residence is located, if the individual is under three years of age (see the HHSC website to search for an ECI program by zip code or by county); and

(B) as required by subparagraph (A) of this paragraph, provide the following information to the entities described in subparagraph (A) of this paragraph:

(i) the individual's full name;

(ii) the individual's sex;

(iii) the individual's ethnicity;

(iv) the individual's birth date;

(v) the individual's social security number;

(vi) the LAR's name, address, and county of residence;

(vii) the date of initiation of supervised living or residential support;

(viii) the address where supervised living or residential support is provided; and

(ix) the name and phone number of the person providing the information;

(37) for an applicant or individual under 22 years of age seeking or receiving supervised living or residential support:

(A) make reasonable accommodations to promote the participation of the LAR in all planning and decision making regarding the individual's care, including participating in:

(i) the initial development and annual review of the individual's PDP;

(ii) decision making regarding the individual's medical care;

(iii) routine service planning team meetings; and

(iv) decision making and other activities involving the individual's health and safety;

(B) ensure that reasonable accommodations include:

(i) conducting a meeting in person, by videoconferencing, or by telephone, as mutually agreed upon by the program provider and the LAR;

(ii) conducting a meeting at a time and location, if the meeting is in person, that is mutually agreed upon by the program provider and the LAR;

(iii) if the LAR has a disability, providing reasonable accommodations in accordance with the Americans with Disabilities Act, including providing an accessible meeting location or a sign language interpreter, if appropriate; and

(iv) providing a language interpreter, if appropriate;

(C) provide written notice to the LAR of a meeting to conduct an annual review of the individual's PDP at least 21 calendar days before the meeting date and request a response from the LAR regarding whether the LAR intends to participate in the annual review;

(D) before an individual who is under 18 years of age, or who is at least 18 years of age and under 22 years of age and has an LAR, moves to another residence operated by the program provider, attempt to obtain consent for the move from the LAR unless the move is made because of a serious risk to the health or safety of the individual or another person; and

(E) document compliance with subparagraphs (A) - (D) of this paragraph in the individual's record;

(38) in accordance with Chapter 303, Subchapter G of this title (relating to Transition Planning) conduct:

(A) a pre-move site review for an applicant 21 years of age or older who is enrolling in the HCS Program from a nursing facility or as a diversion from admission to a nursing facility; and

(B) post-move monitoring visits for an individual 21 years of age or older who enrolled in the HCS Program from a nursing facility or has enrolled in the HCS Program as a diversion from admission to a nursing facility;

(39) do the following to inform applicants and individuals about responsibilities related to EVV:

(A) for an applicant who will receive a service that requires the use of EVV from the program provider or through the CDS option:

(i) orally explain the information in the HHSC Electronic Visit Verification Responsibilities and Additional Information form to the applicant or LAR;

(ii) sign the HHSC Electronic Visit Verification Responsibilities and Additional Information form to attest to explaining the information and to providing a copy to the individual or LAR;

(iii) provide the individual or LAR with a copy of the signed form;

(iv) perform the activities described in clause (i)(iii) of this subparagraph before the individual's enrollment; and

(v) maintain the completed HHSC Electronic Visit Verification Responsibilities and Additional Information form in the individual's record;

(B) for an individual who will receive a service that requires the use of EVV from the program provider or who is transferring to another program provider or LIDDA and will receive a service that requires the use of EVV from the program provider or through the CDS option:

(i) orally explain the information in the HHSC Electronic Visit Verification Responsibilities and Additional Information form to the individual or LAR;

(ii) sign the HHSC Electronic Visit Verification Responsibilities and Additional Information form to attest to explaining the information and to providing a copy to the individual or LAR;

(iii) provide the individual or LAR with a copy of the signed form;

(iv) perform the activities described in clause (i) - (iii) of this subparagraph on or before the effective date of the IPC that includes the EVV required service or the effective date of the transfer to another program provider or LIDDA; and

(v) maintain the completed HHSC Electronic Visit Verification Responsibilities and Additional Information form in the individual's record; and

(C) for an individual who will receive a service that requires the use of EVV through the CDS option or who will transfer to another FMSA and is receiving a service requiring the use of EVV:

(i) orally explain the information in the HHSC Electronic Visit Verification Responsibilities and Additional Information form to the individual or LAR;

(ii) sign the HHSC Electronic Visit Verification Responsibilities and Additional Information form to attest to explaining the information and to providing a copy to the individual or LAR;

(iii) provide the individual or LAR with a copy of the signed form;

(iv) perform the activities described in clause (i) - (iii) of this subparagraph before the individual receiving the EVV required service through the CDS option or on or before the effective date of the transfer to another FMSA; and

(v) maintain the completed HHSC Electronic Visit Verification Responsibilities and Additional Information form in the individual's record;

(40) have contact with an individual in-person, by video-conferencing, or telephone to provide service coordination during a month in which it is anticipated that the individual will not receive an HCS Program service unless:

(A) the individual's HCS Program services have been suspended; or

(B) the service coordinator had an in-person contact with the individual that month to comply with 40 TAC §2.556(d) (relating to LIDDA's Responsibilities);

(41) within one business day after the meeting to revise an IPC described in §263.503(k) of this chapter (relating to Residential Agreements), submit the following documentation to HHSC if the individual or LAR wants to keep residential support, supervised living, or host home/companion care on the individual's IPC:

(A) a completed HHSC Notification of Service Coordinator Disagreement form;

(B) a copy of the written notice of proposed eviction described in §263.503(h)(3) of this chapter;

(C) a copy of the written notice to vacate described in §263.503(j)(3) of this chapter;

(D) progress notes from any meetings related to the eviction; and

(E) a copy of the individual's PDP; and

(42) within one business day after receiving the notice from a program provider described in §263.503(m) of this chapter, notify HHSC that the individual is no longer delinquent in room or board payments.

§263.902. Permanency Planning.

(a) Permanency planning at enrollment. The provisions contained in this subsection apply to an applicant under 22 years of age moving from a family setting and requesting supervised living or residential support.

(1) Information. A LIDDA must, during enrollment, inform the applicant and LAR:

(A) of the benefits of living in a family setting;

(B) that the placement of the applicant is considered temporary; and

(C) that an ongoing permanency planning process is required.

(2) Permanency planning activities.

(A) A LIDDA must convene a permanency planning meeting with the LAR and, if possible, the applicant, during enrollment.

(B) Before the permanency planning meeting, the LIDDA must review the applicant's records, and, if possible, meet the applicant.

(C) During the permanency planning meeting, the meeting participants must discuss and choose one of the following goals:

(i) for an applicant under 18 years of age:

(I) to live in the applicant's family home where the natural supports and strengths of the applicant's family are supplemented, as needed, by activities and supports provided or facilitated by the LIDDA or program provider; or

(II) to live in a family-based alternative in which a family other than the applicant's family:

(-a-) has received specialized training in the provision of support and in-home care for an individual under 18 years of age with an intellectual disability or a related condition;

(-b-) will provide a consistent and nurturing environment in a family home that supports a continued relationship with the applicant's family to the extent possible; and

(-c-) will provide an enduring, positive relationship with a specific adult who will be an advocate for the applicant; or

(ii) for an applicant at least 18 years of age and under 22 years of age:

(I) to live in a setting chosen by the applicant or LAR in which the applicant's natural supports and strengths are supplemented by activities and supports provided or facilitated by the LIDDA or program provider; and

(II) to achieve a consistent and nurturing environment in the least restrictive setting, as defined by the applicant and LAR.

(D) To accomplish the goal chosen in accordance with subparagraph (C) of this paragraph, the meeting participants must discuss and identify:

(i) the problems or issues that led the applicant or LAR to request supervised living or residential support;

(ii) the applicant's daily support needs;

(iii) for the applicant under 18 years of age:

(I) barriers to having the applicant reside in the family home;

(II) supports that would be necessary for the applicant to remain in the family home; and

(III) actions that must be taken to overcome the barriers and provide the necessary supports;

(iv) for an applicant at least 18 years of age and under 22 years of age, the barriers to moving to a consistent and nurturing environment as defined by the applicant and LAR;

(v) the importance for the applicant to live in a long-term nurturing relationship with a family;

(vi) alternatives to the applicant living in an institutional setting;

(vii) the applicant's and LAR's need for information and preferences regarding those alternatives;

(viii) how, after the applicant's enrollment, to facilitate regular contact between the applicant and the applicant's family, and, if desired by the applicant and family, between the applicant and advocates and friends in the community to continue supportive and nurturing relationships;

(ix) natural supports and family strengths that will assist in accomplishing the identified permanency planning goal;

(x) activities and supports that can be provided by the family, LIDDA, or program provider to achieve the permanency planning goal;

(xi) assistance needed by the applicant's family:

(I) in maintaining a nurturing relationship with the applicant; and

(II) preparing the family for the applicant's eventual return to the family home or move to a family-based alternative; and

(xii) action steps, both immediate and long term, for achieving the permanency plan goal.

(E) A LIDDA must make reasonable accommodations to promote the participation of the LAR in a permanency planning meeting, including:

(i) conducting a meeting in person, by videoconferencing, or by telephone, as mutually agreed upon by the LIDDA and LAR;

(ii) conducting a meeting at a time and, if the meeting is in person, at a location that is mutually agreed upon by the LIDDA and LAR;

(iii) if the LAR has a disability, providing reasonable accommodations in accordance with the Americans with Disabilities Act, including providing an accessible meeting location or a sign language interpreter, if appropriate; and

(iv) providing a language interpreter, if appropriate.

(F) A LIDDA must develop a permanency plan using the HHSC Permanency Planning Instrument for Children Under 22 Years of Age form found on the HHSC website.

(G) A LIDDA must:

(i) complete the Permanency Planning Review Screen in HHSC data system during enrollment to obtain approval for an applicant to receive residential support or supervised living;

(ii) keep a copy of the Permanency Planning Review Approval Status View Screen from HHSC data system in the applicant's record; and

(iii) provide a copy of the permanency plan to the program provider, the applicant, and the LAR.

(3) Volunteer advocate.

(A) A LIDDA must inform the applicant and LAR that they may request a volunteer advocate to assist in permanency planning. The applicant or LAR may:

(i) select a person who is not employed by or under contract with the LIDDA or a program provider; or

(ii) request the LIDDA to designate a volunteer advocate.

(B) If an applicant or LAR requests that the LIDDA designate a volunteer advocate or the LIDDA cannot locate the applicant's LAR, the LIDDA must attempt to designate a volunteer advocate to assist in permanency planning who is, in order of preference:

(i) an adult relative who is actively involved with the applicant;

(ii) a person who:

(I) is part of the applicant's natural supports; and

(II) is not employed by or under contract with the LIDDA or a program provider; or

(iii) a person or a child advocacy organization representative who:

(I) is knowledgeable about community services and supports;

(II) is familiar with the permanency planning philosophy and processes; and

(III) is not employed by or under contract with the LIDDA or a program provider.

(C) If a LIDDA is unable to locate a volunteer advocate locally, the LIDDA must request assistance from a statewide advocacy organization in identifying an available volunteer advocate who meets the requirements described in subparagraph (B)(iii) of this paragraph. If the statewide advocacy organization is unable to assist the LIDDA in identifying a volunteer advocate, the LIDDA must document all efforts to designate a volunteer advocate in accordance with subparagraph (B) of this paragraph.

(b) Permanency planning after enrollment. Until an individual either becomes 22 years of age or is no longer receiving supervised living or residential support, a LIDDA must comply with this subsection six months after the date of the initial permanency planning meeting and every six months thereafter.

(1) Written notice. A LIDDA must provide written notice to the LAR of a meeting to conduct a review of the individual's permanency plan no later than 21 calendar days before the meeting date and include a request for a response from the LAR.

(2) Permanency planning activities. A LIDDA must:

(A) convene a permanency planning meeting with the LAR and, if possible, the individual, to review the individual's current permanency plan in accordance with subsection (a)(2)(C) - (E) of this section, with an emphasis on changes or additional information gathered since the last permanency plan was developed;

(B) during the permanency planning meeting, develop a permanency plan using the Permanency Planning Instrument available on the HHSC website;

(C) perform the actions regarding a volunteer advocate as described in subsection (a)(3) of this section;

(D) complete the Permanency Planning Review Screen in the HHSC data system within 10 calendar days after the date of the permanency planning meeting;

(E) ensure that approval for the individual to continue to receive residential support or supervised living is obtained every six months from the HHSC executive commissioner or designee;

(F) keep a copy of the Permanency Planning Review Approval Status View Screen from the HHSC data system in the individual's record;

(G) provide a copy of the permanency plan to the program provider, the individual, and the LAR; and

(H) if the LIDDA determines it is unable to locate the parent or LAR, notify the service coordinator of such determination.

(c) Provision of supervised living or residential support after enrollment. If a LIDDA receives information that an individual under 22 years of age who has been enrolled in the HCS Program moved from a family setting and started receiving supervised living or residential support, the LIDDA must, within the timeframes described in the performance contract between HHSC and the LIDDA:

(1) provide an explanation of services and supports and other information in accordance with §263.104(e)(1) of this chapter (relating to Process for Enrollment of Applicants); and

(2) take actions to conduct permanency planning as described in subsection (a) of this section.

§263.903. Referral from HHSC to DFPS.

If, within one year after the date HHSC receives the notification described in §263.901(e)(33)(B) or (34)(B) of this subchapter (relating to LIDDA Requirements for Providing Service Coordination in the HCS Program), HHSC is unable to locate the parent or LAR, HHSC refers the case to:

(1) the Child Protective Services Division of DFPS if the individual is under 18 years of age; or

(2) the Adult Protective Services Division of DFPS if the individual is at least 18 years of age and under 22 years of age.

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 September 1, 2022.

TRD-202203451
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER K. DECLARATION OF DISASTER

26 TAC §263.1000

STATUTORY AUTHORITY

The new section 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 Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§263.1000. Exceptions to Certain Requirements During Declaration of Disaster.

(a) HHSC may allow program providers and service coordinators to use one or more of the exceptions described in subsections (c) - (j) of this section while an executive order or proclamation declaring a state of disaster under Texas Government Code §418.014 is in effect. HHSC notifies program providers and LIDDAs:

(1) if it allows an exception to be used; and

(2) if an exception is allowed to be used, the date the exception must no longer be used, which may be before the declaration of a state of disaster expires.

(b) In this section "disaster area" means the area of the state specified in an executive order or proclamation described in subsection (a) of this section.

(c) Notwithstanding the definition of "implementation plan" in §263.3 of this chapter (relating to Definitions), the signature of an individual who resides in the disaster area is not required on the individual's implementation plan, if:

(1) the meeting required by §263.302(a)(5)(A) of this chapter (relating to Renewal and Revision of an IPC) is conducted by videoconferencing or telephone;

(2) the individual or LAR orally agrees with the implementation plan; and

(3) the program provider documents the individual's or LAR's oral agreement on the implementation plan.

(d) Notwithstanding §263.8(b) of this chapter (relating to Comprehensive Nursing Assessment), the comprehensive nursing assessment completed by an RN is not required to be completed in

person for an applicant or individual who resides in the disaster area, if the RN conducts the assessment as a telehealth service or by telephone, except as provided in subsection (e) of this section.

(e) Notwithstanding §263.104(j)(2)(A)(i)(I)(-a-) and (-b-), of this chapter (relating to Process for Enrollment of Applicants), a LIDDA is not required to conduct a standardized measure of intellectual functioning in person, and to conduct a standardized measure of adaptive abilities in person for an individual who resides in the disaster area, if the LIDDA conducts the standardized measures by videoconferencing.

(f) Notwithstanding §263.104(j)(2)(B)(i) of this chapter, a LIDDA is not required to conduct an ICAP assessment in person for an individual who resides in the disaster area if the LIDDA conducts the ICAP assessment by videoconferencing.

(g) Notwithstanding §263.302(e)(1)(B) of this chapter, a program provider is not required to ensure that an individual who resides in the disaster area or LAR signs and dates a renewal or revised IPC, if:

(1) the meeting required by §263.302(a)(4) and (b)(3)(D)(ii) of this chapter is conducted by videoconferencing or telephone;

(2) the program provider documents on the renewal or IPC the reason for and the topics discussed at the meeting;

(3) the individual or LAR orally agrees with the renewal or revised IPC; and

(4) the program provider documents the individual's or LAR's oral agreement on the renewal or the revised IPC.

(h) Notwithstanding §263.304(a)(1) of this chapter (relating to Service Limits), the service limit of adaptive aids for an individual who resides in the disaster area may be exceeded if:

(1) the requested adaptive aid that causes the service limit to be exceeded is:

(A) an adaptive aid that replaces an adaptive aid destroyed as a result of the disaster; or

(B) the repair of an adaptive aid that was damaged as a result of the disaster;

(2) the addition of the requested adaptive aid to the individual's IPC does not result in:

(A) the service limit of adaptive aids being exceeded by more than $5,000; or

(B) the individual's IPC cost limit for HCS program services being exceeded as described in §263.101(a)(3)(A)(B)(C) of this chapter (relating to Eligibility Criteria for HCS Program Service and CFC Services);

(3) the program provider:

(A) includes the cost of the requested adaptive aid on the revised IPC; and

(B) submits to HHSC, within 180 days after the effective date of the order or proclamation described in subsection (a) of this section, a written request to HHSC to approve the requested adaptive aid that includes:

(i) a description of the adaptive aid that is replacing the adaptive aid destroyed as a result of the disaster, which may include pictures or other descriptive information from a catalog, web-site or brochure;

(ii) a description of the repair to an adaptive aid that was damaged as a result of the disaster;

(iii) one bid for the requested adaptive aid from a vendor that includes:

(I) the total cost of the requested adaptive aid; and

(II) the name, address and telephone number of the vendor who must not be a relative of the individual; and

(iv) a statement from the program provider that the adaptive aid is not available through a third party resource; and

(4) the requested adaptive aid is approved by HHSC.

(i) Notwithstanding §263.304(a)(3)(A) and (B) of this chapter, the service limit of minor home modifications for an individual who resides in the disaster area may be exceeded if:

(1) the requested minor home modification that causes the service limit to be exceeded is:

(A) a minor home modification that replaces a minor home modification that was destroyed as a result of the disaster; or

(B) the repair of a minor home modification that was damaged as a result of the disaster;

(2) the addition of the requested minor home modification to the individual's IPC does not result in:

(A) the service limit of minor home modification being exceeded by more than $3,750; or

(B) the individual's IPC cost limit for HCS program services being exceeded as described in §263.101(a)(3)(A), (B), or (C) of this chapter;

(3) the program provider:

(A) includes the cost of the requested minor home modification on the revised IPC;

(B) submits to HHSC, within 180 days after the effective date of the order or proclamation described in subsection (a) of this section, a written request to HHSC to approve the requested minor home modification that includes:

(i) a description of the minor home modification that is replacing the minor home modification destroyed as a result of the disaster, which may include pictures or other descriptive information from a catalog, web-site, or brochure;

(ii) a description of the repair to a minor home modification that was damaged as a result of the disaster;

(iii) one bid for the requested minor home modification from a vendor that includes:

(I) the total cost of the requested minor home modification; and

(II) the name, address and telephone number of the vendor who must not be a relative of the individual; and

(iv) a statement from the program provider that the minor home modification is not available through a third party resource; and

(4) the requested minor home modification is approved by HHSC.

(j) Notwithstanding §263.901(e)(9) of this chapter, a service coordinator is not required to ensure that an individual who resides in the disaster area or LAR sign the PDP, if:

(1) the meeting required by §263.302(a)(1)(B) and (b)(3)(D)(i) of this chapter is conducted by videoconferencing or telephone;

(2) the service coordinator documents on the PDP the reason for and the topics discussed at the meeting;

(3) the individual or LAR orally agrees with the PDP; and

(4) the service coordinator documents the individual's or LAR's oral agreement on the PDP.

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 September 1, 2022.

TRD-202203452
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

CHAPTER 272. TRANSITION ASSISTANCE SERVICES

The Texas Health and Human Services Commission (HHSC) proposes amendments to §272.1, concerning Purpose; §272.3, concerning Definitions; §272.5, concerning Service Description; §272.7, concerning TAS in the HCS Program; §272.11, concerning Contracting Requirements; §272.33, concerning Service Delivery; and §272.41, concerning Record Keeping.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments is to replace the reference to the Department of Aging and Disability Services (DADS) with the Texas Health and Human Services Commission (HHSC), revise references to program rules, and make minor editorial changes for clarity.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §272.1 replaces "DADS" with "HHSC," spells out acronyms used in the section and removes language about waiver programs that is addressed in the definitions of the programs.

The proposed amendment to §272.3 spells out acronyms used in the section. The proposed amendment adds definitions for "HHSC" and "Texas Administrative Code (TAC)," removes the definition of "DADS," and replaces "DADS" with "HHSC." The proposed amendment updates rule references, including rule titles, and replaces a reference to a DADS website with a reference to the HHSC website. The proposed amendment reformats the definition of "facility" and revises the definition of "general residential operation (GRO)" to reference Texas Human Resources Code, §42.002 instead of including the entire definition in §272.3.

The proposed amendment to §272.5 replaces "DADS" with "HHSC."

The proposed amendment to §272.7 revises a rule reference, including the title of the rule.

The proposed amendment to §272.11 revises a rule reference.

The proposed amendment to §272.33 replaces "DADS" to "HHSC."

The proposed amendment to §272.41 revises rule references.

FISCAL NOTE

Trey Wood, HHSC Chief Financial Officer, has determined that for each year of the first five years 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 not expand an existing rule;

(7) the proposed rules will not change the number of individuals subject to the rule; 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 no adverse economic effect on small businesses or micro-businesses because the proposed rules do not require a transition assistance services (TAS) provider to alter its current business practices or impose new fees. There are no rural communities that contract with HHSC to provide TAS.

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 do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Stephanie Stephens, State Medicaid Director, has determined that for each year of the first five years the rules are in effect, the public will benefit from rules that have the correct state agency name and accurate rule references.

Trey Wood 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 be-

cause the rules do not require a TAS provider to alter its current business practices or impose new fees.

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 701 W. 51st Street, Austin, Texas 78751; or emailed to *HHSRulesCoordinationOffice@hhs.texas.gov.*

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 22R012" in the subject line.

SUBCHAPTER A. INTRODUCTION

26 TAC §§272.1, 272.3, 272.5, 272.7

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 system; and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The amendments affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§272.1. Purpose.

This chapter:

(1) establishes the requirements for transition assistance services (TAS) [~~TAS~~] provided through [~~the following DADS programs~~]:

(A) the Community Living Assistance and Support Services [~~CLASS~~] Program;

(B) the Medically Dependent Children Program [~~MDCP~~]; and

(C) the Deaf Blind with Multiple Disabilities [~~DBMD~~] Program; and

(2) provides information regarding TAS in the Home and Community-based Services [~~HCS~~] Program.

§272.3. Definitions.

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

(1) Case manager--The person who is responsible for case management activities in the Community Living Assistance and Support Services [~~CLASS~~], Medically Dependent Children Program (MDCP) [~~MDCP~~], and Deaf Blind with Multiple Disabilities (DBMD) [~~DBMD~~] Programs.

(2) CLASS Program--Community Living Assistance and Support Services Program. A Medicaid waiver program authorized by the Centers for Medicare and Medicaid Services in accordance with §1915(c) of the Social Security Act and operated by the Texas Health and Human Services Commission (HHSC) [~~DADS~~] under Title 40 Texas Administrative Code (TAC) Chapter 45 [~~of this title~~] (relating to Community Living Assistance and Support Services and Community First Choice (CFC) Services).

[~~(3) DADS--The Department of Aging and Disability Services.~~]

(3) [~~(4)~~] Day--A calendar day, unless otherwise specified in the text. A calendar day includes Saturday, Sunday, and a national or state holiday listed in Texas Government Code §662.003(a) or (b).

(4) [~~(5)~~] DBMD Program--Deaf Blind with Multiple Disabilities Program. A Medicaid waiver program authorized by the Centers for Medicare and Medicaid Services in accordance with §1915(c) of the Social Security Act and operated by HHSC [~~DADS~~] under 40 TAC Chapter 42 [~~of this title~~] (relating to Deaf Blind with Multiple Disabilities (DBMD) Program and Community First Choice (CFC) Services).

(5) [~~(6)~~] Facility--[~~Means:~~]

(A) a nursing facility, for an individual enrolling in MDCP[~~, a nursing facility~~]; or

(B) a nursing facility or an intermediate care facility for individuals with an intellectual disability or related conditions (ICF/IID), for an individual enrolling in the DBMD Program or CLASS Program[~~, a nursing facility or an ICF/IID~~].

(6) [~~(7)~~] GRO--General Residential Operation. This term has the meaning set forth [~~As defined~~] in Texas Human Resources Code, §42.002[~~, a child-care facility that provides care for more than 12 children for 24 hours a day, including facilities known as children's homes, halfway houses, residential treatment centers, emergency shelters, and therapeutic camps~~].

(7) HHSC--The Texas Health and Human Services Commission.

(8) HCS Program--Home and Community-based Services Program. A Medicaid waiver program authorized by the Centers for Medicare and Medicaid Services in accordance with §1915(c) of the Social Security Act and operated by HHSC [~~DADS~~] under 40 TAC Chapter 9, Subchapter D [~~of this title~~] (relating to Home and Community-based Services (HCS) Program and Community First Choice (CFC)).

(9) HCS program provider--A person, as defined in 40 TAC §49.102 [~~of this title~~] (relating to Definitions), that has a contract with HHSC [~~DADS~~] to provide HCS Program [~~program~~] services, excluding a financial management services agency.

(10) ICF/IID--Intermediate care facility for individuals with an intellectual disability or related conditions. An ICF/IID is licensed in accordance with Texas Health and Safety Code, Chapter 252, or certified by HHSC [~~DADS~~].

(11) Individual--A person for whom HHSC [~~DADS~~] authorizes the delivery of transition assistance services (TAS) [~~TAS~~].

(12) IPC--Individual plan of care.

(13) LAR--Legally authorized representative. A person authorized by law to act on behalf of an individual with regard to

a particular matter. The term may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(14) MDCP--Medically Dependent Children Program. A Medicaid waiver program authorized by the Centers for Medicare and Medicaid Services in accordance with §1915(c) of the Social Security Act and operated by HHSC [~~DADS~~] under 1 TAC §353.1155 [~~Chapter 51 of this title~~] (relating to Medically Dependent Children Program).

(15) Nursing facility--A facility licensed in accordance with Texas Health and Safety Code, Chapter 242.

(16) 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 Transition Assistance Services Orientation Handbook [~~available on DADS website at http://www.dads.state.tx.us/handbooks/tas/appendix/index.htm~~].

(17) TAC--Texas Administrative Code. A compilation of state agency rules published by the Texas State Secretary of State in accordance with Texas Government Code, Chapter 2002, Subchapter C.

(18) [~~(17)~~] TAS--Transition assistance services.

(19) [~~(18)~~] TAS provider--A person, as defined in 40 TAC §49.102 [~~of this title (relating to Definitions)~~], that has a contract with HHSC [~~DADS~~] to provide TAS in accordance with 40 TAC Chapter 49 [~~of this title~~] (relating to Contracting for Community Services).

(20) [~~(19)~~] Working day--Any day except a Saturday, a Sunday, or a national or state holiday listed in Texas Government Code §662.003(a) or (b).

§272.5. Service Description.

(a) TAS assists an individual in setting up a household in the community before being discharged from:

(1) a nursing facility and enrolling in MDCP; or

(2) a nursing facility or an ICF/IID and enrolling in the DBMD Program or CLASS Program.

(b) HHSC [~~DADS~~] does not authorize TAS if an individual's enrollment IPC includes any of the following services:

(1) support family services in the CLASS Program;

(2) continued family services in the CLASS Program;

(3) licensed assisted living in the DBMD Program; or

(4) licensed home health assisted living in the DBMD Program.

(c) An individual may receive TAS only once in the individual's lifetime.

(d) An individual may receive a maximum of $2,500 for TAS.

(e) TAS consists of:

(1) payment of security deposits required to lease a home, including an apartment, or to establish utility services for a home;

(2) purchase of essential furnishings for a home, including a table, a bed, chairs, window blinds, eating utensils, and food preparation items;

(3) payment of expenses required to move personal items, including furniture and clothing, into a home;

(4) payment for services to ensure the health and safety of the individual in a home, including pest eradication, allergen control, or a one-time cleaning before occupancy; and

(5) purchase of essential supplies for a home, including toilet paper, towels, and bed linens.

§272.7. TAS in the HCS Program.

(a) An individual being discharged from a nursing facility, an ICF/IID, or a GRO and enrolling in the HCS Program may receive TAS from an HCS program provider in accordance with 40 TAC Chapter 9, Subchapter D[~~, of this title~~] (relating to Home and Community-based Services (HCS) Program and Community First Choice (CFC)).

(b) An HCS program provider may contract with a TAS provider to provide TAS in accordance with 40 TAC Chapter 9, Subchapter D[~~, of this title~~].

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, 2022.

TRD-202203317
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3501

♦ ♦ ♦

SUBCHAPTER B. TAS PROVIDER REQUIREMENTS

26 TAC §272.11

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 system; and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§272.11. Contracting Requirements.

A TAS provider must comply with this chapter and 40 TAC Chapter 49 [~~of this title~~] (relating to Contracting for Community Services).

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, 2022.

TRD-202203318
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3501

♦ ♦ ♦

SUBCHAPTER D. SERVICE DELIVERY REQUIREMENTS

26 TAC §272.33

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 system; and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§272.33. Service Delivery.

(a) A TAS provider must:

(1) deliver TAS to an individual for whom the TAS provider receives, from the individual's case manager, a completed Transition Assistance Services (TAS) Assessment and Authorization form authorized by HHSC [~~DADS~~];

(2) deliver to the individual the specific TAS authorized on the form;

(3) purchase TAS for the individual within the monetary amount authorized on the form; and

(4) submit a service claim to HHSC [~~DADS~~] only after all of the authorized TAS has been delivered to the individual.

(b) A TAS provider must complete the delivery of TAS to the individual at least two days before the individual's facility discharge date unless the delay in delivery is beyond the control of the TAS provider.

(c) If a TAS provider does not deliver the authorized TAS in accordance with subsection (b) of this section, the TAS provider must:

(1) document the following:

(A) a description of the pending TAS;

(B) the reason for the delay;

(C) the date the TAS provider anticipates it will deliver the pending TAS or specific reasons why the TAS provider cannot anticipate a delivery date; and

(D) a description of the TAS provider's ongoing efforts to deliver the TAS; and

(2) at least two days before the facility discharge date, provide the information described in paragraph (1) of this subsection to:

(A) the individual or LAR, or in MDCP, the individual's primary caregiver; and

(B) the case manager.

(d) A TAS provider must, within one working day after TAS has been delivered, notify the following persons that TAS has been delivered:

(1) the individual or LAR, or in MDCP, the individual's primary caregiver; and

(2) the case manager.

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, 2022.

TRD-202203319
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3501

♦ ♦ ♦

SUBCHAPTER E. CLAIM PAYMENTS AND DOCUMENTATION

26 TAC §272.41

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 system; and Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§272.41. Record Keeping.

(a) A TAS provider must maintain service delivery documentation in the individual's record, including:

(1) the individual's name and Medicaid number;

(2) the TAS provider's name and contract number;

(3) a description of the TAS delivered;

(4) the date the TAS was purchased;

(5) the date the TAS was delivered;

(6) the total monetary amount of the TAS purchased, including taxes and delivery fees;

(7) the original purchase receipts; and

(8) the dated signature of the employee or contractor who delivered the TAS.

(b) If a TAS provider does not complete the delivery of TAS to the individual by the due date described in §272.33(b) [~~§62.33(b)~~] of this chapter (relating to Service Delivery), the TAS provider must maintain the documentation required in §272.33(c)(1) [~~§62.33(c)(1)~~] of this chapter in the individual's record.

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, 2022.

TRD-202203320

Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3501

♦ ♦ ♦

CHAPTER 550. LICENSING STANDARDS FOR PRESCRIBED PEDIATRIC EXTENDED CARE CENTERS

SUBCHAPTER C. GENERAL PROVISIONS

DIVISION 1. OPERATIONS AND SAFETY PROVISIONS

26 TAC §550.209

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §550.209, concerning Emergency Preparedness Planning and Implementation.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement a new procedure that requires a prescribed pediatric extended care center (PPECC or center) to assign a designee to enroll and respond to requests through the emergency communication system in the format established by HHSC. The proposal also reflects the transfer of functions from the Department of Aging and Disability Services to HHSC.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §550.209 updates a reference in subsection (c), updates the agency name in subsections (d) and (f) to reflect the transfer of functions from the Department of Aging and Disability Services to HHSC, and improves readability in subsection (d). The proposed new subsection (g) requires the center administrator and alternate administrator to enroll in an emergency communication system in accordance with instructions from HHSC. Subsection (g) also requires the center to respond to requests for information received through the emergency communication system.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule would have a cost to state government. The cost would be $2,990 General Revenue ($8,624 All Funds) for each year of State Fiscal Year (SFY) 2023 through SFY 2027.

For each year of the first five years 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 not change the number of individuals subject to the rules; 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 will be no adverse economic effect on rural communities because no rural communities contract with the state for these services. The rule could have an adverse economic effect on small businesses or micro-businesses because of costs to comply. HHSC lacks data to estimate the number of small businesses and micro-businesses affected. HHSC did not consider other alternatives for implementing this rule. There is no alternative that is consistent with protecting the health, welfare, and economic welfare of Texans.

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 this rule is necessary to protect the health, safety, and welfare of the residents of Texas.

PUBLIC BENEFIT AND COSTS

Stephen Pahl, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be implementing a procedure for the wellbeing of individuals during emergency situations.

Trey Wood has also determined that for the first five years the rule is in effect there will be economic costs to persons who are required to comply with the proposed rule because they will be required to develop and implement policies and procedures related to the use of the emergency communications system and train their employees on those policies and procedures. HHSC lacks information to provide an estimate of those costs.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposed rule 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 Laura Gutierrez, Senior Policy Specialist, P.O. Box 149030, Austin, Mail Code E-370, Texas 78714-9030; or by email to HHSCLTCR-Rules@hhs.texas.gov.

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 21R148 LTCR Emergency Communication System" 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 Texas Health and Safety Code §248A.101, which authorizes the Executive Commissioner of HHSC to adopt rules to implement Texas Health and Safety Code §248A, including rules prescribing minimum standards to protect the health and safety of minors being served in prescribed pediatric extended care centers.

The amendment implements Texas Government Code §531.0055 and Texas Health and Safety Code, Chapter 248.

§550.209. Emergency Preparedness Planning and Implementation.

(a) A center must have a written emergency preparedness and response plan that comprehensively describes its approach to an emergency situation, including a public health disaster that could affect the need for its services or its ability to provide those services.

(b) Administration. A center must:

(1) develop and implement a written plan as described in subsection (c) of this section;

(2) maintain a current written copy of the plan in a central location that is accessible to all staff at all times and at a work station of each staff who has responsibilities under the plan;

(3) evaluate the plan to determine if information in the plan must change:

(A) no later than 30 days after an emergency situation;

(B) as soon as possible after the remodeling or construction of an addition to the center; and

(C) at least annually;

(4) revise the plan no later than 30 days after information in the plan changes; and

(5) maintain documentation of compliance with this section.

(c) Emergency Preparedness and Response Plan. A center's plan must:

(1) include a risk assessment of all potential external and internal emergency situations that pose a risk for harm to minors or property and are relevant to the provision of services at a center and the center's geographical area, such as fire, earthquake, hurricane, tornado, flood, extreme snow and ice conditions for the area, wildfire, terrorism, hazardous materials accident, thunderstorm, wind storm, wave action, oil spill or other water contamination, epidemic, air contamination, infestation, explosion, riot, hostile military or paramilitary action, energy emergency, water outage, failure of heating and cooling systems, power outage, bomb threat, and explosion;

(2) include a description of minors served at the center;

(3) include a description of the services and assistance needed by minors served at the center in an emergency situation;

(4) include a section for each core function of emergency management, as described in subsection (d) of this section, that is based on the center's decision to either temporarily shelter-in-place or evacuate during an emergency situation; and

(5) include a section for a fire safety plan that complies with §550.205 [~~§15.205~~] of this division (relating to Safety Provisions).

(d) Plan Requirements Regarding Eight Core Functions of Emergency Management.

(1) Direction and control. A center's plan must contain a section for direction and control that:

(A) designates by name or title the emergency preparedness coordinator (EPC) who is the staff person with the authority to manage the center's response to an emergency situation in accordance with the plan, and includes the EPC's current phone number;

(B) designates by name or title the alternate EPC who is the staff person with the authority to act as the EPC if the EPC is unable to serve in that capacity, and includes the alternate EPC's current phone number;

(C) documents the name and contact information for the local emergency management coordinator (EMC) for the area where the center is located, as identified by the office of the local mayor or county judge;

(D) includes procedures for notifying the local EMC of the execution of the plan;

(E) includes a plan for coordinating a staffing response to an emergency situation; and

(F) includes a plan for relocating minors to a safe location that is based on the type of emergency situation occurring and a center's decision to either temporarily shelter-in-place or evacuate during an emergency situation.

(2) Warning. A center's plan must contain a section for warning that:

(A) describes how the EPC will be notified of an emergency situation;

(B) identifies who the EPC will notify of an emergency situation and when the notification will occur, including during off hours, weekends, and holidays; and

(C) addresses monitoring local news and weather reports regarding a disaster or potential disaster, taking into consideration factors such as geographic-specific natural disasters, whether a disaster is likely to be addressed or forecast in the reports, and the conditions, natural or otherwise, that would cause staff to monitor news and weather reports for a disaster.

(3) Communication. A center's plan must contain a section for communication that:

(A) identifies the center's primary mode of communication to be used during an emergency situation and the center's alternate mode of communication to be used in the event of power failure or the loss of the center's primary mode of communication in an emergency situation;

(B) requires posting of the emergency contact number for the local fire department, ambulance, and police at or near each telephone at the center in communities where a 911 emergency management system is unavailable;

(C) includes procedures for maintaining a current list of telephone numbers for:

(i) minors' parents;

(ii) safe locations; and

(iii) center staff;

(D) identifies the location of the lists described in subparagraph (C) of this paragraph;

(E) includes procedures to notify:

(i) center staff about an emergency situation;

(ii) a contact person at a safe location about an impending or actual evacuation of minors; and

(iii) a minor's parent about an impending or actual evacuation;

(F) provides a method for staff to obtain a minor's emergency information during an emergency situation;

(G) includes procedures for the center to maintain communication with:

(i) center staff during an emergency situation;

(ii) a contact person at a safe location; and

(iii) the authorized driver of a vehicle transporting minors, medication, medical records, food, water, equipment, or supplies during an evacuation; and

(H) includes procedures for reporting to the Texas Health and Human Services Commission (HHSC) [~~DADS~~] an emergency situation that caused the death or serious injury of a minor as follows:

(i) by telephone at 1-800-458-9858 or by using the HHSC [~~DADS~~] website, no later than 24 hours after the death or serious injury of a minor; and

(ii) in writing on the HHSC [~~DADS~~] Provider Investigation Report Form no later than five days after the center makes the report.

(4) Shelter-in-place. A center's plan must contain a section that includes procedures to temporarily shelter minors in place during an emergency situation.

(5) Evacuation. A center's plan must contain a section for evacuation that:

(A) requires posting center evacuation routes conspicuously throughout the center;

(B) identifies evacuation destinations and routes for an authorized driver, and includes a map that shows the destinations and routes;

(C) includes procedures for implementing a decision to evacuate minors to a safe location;

(D) includes a current copy of an agreement with a prearranged safe location, outlining arrangements for receiving minors in the event of an evacuation, if the evacuation destination identified in accordance with subparagraph (B) of this paragraph is a prearranged safe location that is not owned by the same entity as the evacuating center;

(E) includes procedures for:

(i) ensuring that staff accompany evacuating minors;

(ii) ensuring that minors and staff present at the center have been evacuated;

(iii) ensuring that visitors, including parents and service providers, evacuate the center;

(iv) accounting for minors and staff after they have been evacuated;

(v) accounting for minors absent from the center at the time of the evacuation;

(vi) releasing minor information in an emergency situation to promote continuity of a minor's care, in accordance with state law;

(vii) [~~includes procedures for~~] notifying the local EMC regarding an evacuation of the center, if required by the local EMC guidelines;

(viii) contacting the local EMC, if required by the local EMC guidelines, to find out if it is safe to return to the geographical area after an evacuation; and

(ix) determining if it is safe to re-enter and occupy the center after an evacuation;

(x) [~~includes procedures for~~] notifying HHSC [~~DADS~~] by telephone, at 1-800-458-9858, no later than 24 hours after an evacuation that minors have been evacuated; and

(xi) [~~includes procedures for~~] notifying HHSC [~~DADS~~] Regulatory Services by telephone immediately after the EPC makes a decision to evacuate all minors from the center.

(6) Transportation. A center's plan must contain a section for transportation that:

(A) arranges for a sufficient number of vehicles to safely evacuate all minors;

(B) identifies staff or contractors designated to drive a center owned, leased, or rented vehicle during an evacuation;

(C) includes procedures for safely transporting minors and staff involved in an evacuation; and

(D) includes procedures for safely transporting and having timely access to oxygen, medications, medical records, food, water, equipment, and supplies needed during an evacuation.

(7) Health and Medical Needs. A center's plan must contain a section for health and special needs that:

(A) identifies the types of services and medical equipment used by minors, including oxygen, respirator care, or hospice services; and

(B) ensures that a minor's needs identified in subparagraph (A) of this paragraph are met during an emergency situation.

(8) Resource Management. A center's plan must contain a section for resource management that:

(A) includes a plan for identifying medications, medical records, food, water, equipment, and supplies needed during an emergency situation;

(B) identifies staff who are assigned to locate the items in subparagraph (A) of this paragraph and who must ensure the transportation of the items during an emergency situation; and

(C) includes procedures to ensure that medications are secure and maintained at the proper temperature during an emergency situation.

(e) Training. A center must:

(1) train staff on their responsibilities under the plan no later than 30 days from their hire date;

(2) train staff on the staff responsibilities under the plan at least annually and when the staff member's responsibilities under the plan change; and

(3) conduct one unannounced annual drill with staff for severe weather and other emergency situations identified by a center as likely to occur, based on the results of the risk assessment required by subsection (c) of this section.

(f) Fire Emergency Response Plan.

(1) The center must have a comprehensive written fire emergency response plan. Copies of the plan must be available to all staff. The center must periodically instruct and inform staff about the duties of their positions under the plan. The written fire emergency response plan must provide for the following:

(A) use of alarms;

(B) transmission of an alarm to a fire department;

(C) response to alarms;

(D) isolation of fire;

(E) evacuation of the immediate area;

(F) preparation of floors and building for evacuation; and

(G) fire extinguishment;

(2) The fire emergency response plan must include procedures to contact HHSC [~~DADS~~] by telephone, at 1-800-458-9858, no later than 24 hours after activation of its Fire Emergency Response Plan.

(3) The staff must conduct emergency egress and relocation drills as follows:

(A) perform a monthly fire drill with all occupants of the building at expected and unexpected times and under varying conditions;

(B) relocate, during the monthly drill, all occupants of the building to a predetermined location where occupants must remain until a recall or dismissal is given; and

(C) complete the HHSC [~~DADS~~] Fire Drill Report Form 4719 for each required drill.

(4) The EPC or a designee must conduct fire prevention inspections on a monthly basis and prepare a report of the inspection results. The center must maintain copies of the fire prevention inspection report prepared by the center within the last 12 months. The center must post a copy of the most recent fire prevention inspection report in a conspicuous place at the center.

(g) Emergency Response System.

(1) The center administrator and alternate administrator must enroll in an emergency communication system in accordance with instructions from HHSC.

(2) The center must respond to requests for information received through the emergency communication system in the format established by HHSC.

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 31, 2022.

TRD-202203336
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3161

♦ ♦ ♦

CHAPTER 551. INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH AN INTELLECTUAL DISABILITY OR RELATED CONDITIONS

SUBCHAPTER C. STANDARDS FOR LICENSURE

26 TAC §551.50

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §551.50, concerning Emergency Preparedness and Response.

BACKGROUND AND PURPOSE

The purpose of proposal is to implement a new procedure that requires an intermediate care facility for individuals with an intellectual disability or related conditions (facility) to assign a designee to enroll and respond to requests through the emergency communication system in the format established by HHSC.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §551.50 spells out an acronym in subsection (d)(3)(F)(iii) to improve readability and adds new subsection (h) to require the facility administrator and alternate administrator to enroll in an emergency communication system in accordance with instructions from HHSC. The subsection also requires the facility to respond to requests for information received through the emergency communication system.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule would have a cost to state government. The cost would be $2,990 General Revenue ($8,624 All Funds) for each year of State Fiscal Year (SFY) 2023 through SFY 2027.

For each year of the first five years 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 not change the number of individuals subject to the rules; 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 will be no adverse economic effect on rural communities because no rural communities contract with the state for these services. The rule could have an adverse economic effect on small businesses or micro-businesses because of costs to comply. HHSC lacks data to estimate the number of small businesses and micro-businesses affected. HHSC did not consider other alternatives for implementing this rule. There is no alternative that is consistent with protecting the health, welfare, and economic welfare of Texans.

LOCAL EMPLOYMENT IMPACT

The proposed amendment will not affect a local economy.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT AND COSTS

Stephen Pahl, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be implementing a procedure for the wellbeing of individuals during emergency situations.

Trey Wood has also determined that for the first five years the rule is in effect there will be economic costs to persons who are required to comply with the proposed rule because they will be required to develop and implement policies and procedures related to the use of the emergency communications system and train their employees on those policies and procedures. HHSC lacks information to provide an estimate of those costs.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposed rule 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 Laura Gutierrez, Senior Policy Specialist, P.O. Box 149030, Mail Code E-370, Austin, Texas 78714-9030; or by email to HHSCLTCRRules@hhs.texas.gov.

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 21R148 LTCR Emergency Communication System" 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 Texas Health and Safety Code §252.008 and §252.036, which, respectively, require the Executive Commissioner of HHSC to adopt rules related to the administration and implementation of Chapter 252 and to adopt minimum standards relating to facilities licensed under Texas Health and Safety Code Chapter 252.

The amendment implements Texas Government Code §531.0055 and Texas Health and Safety Code, Chapter 252.

§551.50. Emergency Preparedness and Response.

(a) Definitions. In this section, "plan" means a facility's emergency preparedness and response plan.

(b) Administration. A facility must:

(1) develop and implement a written plan as described in subsection (c) of this section;

(2) maintain a current written copy of the plan that is accessible to all staff at all times;

(3) evaluate the plan to determine if information in the plan needs to change:

(A) within 30 days after an emergency situation;

(B) due to remodeling or making an addition to the facility; and

(C) at least every two years;

(4) revise the plan within 30 days after information in the plan changes; and

(5) maintain documentation of compliance with this section.

(c) Emergency Preparedness and Response Plan. A facility's plan must:

(1) include a risk assessment of potential internal and external emergency situations, including a fire, failure of heating and cooling systems, a power outage, an explosion, a hurricane, a tornado, a flood, extreme snow and ice conditions for the area, a wildfire, terrorism, or a hazardous materials accident;

(2) include a description of the facility's resident population;

(3) include a description of the services and assistance needed by the residents in an emergency situation;

(4) include a section for each core function of emergency management that complies with subsection (d) of this section and is based on a facility's decision to either shelter-in-place or evacuate during an emergency situation; and

(5) include a fire safety plan that complies with subsection (f) of this section.

(d) Plan Requirements Regarding Eight Core Functions of Emergency Management.

(1) Direction and control. A facility's plan must contain a section for direction and control that:

(A) identifies the emergency preparedness coordinator (EPC), who is the facility staff person with the authority to manage the facility's response to an emergency situation in accordance with the plan;

(B) identifies the alternate EPC, who is the facility staff person with the authority to act as the EPC if the EPC is unable to serve in that capacity; and

(C) documents the name and contact information for the local emergency management coordinator (EMC) for the area in which the facility is located, as identified by the office of the local mayor or county judge.

(2) Warning. A facility's plan must contain a section for warning that:

(A) describes how the EPC will be notified of an emergency situation;

(B) identifies who the EPC will notify of an emergency situation and when the notification will occur, including during off hours, weekends, and holidays; and

(C) ensures monitoring of local news and weather reports.

(3) Communication. A facility's plan must contain a section for communication that:

(A) identifies the facility's primary mode of communication and alternate mode of communication to be used in an emergency situation;

(B) includes procedures for maintaining a current list of telephone numbers for residents' responsible parties;

(C) includes procedures for maintaining a current list of telephone numbers for potential places to which to evacuate, such as hotels, motels, and other facilities licensed under this chapter or certified to participate in the Medicaid ICF/IID program;

(D) includes procedures for maintaining a current list of telephone numbers for the facility's staff, by residence or unit, that identifies the facility's EPC and administrative staff;

(E) identifies the location of the lists described in subparagraphs (B) - (D) of this paragraph, which must be a place where facility staff can obtain the information quickly;

(F) includes procedures to notify:

(i) facility staff about an emergency situation;

(ii) a receiving facility about an impending or actual evacuation of residents; and

(iii) residents, legally authorized representatives [~~LARs~~], and other persons about an impending or actual evacuation;

(G) provides a method for persons to obtain resident information during an emergency situation; and

(H) includes procedures for the facility to maintain communication with:

(i) facility staff involved in an emergency situation;

(ii) a receiving facility, if applicable; and

(iii) the driver of a vehicle transporting residents, medications, records, food, water, equipment, or supplies during an evacuation.

(4) Sheltering Arrangements. A facility's plan must contain a section for sheltering arrangements that:

(A) includes procedures for implementing a decision to shelter-in-place that include:

(i) having access to medications, records, food, water, equipment, and supplies; and

(ii) sheltering facility staff involved in responding to an emergency situation, and their family members, if necessary;

(B) includes procedures for notifying the HHSC regional office for the area in which the facility is located by telephone immediately after a decision to shelter-in-place has been made; and

(C) includes procedures for accommodating evacuated residents, if the facility serves as a receiving facility for a facility that has evacuated.

(5) Evacuation. A facility's plan must contain a section for evacuation that:

(A) requires posting building evacuation routes prominently throughout the facility, except in small one-story buildings where all exits are obvious;

(B) includes procedures for implementing a decision to evacuate residents to a receiving facility in an emergency situation, if applicable;

(C) identifies evacuation destinations and routes and includes a map that shows the destinations and routes;

(D) includes a current copy of the agreement with a receiving facility, if the evacuation destinations identified in accordance with subparagraph (C) of this paragraph include a receiving facility that is not owned by the same entity as the facility;

(E) includes procedures for:

(i) ensuring that facility staff accompany evacuating residents;

(ii) ensuring that residents and facility staff present in the building have been evacuated;

(iii) accounting for residents after they have been evacuated;

(iv) accounting for residents absent from the facility at the time of the evacuation;

(v) releasing resident information in an emergency situation to promote continuity of a resident's care;

(vi) contacting the local EMC to find out if it is safe to return to the geographical area; and

(vii) determining if it is safe to re-enter and occupy the building after an evacuation;

(F) includes procedures for notifying the local EMC regarding an evacuation of the facility;

(G) includes procedures for notifying the HHSC regional office for the area in which the facility is located by telephone immediately after a decision to evacuate is made; and

(H) includes procedures for notifying the HHSC regional office for the area in which the facility is located by telephone that residents have returned to the facility, within 48 hours of their return to the facility after an evacuation.

(6) Transportation. A facility's plan must contain a section for transportation that:

(A) provides for a sufficient number of facility-owned vehicles to evacuate all residents and for alternate transportation arrangements if the facility-owned vehicles are not available;

(B) includes procedures for safely transporting residents, facility staff involved in an evacuation and, if necessary, their family members, and the facility's and residents' pets during an evacuation; and

(C) includes procedures to safely transport and have timely access to oxygen, medications, records, food, water, equipment, and supplies needed during an evacuation.

(7) Health and Medical Needs. A facility's plan must contain a section for health and medical needs that:

(A) identifies all the facility's residents with special medical needs; and

(B) ensures that the needs of those residents are met during an emergency situation.

(8) Resource Management. A facility's plan must contain a section for resource management that:

(A) includes procedures for maintaining accurate and detailed checklists of medications, records, food, water, equipment and supplies needed during an emergency situation;

(B) identifies facility staff who are assigned to locate and ensure the transportation of the items on the list described in subparagraph (A) of this paragraph during an emergency situation; and

(C) includes procedures to ensure that medications are secure and stored at the proper temperatures during an emergency situation.

(e) Training. A facility must:

(1) inform a facility staff member of the staff member's responsibilities under the plan within five working days after assuming job duties;

(2) re-train a facility staff member at least annually on the staff member's responsibilities under the plan and when the staff member's responsibilities under the plan change; and

(3) conduct unannounced, annual drills with facility staff for severe weather and other emergency situations identified by the facility as likely to occur, based on the results of the risk assessment required by subsection (c)(1) of this section.

(f) Fire Safety Plan. A facility's fire safety plan must:

(1) for a large facility, include the provisions described in the Operating Features section of NFPA 101, Chapter 18 (for new healthcare occupancies) and Chapter 19 (for existing healthcare occupancies) concerning:

(A) use of alarms;

(B) transmission of alarms to fire department;

(C) emergency phone calls to fire department;

(D) response to alarms;

(E) isolation of fire;

(F) evacuation of immediate area;

(G) evacuation of smoke compartment;

(H) preparation of floors and building for evacuation; and

(I) extinguishment of fire;

(2) for a small facility, include the provisions described in the Operating Features section of NFPA 101, Chapter 32 (for new residential board and care occupancies) and Chapter 33 (for existing residential board and care occupancies) concerning:

(A) use of alarms;

(B) staff response in the event of a fire;

(C) fire protection procedures for a resident;

(D) actions to take if the primary escape route is blocked; and

(E) specification of an assembly point after a resident evacuates from the facility; and

(3) include procedures for:

(A) rehearsing the fire safety plan at least once per quarter on each work shift;

(B) evacuating residents as follows:

(i) for a small facility that has a prompt or slow evacuation capability, during every fire drill; or

(ii) for a large facility or facility with an impractical evacuation capability, during at least one fire drill each year on each work shift;

(C) completing the HHSC form 4719 titled "Fire Drill Report" or a form containing, at a minimum, the information on the HHSC form; and

(D) providing residents and facility staff with experience in egressing through all exits and means of escape.

(g) Reporting Fires. A facility must report a fire at the facility to HHSC as follows:

(1) by calling 1-800-458-9858 within 24 hours after the fire; and

(2) by submitting a completed HHSC form 3707 titled "Fire Report for Long Term Care Facilities" within 15 days after the fire.

(h) Emergency Response System.

(1) The facility administrator and designee must enroll in an emergency communication system in accordance with instructions from HHSC.

(2) The facility must respond to requests for information received through the emergency communication system in the format established by HHSC.

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 31, 2022.

TRD-202203337
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3161

♦ ♦ ♦

CHAPTER 553. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES
SUBCHAPTER E. STANDARDS FOR LICENSURE

26 TAC §553.275

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §553.275, concerning Emergency Preparedness and Response.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement a new procedure that requires an assisted living facility (facility) to assign a designee to enroll and respond to requests through the emergency communication system in the format established by HHSC. The proposal also reflects the transfer of functions from the Department of Aging and Disability Services to HHSC.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §553.275 updates references in subsection (c) and adds new subsection (p) to require the facility manager and alternate designee to enroll in an emergency communication system in accordance with instructions from HHSC. The subsection also requires the facility to respond to requests for information received through the emergency communication system.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule would have a cost to state government. The cost would be $2,990 General Revenue ($8,624 All Funds) for each year of State Fiscal Year (SFY) 2023 through SFY 2027.

For each year of the first five years 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 not change the number of individuals subject to the rules; 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 will be no adverse economic effect on rural communities because no rural communities contract with the state for these services. The rule could have an adverse economic effect on small businesses or micro-businesses because of costs to comply. HHSC lacks data to estimate the number of small businesses and micro-businesses affected. HHSC did not consider other alternatives for implementing this rule. There is no alternative that is consistent with protecting the health, welfare, and economic welfare of Texans.

LOCAL EMPLOYMENT IMPACT

The proposed amendment will not affect a local economy.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT AND COSTS

Stephen Pahl, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be implementing a procedure for the wellbeing of individuals during emergency situations.

Trey Wood has also determined that for the first five years the rule is in effect there will be economic costs to persons who are required to comply with the proposed rule because they will be required to develop and implement policies and procedures related to the use of the emergency communications system and train their employees on those policies and procedures. HHSC lacks information to provide an estimate of those costs.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposed rule 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 Laura Gutierrez, Senior Policy Specialist, P.O. Box 149030, Mail Code E-370, Austin, Texas 78714-9030; or by email to HHSCLTCR-Rules@hhs.texas.gov.

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 21R148 LTCR Emergency Communication System" 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 Texas Health and Safety Code §247.025 and §247.026, which respectively require the Executive Commissioner to adopt rules

necessary to implement Texas Health and Safety Code, Chapter 247, relating to assisted living facilities, and to prescribe by rule minimum standards to protect the health and safety of an assisted living facility residents.

The amendment implements Texas Government Code §531.0055 and Texas Health and Safety Code, Chapter 247.

§553.275. Emergency Preparedness and Response.

(a) Definitions. The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise.

(1) Designated emergency contact--A person that a resident, or a resident's legally authorized representative, identifies in writing for the facility to contact in the event of a disaster or emergency.

(2) Disaster or emergency--An impending, emerging, or current situation that:

(A) interferes with normal activities of a facility and its residents;

(B) may:

(i) cause injury or death to a resident or staff member of the facility; or

(ii) cause damage to facility property;

(C) requires the facility to respond immediately to mitigate or avoid the injury, death, damage, or interference; and

(D) except as it relates to an epidemic or pandemic, or to the extent it is incident to another disaster or emergency, does not include a situation that arises from the medical condition of a resident, such as cardiac arrest, obstructed airway, or cerebrovascular accident.

(3) Emergency management coordinator (EMC)--The person who is appointed by the local mayor or county judge to plan, coordinate, and implement public health emergency preparedness planning and response within the local jurisdiction.

(4) Emergency preparedness coordinator (EPC)--The facility staff person with the responsibility and authority to direct, control, and manage the facility's response to a disaster or emergency.

(5) Evacuation summary--A current summary of the facility's emergency preparedness and response plan that includes:

(A) the name, address, and contact information for each receiving facility or pre-arranged evacuation destination identified by the facility under subsection (g)(3)(B) of this section;

(B) the procedure for safely transporting residents and any other individuals evacuating a facility;

(C) the name or title, and contact information, of the facility staff member to contact for evacuation information;

(D) the facility's primary mode of communication to be used during a disaster or emergency and the facility's supplemental or alternate mode of communication;

(E) the facility's procedure for notifying persons referenced in subsection (g)(5) of this section as soon as practicable about facility actions affecting residents during a disaster or emergency, including an impending or actual evacuation, and for maintaining ongoing communication with them for the duration of the disaster, emergency, or evacuation;

(F) a statement about training that is available to a resident, the resident's legally authorized representative, and each designated emergency contact for the resident, on procedures under the facility's plan that involve or impact each of them, respectively; and

(G) the facility's procedures for when a resident evacuates with a person other than a facility staff member.

(6) Plan--A facility's emergency preparedness and response plan.

(7) Receiving facility--A separate licensed assisted living facility:

(A) from which a facility has documented acknowledgement, from an identified authorized representative, as described in subsection (i)(2)(C) of this section; and

(B) to which the facility has arranged in advance of a disaster or emergency to evacuate some or all of a facility's residents, on a temporary basis due to a disaster or emergency, if, at the time of evacuation:

(i) the receiving facility can safely receive and accommodate the residents; and

(ii) the receiving facility has any necessary licensure or emergency authorization required to do so.

(8) Risk assessment--The process of evaluating, documenting, and examining potential disasters or emergencies that pose the highest risk to a facility, and their foreseeable impacts, based on the facility's geographical location, structural conditions, resident needs and characteristics, and other influencing factors, in order to develop an effective emergency preparedness and response plan.

(b) A facility must conduct and document a risk assessment that meets the definition in subsection (a)(8) of this section for potential internal and external emergencies or disasters relevant to the facility's operations and location, and that pose the highest risk to a facility, such as:

(1) a fire or explosion;

(2) a power, telecommunication, or water outage; contamination of a water source; or significant interruption in the normal supply of any essential, such as food or water;

(3) a wildfire;

(4) a hazardous materials accident;

(5) an active or threatened terrorist or shooter, a detonated bomb or bomb threat, or a suspicious object or substance;

(6) a flood or a mudslide;

(7) a hurricane or other severe weather conditions;

(8) an epidemic or pandemic;

(9) a cyber attack; and

(10) a loss of all or a portion of the facility.

(c) A facility must develop and maintain a written emergency preparedness and response plan based on its risk assessment under subsection (b) of this section and that is adequate to protect facility residents and staff in a disaster or emergency.

(1) The plan must address the eight core functions of emergency management, which are:

(A) direction and control;

(B) warning;

(C) communication;

(D) sheltering arrangements;

(E) evacuation;

(F) transportation;

(G) health and medical needs; and

(H) resource management.

(2) The facility must prepare for a disaster or emergency based on its plan and follow each plan procedure and requirement, including contingency procedures, at the time it is called for in the event of a disaster or emergency. In addition to meeting the other requirements of this section, the emergency preparedness plan must:

(A) document the contact information for the EMC for the area, as identified by the office of the local mayor or county judge;

(B) include a process that ensures communication with the EMC, both as a preparedness measure and in anticipation of and during a developing and occurring disaster or emergency; and

(C) include the location of a current list of the facility's resident population, which must be maintained as required under subsection (g)(3) of this section, that identifies:

(i) residents with Alzheimer's disease or related disorders;

(ii) residents who have an evacuation waiver approved under §553.259(e) [~~§553.41(f)(2)~~] of this chapter (relating to Admission Policies and Procedures [~~Decrease in Capacity~~]); and

(iii) residents with mobility limitations or other special needs who may need specialized assistance, either at the facility or in case of evacuation.

(3) A facility must notify the EMC of the facility's emergency preparedness and response plan, take actions to coordinate its planning and emergency response with the EMC, and document communications with the EMC regarding plan coordination.

(d) A facility must:

(1) maintain a current printed copy of the plan in a central location that is accessible to all staff, residents, and residents' legally authorized representatives at all times;

(2) at least annually and after an event described in subparagraphs (A)-(D) of this paragraph, review the plan, its evacuation summary, if any, and the contact lists described in subsection (g)(3) of this section, and update each:

(A) to reflect changes in information, including when an evacuation waiver is approved under §553.259(e) [~~§553.41(f)(2)~~] of this chapter;

(B) within 30 days or as soon as practicable following a disaster or emergency if a shortcoming is manifested or identified during the facility's response;

(C) within 30 days after a drill, if, based on the drill, a shortcoming in the plan is identified; and

(D) within 30 days after a change in a facility policy or HHSC rule that would impact the plan;

(3) document reviews and updates conducted under paragraph (2) of this subsection, including the date of each review and dated documentation of changes made to the plan based on a review;

(4) provide residents and the residents' legally authorized representatives with a written copy of the plan or an evacuation summary, as defined in subsection (a)(5) of this section, upon admission, on request, and when the facility makes a significant change to a copy of the plan or evacuation summary it has provided to a resident or a resident's legally authorized representative;

(5) provide the information described in subsection (a)(5)(A) of this section to a resident or legally authorized representative who does not receive an evacuation summary under paragraph (4) of this subsection and requests that information;

(6) notify each resident, next of kin, or legally authorized representative, in writing, how to register for evacuation assistance with the Texas Information and Referral Network (2-1-1 Texas); and

(7) register as a provider with 2-1-1 Texas to assist the state in identifying persons who may need assistance in a disaster or emergency. In doing so, the facility is not required to identify or register individual residents for evacuation assistance.

(e) Core Function One: Direction and Control. A facility's plan must contain a section for direction and control that:

(1) designates the EPC, who is the facility staff person with the responsibility and authority to direct, control, and manage the facility's response to a disaster or emergency;

(2) designates an alternate EPC, who is the facility staff person with the responsibility and authority to act as the EPC if the EPC is unable to serve in that capacity; and

(3) assigns responsibilities to staff members by designated function or position and describes the facility's system for ensuring that each staff member clearly understands the staff member's own role and how to execute it, in the event of a disaster or emergency.

(f) Core Function Two: Warning. A facility's plan must contain a section for warning that:

(1) describes applicable procedures, methods, and responsibility for the facility and for the EMC and other outside organizations, based on facility coordination with them, to notify the EPC or alternate EPC, as applicable, of a disaster or emergency;

(2) identifies who, including during off hours, weekends, and holidays, the EPC or alternate EPC, as applicable, will notify of a disaster or emergency, and the methods and procedures for notification;

(3) describes a procedure for keeping all persons present in the facility informed of the facility's present plan for responding to a potential or current disaster or emergency that is impacting or threatening the area where the facility is located; and

(4) addresses applicable procedures, methods, and responsibility for monitoring local news and weather reports regarding a disaster or potential disaster or emergency, taking into consideration factors such as:

(A) location-specific natural disasters;

(B) whether a disaster is likely to be addressed or forecast in the reports; and

(C) the conditions, natural or otherwise, under which designated staff become responsible for monitoring news and weather reports for a disaster or emergency.

(g) Core Function Three: Communication. A facility's plan must contain a section for communication that:

(1) identifies the facility's primary mode of communication to be used during an emergency and the facility's supplemental or alternate mode of communication, and procedures for communication if telecommunication is affected by a disaster or emergency;

(2) includes instructions on when to call 911;

(3) includes the location of a list of current contact information, where it is easily accessible to staff, for each of the following:

(A) the legally authorized representative and designated emergency contacts for each resident;

(B) each receiving facility and pre-arranged evacuation destination, including alternate pre-arrangements, together with the written acknowledgement for each, as described and required in subsection (i)(2)(C) of this section;

(C) home and community support services agencies and independent health care professionals that deliver health care services to residents in the facility;

(D) personal contact information for facility staff, and

(E) the facility's resident population, which must identify residents who may need specialized assistance at the facility or in case of evacuation, as described in subsection (c)(2)(C) of this section;

(4) provides a method for the facility to communicate information to the public about its status during an emergency; and

(5) describes the facility's procedure for notifying at least the following persons, as applicable and as soon as practicable, about facility actions affecting residents during an emergency, including an impending or actual evacuation, and for maintaining ongoing communication for the duration of the emergency or evacuation:

(A) all facility staff members, including off-duty staff;

(B) each facility resident;

(C) any legally authorized representative of a resident;

(D) each resident's designated emergency contacts;

(E) each home and community support services agency or independent health care professional that delivers health care services to a facility resident;

(F) each receiving facility or evacuation destination to be utilized, if there is an impending or actual evacuation, which, if utilized at the time of evacuation, must be utilized in accordance with the pre-arranged acknowledged procedures described in subsection (i)(2)(C) of this section, where applicable, and must verify with the applicable destination that it is available, ready, and legally authorized at the time to receive the evacuated residents and can safely do so;

(G) the driver of a vehicle transporting residents or staff, medication, records, food, water, equipment, or supplies during an evacuation, and the employer of a driver who is not a facility staff person, and

(H) the EMC.

(h) Core Function Four: Sheltering Arrangements. A facility's plan must contain a section for sheltering arrangements that:

(1) describes the procedure for making and implementing a decision to remain in the facility during a disaster or emergency, that includes:

(A) the arrangements, staff responsibilities, and procedures for accessing and obtaining medication, records, equipment and supplies, water and food, including food to accommodate an individual who has a medical need for a special diet;

(B) facility arrangements and procedures for providing, in areas used by residents during a disaster or emergency, power and ambient temperatures that are safe under the circumstances, but which may not be less than 68 degrees Fahrenheit or more than 82 degrees Fahrenheit; and

(C) if necessary, sheltering facility staff or emergency staff involved in responding to an emergency and, as necessary and appropriate, their family members; and

(2) includes a procedure for notifying HHSC Regulatory Services regional office for the area in which the facility is located and, in accordance with subsection (g)(5)(H) of this section, the EMC, immediately after the EPC or alternate EPC, as applicable, makes a decision to remain in the facility during a disaster or emergency.

(i) Core Function Five: Evacuation.

(1) A facility has the discretion to determine when an evacuation is necessary for the health and safety of residents and staff. However, a facility must evacuate if the county judge of the county in which the facility is located, the mayor of the municipality in which the facility is located mandates it by an evacuation order issued independently or concurrently with the governor.

(2) A facility's plan must contain a section for evacuation that:

(A) identifies evacuation destinations and routes, including at least each pre-arranged evacuation destination and receiving facility described in subparagraph (C) of this paragraph, and includes a map that shows each identified destination and route;

(B) describes the procedure for making and implementing a decision to evacuate some or all residents to one or more receiving facilities or pre-arranged evacuation destinations, with contingency procedures, and a plan for any pets or service animals that reside in the facility;

(C) includes the location of a current documented acknowledgment with an identified authorized representative of at least one receiving facility or pre-arranged evacuation destination, and at least one alternate. The documented acknowledgment must include acknowledgement by the receiving facility or pre-arranged evacuation destination of:

(i) arrangements for the receiving facility or pre-arranged destination to receive an evacuating facility's residents; and

(ii) the process for the facility to notify each applicable receiving facility or pre-arranged destination of the facility's plan to evacuate and to verify with the applicable destination that it is available, ready, and not legally restricted at the time from receiving the evacuated residents, and can do so safely;

(D) includes the procedure and the staff responsible for:

(i) notifying HHSC Regulatory Services regional office for the area in which the facility is located and, in accordance with subsection (g)(5)(H) of this section, the EMC, immediately after the EPC or alternate EPC, as applicable, makes a decision to evacuate, or as soon as feasible thereafter, if it is not safe to do so at the time of decision;

(ii) ensuring that sufficient facility staff with qualifications necessary to meet resident needs accompany evacuating residents to the receiving facility, pre-arranged evacuation destination, or other destination to which the facility evacuates, and remain with the residents, providing any necessary care, for the duration of the residents' stay in the receiving facility or other destination to which the facility evacuates;

(iii) ensuring that residents and facility staff present in the building have been evacuated;

(iv) accounting for and tracking the location of residents, facility staff, and transport vehicles involved in the facility evacuation, both during and after the facility evacuation, through the time the residents and facility staff return to the evacuated facility;

(v) accounting for residents absent from the facility at the time of the evacuation and residents who evacuate on their own or with a third party, and notifying them that the facility has been evacuated;

(vi) overseeing the release of resident information to authorized persons in an emergency to promote continuity of a resident's care;

(vii) contacting the EMC to find out if it is safe to return to the geographical area after an evacuation;

(viii) making or obtaining, as appropriate, a comprehensive determination whether and when it is safe to re-enter and occupy the facility after an evacuation;

(ix) returning evacuated residents to the facility and notifying persons listed in subsection (g)(5) of this section who were not involved in the return of the residents; and

(x) notifying the HHSC Regulatory Services regional office for the area in which the facility is located immediately after each instance when some or all residents have returned to the facility after an evacuation.

(j) Core Function Six: Transportation. A facility's plan must contain a section for transportation that:

(1) identifies current arrangements for access to a sufficient number of vehicles to safely evacuate all residents;

(2) identifies facility staff designated during an evacuation to drive a vehicle owned, leased, or rented by the facility; notification procedures to ensure designated staff's availability at the time of an evacuation; and methods for maintaining communication with vehicles, staff, and drivers transporting facility residents or staff during evacuation, in accordance with subsection (g)(5)(A) and (G) of this section;

(3) includes procedures for safely transporting residents, facility staff, and any other individuals evacuating a facility; and

(4) includes procedures for the safe and secure transport of, and staff's timely access to, the following resident items needed during an evacuation: oxygen, medications, records, food, water, equipment, and supplies.

(k) Core Function Seven: Health and Medical Needs. A facility's plan must contain a section for health and medical needs that:

(1) identifies special services that residents use, such as dialysis, oxygen, or hospice services;

(2) identifies procedures to enable each resident, notwithstanding an emergency, to continue to receive from the appropriate provider the services identified under paragraph (1) of this subsection; and

(3) identifies procedures for the facility to notify home and community support services agencies and independent health care professionals that deliver services to residents in the facility of an evacuation in accordance with subsection (g)(5)(E) of this section.

(l) Core Function Eight: Resource Management. A facility's plan must contain a section for resource management that:

(1) identifies a plan for identifying, obtaining, transporting, and storing medications, records, food, water, equipment, and supplies needed for both residents and evacuating staff during an emergency;

(2) identifies facility staff, by position or function, who are assigned to access or obtain the items under paragraph (1) of this subsection and other necessary resources, and to ensure their delivery to the facility, as needed, or their transport in the event of an evacuation;

(3) describes the procedure to ensure medications are secure and maintained at the proper temperature throughout an emergency; and

(4) describes procedures and safeguards to protect the confidentiality, security, and integrity of resident records throughout an emergency and any evacuation of residents.

(m) Receiving Facility. To act as a receiving facility, as defined in paragraph (a)(7) of this section, a facility's plan must include procedures for accommodating a temporary emergency placement of one or more residents from another assisted living facility, only in an emergency and only if:

(1) the facility does not exceed its licensed capacity, unless pre-approved in writing by HHSC, and the excess is not more than 10 percent of the facility's licensed capacity;

(2) the facility ensures that the temporary emergency placement of one or more residents evacuated from another assisted living facility does not compromise the health or safety of any evacuated or facility resident, facility staff, or any other individual;

(3) the facility is able to meet the needs of all evacuated residents and any other persons it receives on a temporary emergency basis, in accordance with §553.18(h) of this chapter, while continuing to meet the needs of its own residents, and of any of its own staff or other individuals it is sheltering at the facility during an emergency, in accordance with its plan under subsection (h) of this section;

(4) the facility maintains a log of each additional individual being housed in the facility that includes the individual's name, address, and the date of arrival and departure.

(5) the receiving facility ensures that each temporarily placed resident has at arrival, or as soon after arrival as practicable and no later than necessary to protect the health of the resident, each of the following necessary to the resident's continuity of care:

(A) necessary physician orders for care;

(B) medications;

(C) a service plan;

(D) existing advance directives; and

(E) contact information for each legally authorized representative and designated emergency contact of an evacuated resident, and a record of any notifications that have already occurred.

(n) Emergency preparedness and response plan training. The facility must:

(1) provide staff training on the emergency preparedness plan at least annually;

(2) train a facility staff member on the staff member's responsibilities under the plan:

(A) prior to the staff member assuming job responsibilities; and

(B) when a staff member's responsibilities under the plan change;

(3) conduct at least one unannounced annual drill with facility staff for severe weather or another emergency identified by the facility as likely to occur, based on the results of the risk assessment required by subsection (b) of this section;

(4) offer training, and document, for each, the provision or refusal of such training, to each resident, legally authorized representative, if any, and each designated emergency contact, on procedures under the facility's plan that involve or impact each of them, respectively; and

(5) document the facility's compliance with each paragraph of this subsection at the time it is completed.

(o) Self-reported incidents related to a disaster or emergency.

(1) A facility must report a fire to HHSC as follows:

(A) by calling 1-800-458-9858 immediately after the fire or as soon as practicable during the course of an extended fire; and

(B) by submitting a completed HHSC form titled "Fire Report for Long Term Care Facilities" within 15 calendar days after the fire.

(2) A facility must report to HHSC a death or serious injury of a resident, or threat to resident health or safety, resulting from an emergency or disaster as follows:

(A) by calling 1-800-458-9858 immediately after the incident, or, if the incident is of extended duration, as soon as practicable after the injury, death, or threat to the resident; and

(B) by conducting an investigation of the emergency and resulting resident injury, death, or threat, and submitting a completed HHSC Form 3613-A titled "SNF, NF, ICF/IID, ALF, DAHS and PPECC Provider Investigation Report with Cover Sheet." The facility must submit the completed form within five working days after making the telephone report required by paragraph (2)(A) of this subsection.

(p) Emergency Response System.

(1) The facility administrator and designee must enroll in an emergency communication system in accordance with instructions from HHSC.

(2) The facility must respond to requests for information received through the emergency communication system in the format established by HHSC.

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 31, 2022.

TRD-202203338
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3161

♦ ♦ ♦

CHAPTER 554. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

SUBCHAPTER T. ADMINISTRATION

26 TAC §554.1914

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §554.1914, concerning Emergency Preparedness and Response.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement a new procedure that requires the nursing facility to assign a designee to enroll in and respond to requests through the emergency communication system in the format established by HHSC. The proposal also updates a cross-reference and reflects the transfer of functions from the Department of Aging and Disability Services to HHSC.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §554.1914 updates a reference in subsection (c), updates subsections (d) and (f) to reflect the transfer of functions from the Department of Aging and Disability Services to HHSC, and adds a new subsection (g). The proposed new subsection (g) requires the facility administrator and director of nursing to enroll in an emergency communication system in accordance with instructions from HHSC. The subsection also requires the facility to respond to requests for information received through the emergency communication system.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule would have a cost to state government. The cost would be $2,990 General Revenue ($8,624 All Funds) for each year of State Fiscal Year (SFY) 2023 through SFY 2027.

For each year of the first five years 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 not change the number of individuals subject to the rules; 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 will be no adverse economic effect on rural communities because no rural communities contract with the state for these services. The rule could have an adverse economic effect on small businesses or micro-businesses because of costs to comply. HHSC lacks data to

estimate the number of small businesses and micro-businesses affected. HHSC did not consider other alternatives for implementing this rule. There is no alternative that is consistent with protecting the health, welfare, and economic welfare of Texans.

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 this rule is necessary to protect the health, safety, and welfare of the residents of Texas.

PUBLIC BENEFIT AND COSTS

Stephen Pahl, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be implementing a procedure for the wellbeing of individuals during emergency situations.

Trey Wood has also determined that for the first five years the rule is in effect there will be economic costs to persons who are required to comply with the proposed rule because they will be required to develop and implement policies and procedures related to the use of the emergency communications system and train their employees on those policies and procedures. HHSC lacks information to provide an estimate of those costs.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposed amendment 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 Laura Gutierrez, Senior Policy Specialist, P.O. Box 149030, Mail Code E-370, Austin, Texas 78714-9030; or by email to HHSCLTCRRules@hhs.texas.gov.

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 21R148 LTCR Emergency Communication System" in the subject line.

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055 and Texas Health and Safety Code §242.001 and §242.037. Texas Government Code §531.0055 authorizes the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services agencies. Texas Health and Safety Code §242.001 states that the goal of Chapter 242 is to ensure that nursing facilities in Texas deliver the highest possible quality of care and establish the minimum acceptable level of care for individuals who are living in a nursing facility. Texas Health and Safety Code §242.037 requires the Executive Commissioner of HHSC to make and enforce rules prescribing minimum standards relating to quality of life, quality of care, and resident rights for nursing facility residents.

The amendment implements Texas Government Code §531.0055 and Texas Health and Safety Code Chapter 242.

§554.1914. Emergency Preparedness and Response.

(a) Definitions. In this section:

(1) "emergency situation" means an impending or actual situation that:

(A) interferes with normal activities of a facility and its residents;

(B) may:

(i) cause injury or death to a resident or staff member of the facility; or

(ii) cause damage to facility property;

(C) requires the facility to respond immediately to mitigate or avoid the injury, death, damage or interference; and

(D) does not include a situation that arises from the medical condition of a resident, such as cardiac arrest, obstructed airway, or cerebrovascular accident;

(2) "plan" refers to a facility's emergency preparedness and response plan; and

(3) "receiving facility" means a facility or location that has agreed to receive the residents of another facility who are evacuated due to an emergency situation.

(b) Administration. A facility must:

(1) develop and implement a written plan as described in subsection (c) of this section;

(2) maintain a current printed copy of the plan in a central location that is accessible to all staff at all times and at a work station of each personnel supervisor who has responsibilities under the plan;

(3) evaluate the plan to determine if information in the plan needs to change:

(A) within 30 days after an emergency situation;

(B) due to remodeling or making an addition to the facility; and

(C) at least annually;

(4) revise the plan within 30 days after information in the plan changes; and

(5) maintain documentation of compliance with this section.

(c) Emergency Preparedness and Response Plan. A facility's plan must:

(1) include a risk assessment of all potential internal and external emergency situations relevant to the facility's operations and geographical area, such as a fire, failure of heating and cooling systems, a power outage, a bomb threat, an explosion, a hurricane, a tornado, a flood, extreme snow and ice conditions for the area, a wildfire, terrorism, a hazardous materials accident, or a thunderstorm with a risk for harm to persons or property;

(2) include a description of the facility's resident population;

(3) include a section for each core function of emergency management, as described in subsection (d) of this section, that is based on a facility's decision to either shelter-in-place or evacuate during an emergency situation;

(4) include a section for a fire safety plan that complies with §554.326 [~~§19.326~~] of this chapter (relating to Safety Operations); and

(5) include a section for self reporting incidents that complies with subsection (f) of this section.

(d) Plan Requirements Regarding Eight Core Functions of Emergency Management.

(1) Direction and control. The facility's plan must contain a section for direction and control that:

(A) designates by name or title the emergency preparedness coordinator (EPC), who is the facility staff person with the authority to manage the facility's response to an emergency situation in accordance with the plan, and includes the EPC's current phone number;

(B) designates by name or title the alternate EPC, who is the facility staff person with the authority to act as the EPC if the EPC is unable to serve in that capacity, and includes the alternate EPC's current phone number;

(C) documents the name and contact information for the local emergency management coordinator (EMC) for the area where the facility is located, as identified by the office of the local mayor or county judge;

(D) includes procedures for notifying the local EMC of the execution of the plan;

(E) includes a plan for coordinating a staffing response to an emergency situation; and

(F) includes a plan for guiding residents to a safe location that is based on the type of emergency situation occurring and a facility's decision to either shelter-in-place or evacuate during an emergency situation.

(2) Warning. A facility's plan must contain a section for warning that:

(A) describes how the EPC will be notified of an emergency situation;

(B) identifies who the EPC will notify of an emergency situation and when the notification will occur, including during off hours, weekends, and holidays; and

(C) addresses monitoring local news and weather reports regarding a disaster or potential disaster taking into consideration factors such as geographic specific natural disasters, whether a disaster is likely to be addressed or forecast in the reports, and the conditions, natural or otherwise, that would cause staff to monitor news and weather reports for a disaster.

(3) Communication. A facility's plan must contain a section for communication that:

(A) identifies the facility's primary mode of communication to be used during an emergency situation and the facility's alternate mode of communication to be used in the event of power failure or the loss of the facility's primary mode of communication in an emergency situation;

(B) requires posting of the emergency contact number for the local fire department, ambulance, and police on or near each telephone in the facility in communities where a "911" emergency management system is unavailable;

(C) includes procedures for maintaining a current list of telephone numbers for residents' responsible parties;

(D) includes procedures for maintaining a current list of telephone numbers for pre-arranged receiving facilities;

(E) includes procedures for maintaining a current list of telephone numbers for the facility's staff;

(F) identifies the location of the lists described in subparagraphs (C) through (E) of this paragraph and in subsection (d)(1)(A) and (B) of this section;

(G) includes procedures to notify:

(i) facility staff about an emergency situation;

(ii) a receiving facility about an impending or actual evacuation of residents; and

(iii) residents and residents' responsible parties about an impending or actual evacuation;

(H) provides a method for a person to obtain resident information during an emergency situation; and

(I) includes procedures for the facility to maintain communication with:

(i) facility staff involved in an emergency situation;

(ii) a receiving facility; and

(iii) the driver of a vehicle transporting residents, medication, records, food, water, equipment, or supplies during an evacuation.

(4) Sheltering Arrangements. A facility's plan must contain a section for sheltering arrangements that:

(A) includes procedures for implementing a decision to shelter-in-place that includes:

(i) having access to medications, records, food, water, equipment and supplies; and

(ii) sheltering facility staff involved in responding to an emergency situation, and their family members, if necessary;

(B) includes procedures for notifying HHSC [~~DADS~~] Regulatory Services regional office for the area in which the facility is located by telephone immediately after the EPC makes a decision to shelter-in-place:

(i) before, during, or after a hurricane or flood impacts a facility, if the risk assessment identified a hurricane or flood as a potential emergency situation; or

(ii) after any other type of emergency situation that has caused property damage to a facility;

(C) includes procedures for accommodating evacuated residents, if the facility serves as a receiving facility for a facility that has evacuated.

(5) Evacuation. A facility's plan must contain a section for evacuation that:

(A) identifies evacuation destinations and routes, and includes a map that shows the destinations and routes;

(B) includes procedures for implementing a decision to evacuate residents to a receiving facility;

(C) includes a current copy of an agreement with a receiving facility, outlining arrangements for receiving residents in the event of an evacuation, if the evacuation destination identified in accordance with subparagraph (B) of this paragraph is a receiving facility that is not owned by the same entity as the evacuating facility;

(D) includes procedures for:

(i) ensuring facility staff accompany evacuating residents;

(ii) ensuring that residents and facility staff present in the building have been evacuated;

(iii) accounting for residents and facility staff after they have been evacuated;

(iv) accounting for residents absent from the facility at the time of the evacuation;

(v) releasing resident information in an emergency situation to promote continuity of a resident's care;

(vi) contacting the local EMC to find out if it is safe to return to the geographical area after an evacuation;

(vii) determining if it is safe to re-enter and occupy the building after an evacuation; and

(E) includes procedures for notifying the local EMC regarding an evacuation of the facility;

(F) includes procedures for notifying HHSC [~~DADS~~] Regulatory Services regional office for the area in which the facility is located by telephone immediately after the EPC makes a decision to evacuate; and

(G) includes procedures for notifying HHSC [~~DADS~~] Regulatory Services regional office for the area in which the facility is located by telephone immediately when residents have returned to the facility after an evacuation.

(6) Transportation. A facility's plan must contain a section for transportation that:

(A) arranges for a sufficient number of vehicles to safely evacuate all residents;

(B) identifies facility staff designated to drive a facility owned, leased or rented vehicle during an evacuation;

(C) includes procedures for safely transporting residents, facility staff involved in an evacuation; and

(D) includes procedures for safely transporting and having timely access to oxygen, medications, records, food, water, equipment, and supplies needed during an evacuation.

(7) Health and Medical Needs. A facility's plan must contain a section for health and medical needs that:

(A) identifies the types of services used by residents, such as dialysis, oxygen, respirator care, or hospice services; and

(B) ensures the resident's needs identified in subparagraph (A) of this paragraph are met during an emergency situation.

(8) Resource Management. A facility's plan must contain a section for resource management that:

(A) includes a plan for identifying medications, records, food, water, equipment and supplies needed during an emergency situation;

(B) identifies facility staff who are assigned to locate the items in subparagraph (A) of this paragraph and who must ensure the transportation of the items during an emergency situation; and

(C) includes procedures to ensure medications are secure and maintained at the proper temperature during an emergency situation.

(e) Training. The facility must:

(1) train a facility staff member on the staff member's responsibilities under the plan within 30 days after assuming job duties;

(2) train a facility staff member on the staff member's responsibilities under the plan at least annually and when the staff member's responsibilities under the plan change; and

(3) conduct one unannounced annual drill with facility staff for severe weather and other emergency situations identified by the facility as likely to occur, based on the results of the risk assessment required by subsection (c)(1) of this section.

(f) Self-Reported Incidents.

(1) A facility must report a fire to HHSC [~~DADS~~] as follows:

(A) by calling 1-800-458-9858 immediately after the fire; and

(B) by submitting a completed HHSC [~~DADS~~] form titled "Fire Report for Long Term Care Facilities" within 15 calendar days after the fire.

(2) A facility must report an emergency situation that caused the death or serious injury of a resident to HHSC [~~DADS~~] as follows:

(A) by calling 1-800-458-9858 immediately after the death or serious injury; and

(B) by submitting a completed HHSC [~~DADS~~] form titled "HHSC [~~DADS~~] Provider Investigation Report" within 5 working days after making the telephone report required by paragraph (2)(A) of this subsection.

(g) Emergency Response System.

(1) The facility administrator and director of nursing must enroll in an emergency communication system in accordance with instructions from HHSC.

(2) The facility must respond to requests for information received through the emergency communication system in the format established by HHSC.

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 31, 2022.

TRD-202203339
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3161

♦ ♦ ♦

CHAPTER 558. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

DIVISION 3. AGENCY ADMINISTRATION

26 TAC §558.256

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §558.256, concerning Emergency Preparedness Planning and Implementation.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement a new procedure that requires a home and community support services agency (agency) to assign a designee to enroll and respond to requests through the emergency communication system in the format established by HHSC. The proposal also reflects the transfer of functions from the Department of Aging and Disability Services to HHSC.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §558.256 improves readability in subsections (g) and (o) and adds new subsection (q) to require the agency administrator and alternate administrator to enroll in an emergency communication system in accordance with instructions from HHSC. Subsection (q) also requires the agency to respond to requests for information received through the emergency communication system.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule would have a cost to state government. The cost would be $2,990 General Revenue ($8,624 All Funds) for each year of State Fiscal Year (SFY) 2023 through SFY 2027.

For each year of the first five years 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 not change the number of individuals subject to the rules; 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 will be no adverse economic effect on rural communities because no rural communities contract with the state for these services. The rule could have an adverse economic effect on small businesses or micro-businesses because of costs to comply. HHSC lacks data to estimate the number of small businesses and micro-businesses affected. HHSC did not consider other alternatives for implementing this rule. There is no alternative that is consistent with protecting the health, welfare, and economic welfare of Texans.

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 this rule is necessary to protect the health, safety, and welfare of the residents of Texas.

PUBLIC BENEFIT AND COSTS

Stephen Pahl, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be implementing a procedure for the wellbeing of individuals during emergency situations.

Trey Wood has also determined that for the first five years the rule is in effect there will be economic costs to persons who are required to comply with the proposed rule because they will be required to develop and implement policies and procedures related to the use of the emergency communications system and train their employees on those policies and procedures. HHSC lacks information to provide an estimate of those costs.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposed rule 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 Laura Gutierrez, Senior Policy Specialist, P.O. Box 149030, Mail Code E-370, Austin, Texas 78714-9030; or by email to HHSCLTCRRules@hhs.texas.gov.

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 21R148 LTCR Emergency Communication System" 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 Texas Health and Safety Code §142.010 and §142.012, which respectively authorize the Executive Commission of HHSC to adopt rules necessary to implement Chapter 142 and set minimum standards for home and community support services agencies licensed under Chapter 142.

The amendment implements Texas Government Code §531.0055 and Texas Health and Safety Code, Chapter 142.

§558.256. Emergency Preparedness Planning and Implementation.

(a) An agency must have a written emergency preparedness and response plan that comprehensively describes its approach to a disaster that could affect the need for its services or its ability to provide those services. The written plan must be based on a risk assessment that identifies the disasters from natural and man-made causes that are likely to occur in the agency's service area. Except for a freestanding hospice inpatient unit, HHSC does not require an agency to physically evacuate or transport a client.

(b) Agency personnel that must be involved with developing, maintaining, and implementing an agency's emergency preparedness and response plan include:

(1) the administrator;

(2) the supervising nurse, if the agency is required to employ or contract with a supervising nurse, as required by §558.243 of this subchapter (relating to Administrative and Supervisory Responsibilities);

(3) the agency disaster coordinator; and

(4) the alternate disaster coordinator.

(c) An agency's written emergency preparedness and response plan must:

(1) designate, by title, an employee, and at least one alternate employee, to act as the agency's disaster coordinator;

(2) include a continuity of operations business plan that addresses emergency financial needs, essential functions for client services, critical personnel, and how to return to normal operations as quickly as possible;

(3) include how the agency will monitor disaster-related news and information, including after hours, weekends, and holidays, to receive warnings of imminent and occurring disasters;

(4) include procedures to release client information in the event of a disaster, in accordance with the agency's written policy required by §558.301(a)(2) of this subchapter (relating to Client Records); and

(5) describe the actions and responsibilities of agency staff in each phase of emergency planning, including mitigation, preparedness, response, and recovery.

(d) The response and recovery phases of the plan must describe:

(1) the actions and responsibilities of agency staff when warning of an emergency is not provided;

(2) who at the agency will initiate each phase;

(3) a primary mode of communication and alternate communication or alert systems in the event of telephone or power failure; and

(4) procedures for communicating with:

(A) staff;

(B) clients or persons responsible for a client's emergency response plan;

(C) local, state, and federal emergency management agencies; and

(D) other entities including HHSC and other health care providers and suppliers.

(e) An agency's emergency preparedness and response plan must include procedures to triage clients that allow the agency to:

(1) readily access recorded information about an active client's triage category in the event of an emergency to implement the agency's response and recovery phases, as described in subsection (d) of this section; and

(2) categorize clients into groups based on:

(A) the services the agency provides to a client;

(B) the client's need for continuity of the services the agency provides; and

(C) the availability of someone to assume responsibility for a client's emergency response plan, if needed by the client.

(f) The agency's emergency preparedness and response plan must include procedures to identify a client who may need evacuation assistance from local or state jurisdictions because the client:

(1) cannot provide or arrange for his or her transportation; or

(2) has special health care needs requiring special transportation assistance.

(g) If the agency identifies a client who may need evacuation assistance, as described in subsection (f) of this section, agency personnel must provide the client with the amount of assistance the client requests to complete the registration process for evacuation assistance, if the client:

(1) wants to register with the State of Texas Emergency Assistance Registry (STEAR), accessed by dialing 2-1-1; and

(2) is not already registered, as reported by the client or legally authorized representative [~~LAR~~].

(h) An agency must provide and discuss the following information about emergency preparedness with each client:

(1) the actions and responsibilities of agency staff during and immediately following an emergency;

(2) the client's responsibilities in the agency's emergency preparedness and response plan;

(3) materials that describe survival tips and plans for evacuation and sheltering in place; and

(4) a list of community disaster resources that may assist a client during a disaster, including the STEAR, for which registration is available through 2-1-1 Texas, and other community disaster resources provided by local, state, and federal emergency management agencies. An agency's list of community disaster resources must include information on how to contact the resources directly or instructions to call 2-1-1 for more information about community disaster resources.

(i) An agency must orient and train employees, volunteers, and contractors about their responsibilities in the agency's emergency preparedness and response plan.

(j) An agency must complete an internal review of the plan at least annually, and after each actual emergency response, to evaluate its effectiveness and to update the plan as needed.

(k) As part of the annual internal review, an agency must test the response phase of its emergency preparedness and response plan in a planned drill, if not tested during an actual emergency response. Except for a freestanding hospice inpatient unit, a planned drill can be limited to the agency's procedures for communicating with staff.

(l) An agency must make a good faith effort to comply with the requirements of this section during a disaster. If the agency is unable to comply with any of the requirements of this section, it must document in the agency's records attempts of staff to follow procedures outlined in the agency's emergency preparedness and response plan.

(m) An agency is not required to continue to provide care to clients in emergency situations that are beyond the agency's control and that make it impossible to provide services, such as when roads are impassable or when a client relocates to a place unknown to the agency. An agency may establish links to local emergency operations centers to determine a mechanism by which to approach specific areas within a disaster area for the agency to reach its clients.

(n) If written records are damaged during a disaster, the agency must not reproduce or recreate client records, except from existing electronic records. Records reproduced from existing electronic records must include:

(1) the date the record was reproduced;

(2) the agency staff member who reproduced the record; and

(3) how the original record was damaged.

(o) Notwithstanding the provisions specified in Division 2 of this subchapter (relating to Conditions of a License), no later than five working days after an agency temporarily relocates a place of business, or temporarily expands its service area resulting from the effects of an emergency or disaster, an agency must notify and provide the following information to the HHSC Home and Community Support Services Agencies [~~HCSSA~~] licensing unit:

(1) if temporarily relocating a place of business:

(A) the license number for the place of business and the date of relocation;

(B) the physical address and phone number of the location; and

(C) the date the agency returns to a place of business after the relocation; or

(2) if temporarily expanding the service area to provide services during a disaster:

(A) the license number and revised boundaries of the service area;

(B) the date the expansion begins; and

(C) the date the expansion ends.

(p) An agency must provide the notice and information described in subsection (o) of this section by fax or email. If fax and email are unavailable, the agency may notify the HHSC licensing unit by telephone but must provide the notice and information in writing as soon as possible. If communication with the HHSC licensing unit is not possible, the agency must provide the notice and information by fax, email, or telephone to the designated survey office.

(q) Emergency Response System.

(1) The agency administrator and alternate administrator must enroll in an emergency communication system in accordance with instructions from HHSC.

(2) The agency must respond to requests for information received through the emergency communication system in the format established by HHSC.

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 31, 2022.

TRD-202203340
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3161

♦ ♦ ♦

CHAPTER 559. DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

SUBCHAPTER D. LICENSURE AND PROGRAM REQUIREMENTS

26 TAC §559.64

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §559.64, concerning Emergency Preparedness and Response.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement a new procedure that requires a day activity and health services facility (facility) to assign a designee to enroll and respond to requests through the emergency communication system in the format established by HHSC. The proposed amendment also reflects the transfer of functions from the Department of Aging and Disability Services to HHSC.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §559.64 updates subsections (d) and (e) to reflect the transfer of functions from the Department of Aging and Disability Services to HHSC. The proposed new subsection (g) requires the facility director and designees to enroll in an emergency communication system in accordance with instructions from HHSC. The subsection also requires the facility to respond to requests for information received through the emergency communication system. Edits throughout the section improve readability and understanding.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule would have a cost to state government. The cost would be $2,990 General Revenue ($8,624 All Funds) for each year of State Fiscal Year (SFY) 2023 through SFY 2027.

For each year of the first five years the rule will be in effect, enforcing or administering the rule does not have foreseeable im-

plications 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 not change the number of individuals subject to the rules; 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 will be no adverse economic effect on rural communities because no rural communities contract with the state for these services. The rule could have an adverse economic effect on small businesses or micro-businesses because of costs to comply. HHSC lacks data to estimate the number of small businesses and micro-businesses affected. HHSC did not consider other alternatives for implementing this rule. There is no alternative that is consistent with protecting the health, welfare, and economic welfare of Texans.

LOCAL EMPLOYMENT IMPACT

The proposed amendment will not affect a local economy.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT AND COSTS

Stephen Pahl, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the repeal is in effect, the public benefit will be implementing a procedure for the wellbeing of individuals during emergency situations.

Trey Wood has also determined that for the first five years the rule is in effect there will be economic costs to persons who are required to comply with the proposed rule because they will be required to develop and implement policies and procedures related to the use of the emergency communications system and train their employees on those policies and procedures. HHSC lacks information to provide an estimate of those costs.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposed rule 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 Laura Gutierrez, Senior Policy Specialist, P.O. Box 149030, Mail Code E-370, Austin, Texas 78714-9030; or by email to HHSCLTCR-Rules@hhs.texas.gov.

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 21R148 LTCR Emergency Communication System" 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 Texas Human Resources Code §103.004 and §103.005, which respectively provide that the Executive Commissioner of HHSC shall adopt rules for implementing Chapter 103 and adopt rules for licensing and set standards for safety and sanitation for facilities.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code, Chapter 103.

§559.64. Emergency Preparedness and Response.

(a) Definitions. In this section:

(1) "emergency situation" means an impending or actual situation that:

(A) interferes with normal activities of a facility or its clients;

(B) may:

(i) cause injury or death to a client or staff member of the facility; or

(ii) cause damage to facility property;

(C) requires the facility to respond immediately to mitigate or avoid the injury, death, damage, or interference; and

(D) does not include a situation that arises from the medical condition of a client such as cardiac arrest, obstructed airway, cerebrovascular accident; and

(2) "plan" refers to a facility's emergency preparedness and response plan.

(b) Administration. A facility must:

(1) develop and implement a written plan as described in subsection (c) of this section;

(2) maintain a written copy of the plan that is accessible to all staff at all times;

(3) evaluate and revise the plan as necessary:

(A) within 30 days after an emergency situation;

(B) as soon as possible after the remodeling or construction of an addition to the facility; and

(C) at least annually; and

(4) revise the plan within 30 days after information included in the plan changes.

(c) Emergency Preparedness and Response Plan. A facility's plan must:

(1) include a risk assessment of all potential internal and external emergency situations relevant to the facility operations and geographical area, such as a fire, failure of heating and cooling systems, a power outage, an explosion, a hurricane, a tornado, a flood, extreme snow and ice for the area, a wildfire, terrorism, or a hazardous materials accident;

(2) include a description of the facility's client population;

(3) include a description of the services and assistance needed by the clients in an emergency situation;

(4) include a section for each core function of emergency management, as described in subsection (d) of this section, that is based on a facility's decision to either shelter-in-place or evacuate during an emergency; and

(5) include a fire safety plan that complies with subsection (f) of this section.

(d) Plan Requirements Regarding Eight Core Functions of Emergency Management.

(1) Direction and control. A facility's plan must contain a section for direction and control that:

(A) designates by name or title the emergency preparedness coordinator (EPC) who is the facility staff person with the authority to manage the facility's response to an emergency situation in accordance with the plan;

(B) designates by name or title the alternate EPC who is the facility staff person with the authority to act as the EPC if the EPC is unable to serve in that capacity;

(C) documents the name and contact information for the local emergency management coordinator (EMC) for the area where the facility is located, as identified by the office of the local mayor or county judge; and

(D) documents coordination with the local EMC as required by the local EMC's guidelines relating to emergency situations.

(2) Warning. A facility's plan must contain a section for warning that:

(A) describes how the EPC will be notified of an emergency situation;

(B) identifies who the EPC will notify of an emergency situation and when the notification will occur; and

(C) ensures monitoring of local news and weather reports.

(3) Communication. A facility's plan must contain a section for communication that:

(A) identifies the facility's primary mode of communication and alternate mode of communication to be used in the event of power failure or the loss of the facility's primary mode of communication in an emergency situation;

(B) includes procedures for maintaining a current list of telephone numbers for clients and responsible parties;

(C) includes procedures for maintaining a current list of telephone numbers for the facility's staff that also identifies the facility's EPC;

(D) identifies the location of the lists described in subparagraphs [~~paragraphs~~] (B) and (C) of this paragraph [~~subsection~~] where facility staff can obtain the lists [~~list~~] quickly;

(E) includes procedures to notify:

(i) facility staff about an emergency situation;

(ii) a receiving facility about an impending or actual evacuation of clients; and

(iii) clients, legally authorized representatives, and other persons about an emergency situation;

(F) describes how the facility will provide, during an emergency situation, general information to the public, such as the change in the facility's location and hours, or that the facility is closed due to the emergency situation;

(G) includes procedures for the facility to maintain communication with:

(i) facility staff during an emergency situation;

(ii) a receiving facility if applicable; and

(iii) facility staff who will transport clients to a secure location during an evacuation in a facility vehicle;

(H) includes procedures for reporting to HHSC [~~DADS~~] an emergency situation that caused the death or serious injury of a client as follows:

(i) by telephone, at 1-800-458-9858, within 24 hours after the death or serious injury; and

(ii) in writing, on the HHSC [~~DADS~~] form titled "HHSC [~~DADS~~] Provider Investigation Report," within five [~~5~~] working days after the facility makes the telephone report required by clause (i) of this subparagraph.

(4) Sheltering-in-place. A facility's plan must contain a section that includes procedures to shelter clients in place during an emergency situation.

(5) Evacuation. A facility's plan must contain a section for evacuation that:

(A) requires posting building evacuation routes prominently throughout the facility, except in small, one-story buildings where all exits are obvious;

(B) includes procedures for evacuating clients to a prearranged location in an emergency situation, if applicable;

(C) includes a mutual aid agreement with a receiving facility which must specify the arrangements for receiving clients in the event of an evacuation;

(D) identifies primary and alternate evacuation destinations and routes, and includes a map that shows the destination and routes;

(E) includes procedures for:

(i) ensuring facility staff accompany evacuating clients;

(ii) ensuring that all persons present in the building have been evacuated;

(iii) accounting for clients and staff after they have been evacuated;

(iv) accounting for clients who are absent from the facility at the time of the evacuation;

(v) contacting the local EMC, if required by the local EMC guidelines, to find out if it is safe to return to the geographical area; and

(vi) determining if it is safe to re-enter and occupy the building after an evacuation;

(F) includes procedures for notifying the local EMC regarding an evacuation of the facility, if required by the local EMC guidelines;

(G) includes procedures for notifying HHSC [~~DADS~~] by telephone, at 1-800-458-9858, within 24 hours after an evacuation that clients have been evacuated;

(H) includes procedures for notifying HHSC [~~DADS~~] Regulatory Services regional office for the area in which the facility is located, by telephone, as soon as safely possible after a decision to evacuate is made; and

(I) includes procedures for notifying HHSC [~~DADS~~] regional office for the area in which the facility is located, by telephone, that clients have returned to the facility after an evacuation, within 48 hours after their return.

(6) Transportation. A facility's plan must contain a section for transportation that:

(A) provides for a sufficient number of vehicles that are safe and suitable for any special needs of the clients or requires that the facility maintain a contract for transporting clients during an evacuation;

(B) identifies facility staff authorized to drive a vehicle during an evacuation;

(C) establishes alternate transportation arrangements if the vehicles or contracted transportation described in subparagraph (A) of this paragraph are not available;

(D) includes procedures for safely transporting oxygen tanks currently being used by clients and any extra oxygen tanks that may be needed during an evacuation; and

(E) includes procedures that will ensure:

(i) safe transport of records, food, water, equipment, and supplies needed during an evacuation; and

(ii) that the records, food, water, equipment, and supplies, described in clause (i) of this subparagraph, arrive at the receiving facility at the same time as the clients.

(7) Health and Medical Needs. A facility's plan must contain a section for client health and special needs that:

(A) identifies all of the facility's special needs clients including clients with conditions requiring assistance during an evacuation; and

(B) ensures the needs of those clients are met during an emergency.

(8) Resource Management. A facility's plan must contain a section for resource management that:

(A) includes procedures for accessing medications, records, food, water, equipment, and supplies needed during an emergency;

(B) identifies facility staff who are assigned to locate and ensure the transportation of items described in subparagraph (A) of this paragraph during an emergency situation; and

(C) includes procedures to ensure medications are secure and stored at the proper temperatures during an emergency situation.

(e) Training. A facility must:

(1) train all staff on their responsibilities under the plan when hired in accordance with §559.62(e) [~~§98.62(e)~~] of this subchapter [~~chapter~~] (relating to Program Requirements);

(2) retrain staff at least annually on the staff member's responsibilities under the plan and when the staff member's responsibilities under the plan change; and

(3) conduct unannounced drills with facility staff for severe weather and other emergency situations identified by the facility as likely to occur, based on the results of the risk assessment required by subsection (c)(1) of this section.

(f) Fire Safety Plan. A facility's fire safety plan must:

(1) include the provisions described in the Operating Features section of the NFPA 101 Life Safety Code, 2000 Edition, Chapter 16 (for new day-care occupancies) and Chapter 17 (for existing day-care occupancies) concerning:

(A) use of alarms;

(B) transmission of alarm to fire department;

(C) response to alarms;

(D) isolation of fire;

(E) evacuation of immediate area;

(F) evacuation of smoke compartment;

(G) preparation of floors and building for evacuation; and

(H) fire extinguishment;

(2) include procedures to contact HHSC [~~DADS~~] by telephone, at 1-800-458-9858, within 24-hours after a fire in accordance with §559.42 [~~§98.42~~] of this chapter (relating to Safety); [~~and~~]

(3) include procedures to submit to HHSC [~~DADS~~], within 15 days after the fire, the form entitled "Fire Report for Long Term Care Facilities";

(4) include in the fire safety plan the provisions described in the Operating Features section of the NFPA 101 Life Safety Code, 2000 Edition, Chapter 16 (for new day-care occupancies) and Chapter 17 (for existing day-care occupancies) concerning drills and inspections, except as superseded by this section; and

(5) establish procedures to:

(A) perform a monthly fire drill with all occupants of the building at expected and unexpected times and under varying conditions;

(B) relocate, during the monthly fire drill, all occupants of the building to a predetermined location where participants must remain until a recall or dismissal signal is given;

(C) complete the HHSC [~~DADS~~] Fire Drill Report Form for each required fire drill;

(D) conduct a monthly fire prevention inspection performed by a trained and senior member of the facility and prepare a report of the inspection results;

(E) maintain copies of the fire prevention inspection report, described in subparagraph (D) of this paragraph, that were prepared by the facility within the last 12 months; and

(F) post a copy of the most recent fire prevention inspection report, described in subparagraph (D) of this paragraph, in a conspicuous place in the facility.

(g) Emergency Response System.

(1) The facility director and designee must enroll in an emergency communication system in accordance with instructions from HHSC.

(2) The facility must respond to requests for information received through the emergency communication system in the format established by HHSC.

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 31, 2022.

TRD-202203341
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3161

♦ ♦ ♦

CHAPTER 565. HOME AND COMMUNITY-BASED (HCS) PROGRAM AND COMMUNITY FIRST CHOICE (CFC) CERTIFICATION STANDARDS

26 TAC §565.1

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §565.1, concerning Emergency Response System, in Title 26, Part 1, new Chapter 565, Home and Community-based Services (HCS) Program and Community First Choice (CFC) Certification Standards.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement a new procedure that requires a home and community-based services program provider (program provider) to assign a designee to enroll and respond to requests through the emergency communication system in the format established by HHSC. The proposed amendment also reflects the transfer of functions from the Department of Aging and Disability Services to HHSC.

SECTION-BY-SECTION SUMMARY

Proposed new §565.1 requires the program provider designee to enroll in an emergency communication system in accordance with instructions from HHSC. The section also requires the program provider designee to respond to requests for information received through the emergency communication system.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule would have a cost to state government. The cost would be $2,990 General Revenue ($8,624 All Funds) for each year of State Fiscal Year (SFY) 2023 through SFY 2027.

For each year of the first five years 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 create a new rule;

(6) the proposed rule will expand existing rules;

(7) the proposed rule will not change the number of individuals subject to the rules; 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 will be no adverse economic effect on rural communities because no rural communities contract with the state for these services. The rule could have an adverse economic effect on small businesses or micro-businesses because of costs to comply. HHSC lacks data to estimate the number of small businesses and micro-businesses affected. HHSC did not consider other alternatives for implementing this rule. There is no alternative that is consistent with protecting the health, welfare, and economic welfare of Texans.

LOCAL EMPLOYMENT IMPACT

The proposed amendment will not affect a local economy.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT AND COSTS

Stephen Pahl, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be implementing a procedure for the wellbeing of individuals during emergency situations.

Trey Wood has also determined that for the first five years the rule is in effect there will be economic costs to persons who are required to comply with the proposed rule because they will be required to develop and implement policies and procedures related to the use of the emergency communications system and

train their employees on those policies and procedures. HHSC lacks information to provide an estimate of those costs.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposed rule 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 Laura Gutierrez, Senior Policy Specialist, P.O. Box 149030, Mail Code E-370, Austin, Texas 78714-9030; or by email to HHSCLTCR-Rules@hhs.texas.gov.

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 21R148 LTCR Emergency Communication System" in the subject line.

STATUTORY AUTHORITY

The new rule 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; 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; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rule-making authority; 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 new rule implements Texas Government Code §531.0055, §531.021, and Chapter 531, Subchapter A-1; and Texas Human Resources Code §32.021.

§565.1. Emergency Response System.

(a) The program provider designee must enroll in an emergency communication system in accordance with instructions from HHSC.

(b) The program provider designee must respond to requests for information received through the emergency communication system in the format established by HHSC.

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 31, 2022.

TRD-202203342
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3161

♦ ♦ ♦

CHAPTER 566. TEXAS HOME LIVING (TXHML) PROGRAM AND COMMUNITY FIRST CHOICE (CFC) CERTIFICATION STANDARDS

26 TAC §566.1

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §566.1, concerning Emergency Response System, in Title 26, Part 1, new Chapter 566, Texas Home Living (TXHML) Program and Community First Choice (CFC) Certification Standards.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement a new procedure that requires a Texas home living program provider (program provider) to assign a designee to enroll and respond to requests through the emergency communication system in the format established by HHSC. The proposed amendment also reflects the transfer of functions from the Department of Aging and Disability Services to HHSC.

SECTION-BY-SECTION SUMMARY

Proposed new §566.1 requires the program provider designee to enroll in an emergency communication system in accordance with instructions from HHSC. The subsection also requires the program provider designee to respond to requests for information received through the emergency communication system.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule would have a cost to state government. The cost would be $2,993 General Revenue ($8,632 All Funds) for each year of State Fiscal Year (SFY) 2023 through SFY 2027.

For each year of the first five years 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 create a new rule;

(6) the proposed rule will expand existing rules;

(7) the proposed rule will not change the number of individuals subject to the rules; 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 will be no adverse economic effect on rural communities because no rural communities contract with the state for these services. The rule could have an adverse economic effect on small businesses or micro-businesses because of costs to comply. HHSC lacks data to estimate the number of small businesses and micro-businesses affected. HHSC did not consider other alternatives for implementing this rule. There is no alternative that is consistent with protecting the health, welfare, and economic welfare of Texans.

LOCAL EMPLOYMENT IMPACT

The proposed amendment will not affect a local economy.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT AND COSTS

Stephen Pahl, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be implementing a procedure for the wellbeing of individuals during emergency situations.

Trey Wood has also determined that for the first five years the rule is in effect there will be economic costs to persons who are required to comply with the proposed rule because they will be required to develop and implement policies and procedures related to the use of the emergency communications system and train their employees on those policies and procedures. HHSC lacks information to provide an estimate of those costs.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposed rule 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 Laura Gutierrez, Senior Policy Specialist, P.O. Box 149030, Mail Code E-370, Austin, Texas 78714-9030; or by email to HHSCLTCR-Rules@hhs.texas.gov.

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 21R148 LTCR Emergency Communication System" in the subject line.

STATUTORY AUTHORITY

The new rule 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; 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; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rule-making authority; 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 new rule implements Texas Government Code §531.0055, §531.021, and Chapter 531, Subchapter A-1; and Texas Human Resources Code §32.021.

§566.1. Emergency Response System.

(a) The program provider designee must enroll in an emergency communication system in accordance with instructions from HHSC.

(b) The program provider designee must respond to requests for information received through the emergency communication system in the format established by HHSC.

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 31, 2022.

TRD-202203344
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3161

♦ ♦ ♦

CHAPTER 965. ELECTRONIC MONITORING IN AN INDIVIDUAL'S BEDROOM IN A STATE SUPPORTED LIVING CENTER

26 TAC §§965.1 - 965.9

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new Chapter 965, Electronic Monitoring in an Individual's Bedroom in a State Supported Living Center, in Texas Administrative Code (TAC) which comprises of §§965.1, concerning Definitions; 965.2, concerning Electronic Monitoring; 965.3, concerning Information Regarding Electronic Monitoring; 965.4, concerning Request to Conduct Electronic Monitoring; 965.5, concerning Annual Consent by a Roommate; 965.6, concerning Capacity to Request or Consent to Electronic Monitoring; 965.7, concerning Conducting Electronic Monitoring; 965.8, concerning Required Facility Notice and Accommodation; and 965.9, concerning Reporting Abuse, Neglect, or Exploitation.

BACKGROUND AND PURPOSE

The purpose of the proposal is to place HHSC rules in 40 TAC Chapter 3, Subchapter G regarding Electronic Monitoring rules in 26 TAC. The repeal of 40 TAC Chapter 3, Subchapter G is being proposed elsewhere in this issue of the *Texas Register.*

SECTION-BY-SECTION

Proposed new §965.1 defines terms used in this chapter.

Proposed new §965.2 provides when a facility must allow electronic monitoring.

Proposed new §965.3 provides information regarding electronic monitoring.

Proposed new §965.4 provides information on how to request to conduct electronic monitoring.

Proposed new §965.5 describes when annual consent by a roommate is needed.

Proposed new §965.6 provides information about capacity to request or consent to electronic monitoring.

Proposed new §965.7 describes how electronic monitoring is conducted.

Proposed new §965.8 provides when a facility is requested to provide notice and accommodation.

Proposed new §965.9 provides information about reporting abuse, neglect, or exploitation.

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 not expand, limit, or repeal 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 no adverse economic effect on small businesses, micro-businesses, or rural communities. The proposed rules apply only to state government.

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 does not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Laura Cazabon-Braly, SSLCs Associate Commissioner, has determined that for each year of the first five years the rules are in effect, the public benefit will be clarity regarding the process by which an individual served at an SSLC may elect to have electronic monitoring in their bedroom.

Trey Wood 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 electronic monitoring of an individual's bedroom is not compulsory.

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 HHSC, Health and Specialty Care System, Mail Code E619, P.O. Box 13247, Austin, Texas 78711-3247, or by email to Healthandspecialtycare@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 22R030" in the subject line.

STATUTORY AUTHORITY

The new sections 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, Texas Health and Safety Code §555.154, which requires the Executive Commissioner to prescribe by rule the forms to be used to notify residents upon admission of the option to conduct electronic monitoring, Texas Health and Safety Code §555.155, which requires the Executive Commissioner to adopt guidelines to determine who may request electronic monitoring on behalf of a resident, Texas Health and Safety Code §555.156 which requires the Executive Commissioner to adopt rules regarding the retention of consent forms for electronic monitoring, and Texas Health and Safety Code §555.160, which requires the Executive Commissioner to prescribe the format and content of a notice posted at the facility advising that the rooms of some residents may be monitored electronically.

The new sections affect Texas Government Code §531.0055 and Texas Health and Safety Code §§555.154, 555.155, 555.156, and 555.160.

§965.1. Definitions.

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

(1) Abuse--An act or failure to act that, with regard to an individual, meets the definition of "physical abuse," "sexual abuse," or "verbal/emotional abuse" in Chapter 711, Subchapter A of this title (relating to Introduction), or the definition of "abuse," "physical abuse," "sexual abuse," "verbal abuse," "psychological abuse," or "threat" in the Centers for Medicare & Medicaid Services (CMS) State

Operations Manual, Appendix J, Guidance to Surveyors: Intermediate Care Facilities for Individuals with Intellectual Disabilities, available at www.cms.gov.

(2) Bedroom--The room at a facility in which an individual usually sleeps.

(3) Capacity--An individual's ability to:

(A) understand the nature and consequences of a proposed treatment, including the benefits, risks, and alternatives to the proposed treatment; and

(B) make a decision whether to undergo the proposed treatment.

(4) Covert electronic monitoring--Electronic monitoring that is not open and obvious, and that is conducted when the director of the facility in which the monitoring is being conducted has not been informed about the device by the individual, by a person who placed the device in the bedroom, or by a person who uses the device.

(5) Director--The director of a facility or the director's designee.

(6) Electronic monitoring--The placement of an electronic monitoring device in an individual's bedroom and making a tape or a recording with the device.

(7) Electronic monitoring device (EMD)--A device that:

(A) includes:

(i) a video surveillance camera; and

(ii) an audio device designed to acquire communications or other sounds; and

(B) does not include an electronic, mechanical, or other device that is specifically used for the nonconsensual interception of wire or electronic communications.

(8) Exploitation--An act or failure to act that, with regard to an individual, meets the definition of "exploitation" in Chapter 711, Subchapter A of this title (relating to Introduction), or the definition of "mistreatment" in the CMS State Operations Manual, Appendix J, Guidance to Surveyors: Intermediate Care Facilities for Individuals with Intellectual Disabilities, available at www.cms.gov.

(9) Facility--A state supported living center or the intermediate care facility for individuals with an intellectual disability component of the Rio Grande State Center.

(10) Guardian--An individual appointed and qualified as a guardian of the person under Texas Estates Code Title 3.

(11) HHSC--Texas Health and Human Services Commission.

(12) Interdisciplinary team (IDT)--A team consisting of an individual, the individual's legally authorized representative and qualified developmental disability professional, other professionals dictated by the individual's strengths, preferences, and needs, and staff who regularly and directly provide services and supports to the individual. The team is responsible for assessing the individual's treatment, training, and habilitation needs and making recommendations for services based on the personal goals and preferences of the individual using a person-directed planning process, including recommendations on whether the individual is best served in a facility or community setting.

(13) Legally authorized representative (LAR)--A person authorized by law to act on behalf of an individual, including a parent, guardian, or managing conservator of a minor individual, or a guardian of an adult individual.

(14) Neglect--An act or failure to act that, with regard to an individual, meets the definition of "neglect" in Chapter 711, Subchapter A of this title, or the definition of "neglect" in the CMS State Operations Manual, Appendix J, Guidance to Surveyors: Intermediate Care Facilities for Individuals with Intellectual Disabilities, available at www.cms.gov.

(15) SSLC--A state supported living center.

§965.2 Electronic Monitoring.

(a) A facility must permit an individual or an individual's legally authorized representative (LAR) to conduct electronic monitoring if the individual or LAR complies with the requirements for conducting electronic monitoring in this chapter. A facility must not discharge an individual because the individual or the individual's LAR conducts electronic monitoring in accordance with this chapter.

(b) A facility must not refuse to admit an individual and must not discharge an individual from the facility because the individual or individual's LAR:

(1) requests authorization to conduct electronic monitoring;

(2) refuses to give consent or gives consent to conduct electronic monitoring requested by another individual or the other individual's LAR; or

(3) withdraws consent for another individual or the individual's LAR to conduct electronic monitoring.

(c) A facility must not discharge an individual because covert electronic monitoring is conducted by or on behalf of an individual.

§965.3. Information Regarding Electronic Monitoring.

(a) An individual or an individual's legally authorized representative must complete and sign the required Texas Health and Human Services Commission form pertaining to placing an electronic monitoring device in an individual's bedroom upon admission to a state supported living center.

(b) A facility must maintain a copy of the completed and signed form in the individual's active record.

§965.4. Request to Conduct Electronic Monitoring.

(a) To conduct electronic monitoring, an individual or an individual's legally authorized representative (LAR) must request authorization to do so by using the Texas Health and Human Services Commission (HHSC) form. The form must be signed and dated by the person described in subsection (b) of this section and given to the director of the facility in which the individual resides.

(b) A request to conduct electronic monitoring in an individual's bedroom may be made:

(1) only by an individual, if the individual's interdisciplinary team (IDT) determines that the individual has the capacity to request electronic monitoring in accordance with §965.6 of this chapter (relating to Capacity to Request or Consent to Electronic Monitoring) and the individual has not been judicially declared to lack the required capacity;

(2) only by the guardian of an individual, if the individual has been judicially declared to lack the capacity required for taking an action such, as requesting electronic monitoring; or

(3) only by an LAR, other than the guardian, of an individual if the individual's IDT determines that the individual does not have the capacity to request electronic monitoring in accordance with

§965.6 of this chapter, but the individual has not been judicially declared to lack the required capacity.

(c) A facility may move an individual to a different bedroom to accommodate a request for electronic monitoring.

(d) A facility must maintain a completed and signed copy of the HHSC form in the individual's active record of the individual requesting authorization to conduct electronic monitoring.

§965.5. Annual Consent by a Roommate.

(a) An individual or an individual's legally authorized representative (LAR) who requests to conduct electronic monitoring in the individual's bedroom must obtain consent annually on behalf of any individual who shares a bedroom with the requesting individual, using the required Texas Health and Human Services (HHSC) form. To provide consent, the form must be signed and dated by a person described in subsection (b) of this section and given to the director of the facility in which the individual resides. If the person's consent is conditioned on a limitation, the limitation must be stated on the form.

(b) Consent to conduct electronic monitoring may be given:

(1) only by an individual who shares a bedroom with the requesting individual, if the individual's interdisciplinary team (IDT) determines that the individual has the capacity to consent to electronic monitoring in accordance with §965.6 of this chapter (relating to Capacity to Request or Consent to Electronic Monitoring) and the individual has not been judicially declared to lack the required capacity; or

(2) only by the guardian of an individual who shares a bedroom with the requesting individual, if the individual has been judicially declared to lack the required capacity; or

(3) only by an LAR, other than the guardian, of an individual who shares a bedroom with the requesting individual, if the individual's IDT determines that the individual does not have the capacity to consent to electronic monitoring in accordance with §965.6 of this chapter, but the individual has not been judicially declared to lack the required capacity.

(c) Except as provided in subsection (g) of this section, consent given in accordance with this section may be conditioned on:

(1) pointing the camera away from the roommate, when the proposed electronic monitoring device (EMD) is a video surveillance camera;

(2) limiting or prohibiting the use of an audio EMD;

(3) limiting or prohibiting the use of a recording made by an EMD; or

(4) limiting or prohibiting the use of an EMD in any other way.

(d) If an individual who has not yet consented to electronic monitoring moves into a bedroom in which electronic monitoring is being conducted, the electronic monitoring must cease until consent is obtained from or on behalf of the individual in accordance with this section.

(e) If more than a year has elapsed since consent was given by or on behalf of an individual who shares a bedroom with an individual conducting electronic monitoring, the electronic monitoring must cease until consent is obtained in accordance with this section.

(f) A facility must maintain a copy of the required HHSC form in the individual's active record of the individual consenting to electronic monitoring.

(g) Consent that is subject to a condition, as described in subsection (c) of this section, must not prevent a person from complying with this chapter or other law, including §965.9(a) of this chapter (relating to Reporting Abuse, Neglect, and Exploitation). If a condition on consent would require a person to violate this chapter or other law, the consent is not valid.

§965.6. Capacity to Request or Consent to Electronic Monitoring.

The interdisciplinary team of an individual who has not been judicially declared to lack the capacity to request or consent to electronic monitoring determines if the individual has the capacity to request or consent to electronic monitoring. The facility must document the determination made in the individual's active record.

§965.7. Conducting Electronic Monitoring.

(a) Once a director receives a completed Texas Health and Human Services Commission (HHSC) form requesting electronic monitoring, the director authorizes electronic monitoring to be conducted in accordance with this chapter.

(b) A person conducting electronic monitoring must post and maintain a conspicuous notice at the entrance to the bedroom in which the monitoring is being conducted. The notice must state that the bedroom is being monitored by an electronic monitoring device (EMD).

(c) A person conducting electronic monitoring must ensure that:

(1) the electronic monitoring is conducted in plain view;

(2) an EMD is installed and maintained in a manner that is safe for individuals, employees, and visitors, and that meets the requirements of applicable safety codes and laws;

(3) electronic monitoring complies with any condition placed on it by a person giving consent in accordance with §965.5 of this chapter (relating to Annual Consent by a Roommate);

(4) a video tape or recording made by the EMD shows the time and date that the recorded events occurred;

(5) a tape or recording made by the EMD is not edited or artificially enhanced; and

(6) if the contents of a recording are transferred from the original format to another technological format, a qualified professional performs the transfer and the content of the tape or recording is not altered.

(d) A person conducting electronic monitoring must pay for all costs associated with conducting the monitoring, including the cost to install, maintain, repair, and remove the EMD, and to post and remove the notice required by subsection (b) of this section, other than the cost of electricity.

§965.8. Required Facility Notice and Accommodation.

(a) A facility must post a notice at the main facility entrance titled "Electronic Monitoring." The notice must state, in large, easy-to-read type, "The bedrooms of some individuals may be monitored electronically by or on behalf of those individuals. Monitoring may not be open and obvious."

(b) A facility must make reasonable physical accommodation for electronic monitoring, which includes providing:

(1) a reasonably secure place to mount an electronic monitoring device (EMD); and

(2) access to power sources for an EMD.

§965.9. Reporting Abuse, Neglect, or Exploitation.

(a) If, based on a person's viewing of or listening to a recording obtained through electronic monitoring, the person has cause to believe that an individual is in a state of abuse, neglect, or exploitation or has been abused, neglected, or exploited, the person must:

(1) report the suspected or known abuse, neglect, or exploitation to the Texas Health and Human Services Commission Provider Investigations (HHSC-PI) and the director of the facility in which the alleged abuse, neglect, or exploitation occurred immediately, if possible, but in no case more than one hour after the person knows or suspects that abuse, neglect, or exploitation has occurred; and

(2) provide the original tape or recording to HHSC-PI.

(b) A person who sends more than one tape or recording to HHSC-PI must identify each tape or recording on which the person believes an incident of abuse or exploitation or evidence of neglect may be found. A person is encouraged to identify the place on the tape or recording where an incident of abuse or exploitation or evidence of neglect may be found.

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 31, 2022.

TRD-202203349
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3049

♦ ♦ ♦

CHAPTER 985. HUMAN IMMUNODEFICIENCY VIRUS PREVENTION AND TREATMENT IN STATE SUPPORTED LIVING CENTERS

26 TAC §§985.1 - 985.6

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new Chapter 985, Human Immunodeficiency Virus Prevention and Treatment in State Supported Living Centers, comprising §§985.1, concerning Purpose; 985.2, concerning Application; 985.3, concerning Definitions; 985.4, concerning Education; 985.5, concerning Counseling; and 985.6, concerning Limitation of an Individual's Activity, in the Texas Administrative Code (TAC).

BACKGROUND AND PURPOSE

The purpose of the proposal is to transfer HHSC rules regarding Human Immunodeficiency Virus (HIV) prevention, testing, and treatment from 40 TAC Chapter 8, Subchapter L to 26 TAC Chapter 985. The new rules simplify and consolidate requirements for the state supported living centers regarding the prevention, testing, and treatment of human immunodeficiency virus for individuals served, and workplace guidelines for contractors providing services to individuals served by the SSLCs. The repeal of 40 TAC Chapter 8, Subchapter L is proposed simultaneously elsewhere in this issue of the *Texas Register.*

SECTION-BY-SECTION SUMMARY

Proposed new §985.1 provides that the purpose of the chapter is to describe efforts to prevent and treat HIV for people receiving services from SSLCs.

Proposed new §985.2 provides that the chapter applies to all SSLCs and contractors providing services to individuals served by the SSLCs.

Proposed new §985.3 defines certain terms used in the chapter.

Proposed new §985.4 describes when HIV and acquired immune deficiency syndrome education is provided and when contractors must adopt model workplace guidelines.

Proposed new §985.5 describes when counseling is provided.

Proposed new §985.6 describes when an individual's activity can be limited.

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 a new rule;

(6) the proposed rules will not expand, limit, or repeal 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 no adverse economic effect on small businesses, micro-businesses, or rural communities. The rule does not apply to small businesses, micro-businesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect the 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

Laura Cazabon-Braly, Associate Commissioner for State Supported Living Centers (SSLCs), has determined that for each year of the first five years the rules are in effect, the public benefit will be succinct explanations of the requirements of the SSLCs

regarding the prevention, testing, and treatment of human immunodeficiency virus for individuals served and staff.

Trey Wood 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 the rules apply only to HHSC.

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 HHSC, Health and Specialty Care System, Mail Code E-619, P.O. Box 13247, Austin, Texas 78711-3247, or by email to HealthandSpecialtyCare@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 21R077" in the subject line.

STATUTORY AUTHORITY

The new sections 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 §531.008(c)(5), which requires the Executive Commissioner to establish a facilities division for the purpose of administering state facilities, including state hospitals and state supported living centers, and Texas Health and Safety Code §85.113, which requires an entity that contracts with HHSC to operate a program involving direct client contact to adopt and implement human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS) workplace guidelines similar to the guidelines adopted by the agency, and §85.114 which requires certain state agencies, including HHSC, to make HIV education available for residential facilities under the agency's jurisdiction, and Texas Health and Safety Code §531.001(h), which provides that the Executive Commissioner is responsible for the planning, policy development, and resource development and allocation for and oversight of mental health and intellectual disability services in this state.

The new sections affect Texas Government Code §531.0055, Texas Health and Safety Code §85.114, and §531.001(h).

§985.1. Purpose.

The purpose of this chapter is to describe efforts to prevent and treat the human immunodeficiency virus (HIV) or acquired immune deficiency syndrome (AIDS) for people receiving services from state supported living centers (SSLCs) operated by the Texas Health and Human Services Commission. This chapter also describes workplace guidelines for HHSC contractors providing services to individuals served by the SSLCs.

§985.2. Application.

This chapter applies to all SSLCs.

§985.3. Definitions.

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

(1) Acquired immune deficiency syndrome (AIDS)--As defined by the Centers for Disease Control and Prevention of the U.S. Department of Health and Human Services.

(2) Individual--A person who is receiving services at an SSLC.

(3) State Supported Living Center (SSLC)--A state supported living center as defined by Texas Health and Safety Code §531.002 and the intermediate care facility for individuals with intellectual disabilities component of the Rio Grande State Center operated by the Texas Health and Human Services Commission.

(4) Test results--Any statement that indicates that an identifiable individual has or has not been tested for the acquired immune deficiency syndrome (AIDS) or human immunodeficiency virus (HIV) infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the person is positive, negative, at risk, or has or does not have a certain level of antigen or antibody.

§985.4. Education.

(a) Texas Health and Safety Code §85.113 requires an entity that contracts with the Texas Health and Human Services Commission (HHSC) to operate a program involving direct client contact to adopt and implement human immunodeficiency virus (HIV) and acquired immune deficiency syndrome (AIDS) workplace guidelines similar to the guidelines adopted by the agency. A contractor operating a program involving direct client contact with an individual must follow the HIV/AIDS Model Workplace Guidelines for Businesses, State Agencies, and State Contractors listed on the Department of State Health Services website.

(b) Texas Health and Safety Code §85.114 requires HIV and AIDS education for individuals served at SSLCs. HIV/AIDS education, including risk reduction, must be tailored to each individual and routinely made available to all individuals or their legally authorized representative. If education cannot be provided, the reasons must be documented in the individual's medical record.

§985.5. Counseling.

Each individual to be screened shall be offered pre- and post-HIV/AIDS test counseling from trained counselors. For individuals who are likely to be discharged from the state supported living center prior to receipt of test results, consent should be obtained from the individual or their legally authorized representative (LAR) to refer the individual to the local public health department for further HIV/AIDS treatment services. Prior to referral, consent should also be obtained from the individual or their LAR to send the individual's test results to the local public health department.

§985.6. Limitation of an Individual's Activity.

The behavioral and medical considerations of each individual will be evaluated by the attending physician with appropriate consultation, and only those restrictions recognized to be necessary relative to the containment of infection in each case will be imposed.

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 31, 2022.

TRD-202203407
Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3049

♦ ♦ ♦

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 59. PARKS
SUBCHAPTER F. STATE PARK OPERATIONAL RULES

31 TAC §59.131, §59.134

The Texas Parks and Wildlife Department (TPWD) proposes amendments to 31 TAC §59.131 and §59.134 concerning State Park Operational Rules.

The proposed amendments would define "electric bicycles" and prescribe the conditions and circumstances for their use in state parks.

Under current rule, electric bicycles are defined as motor vehicles and their use within parks is restricted to roads, driveways, parking areas, and areas designated as open for motor vehicle use. Current rules also prohibit the use of motor vehicles and bicycles on an unpaved road, trail, or path not designated and posted for use by such a motor vehicle or bicycle.

The department has received a number of inquiries regarding the use of electric bicycles on trails in state parks. Staff considers that since the use of bicycles and equines in many state parks is already being managed with minimal and manageable user conflict, and because electric bicycles offer opportunity to persons who otherwise might not consider the visitation experience, the use of electric bicycles on trails is feasible within constraints involving multiple user groups or impacts to conservation or preservation of natural or cultural features. Staff have determined that the most efficient manner of regulating the use of electric bicycles is to allow their use anywhere except where such use is specifically prohibited by posted signage or printed instructions. Staff notes that in most parks, trail use is already permitted for bicycles, equestrians, and foot traffic where such multiple use can be allowed without causing user conflict or degradation of park features.

The proposed amendment to §59.131, concerning Definitions, would alter the current definition of "motor vehicle" to stipulate that "electric bicycle" means an electric bicycle as defined in Transportation Code, §664.001, which is necessary to provide for an unambiguous meaning of the term for purposes of compliance and enforcement.

The proposed amendment to §59.134, concerning Rules of Conduct in Parks, would allow the use of electric bicycles on trails, roads (paved and unpaved), and paths, unless specifically prohibited by posted signage or printed instructions at the park. The proposed amendment would also require all electric bicycles used in state parks to be lawfully labelled in accordance with the provisions of Transportation Code, Chapter 664, which requires manufacturers of electric bicycles to label electric bicycles with information to identify the class of electric bicycle. Electric bicycles are manufactured in a variety of configurations, and the rules would allow the department to restrict certain trails or paths to certain classes of electric bicycle as conditions warrant. The proposed rules would also make stipulations regarding the parking of electric bicycles while using trails and paths in order to make clear that electric bicycles cannot be parked in such a manner as to impede or interfere with trail use by other users. Finally, the proposed amendments would make comporting changes as necessary to create exceptions necessary to eliminate conflicts with existing rules regarding the use of motor vehicles.

Aaron Friar, Special Assistant to the Director, State Parks Division, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rules.

There will be no fiscal implications for persons required to comply with the rules as proposed.

Mr. Friar also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be increased opportunity for enjoyment of the state park visitation experience.

Under 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. 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 the proposed rules will not result in any direct economic costs to any small businesses, micro-businesses, or rural communities; therefore, the department has determined that neither the economic impact statement nor the regulatory flexibility analysis described in Government Code, Chapter 2006, is required.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rules 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 rules.

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 rules.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rules 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; not create a new regulation; 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 rules may be submitted to Aaron Friar, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4415; email: aaron.friar@tpwd.texas.gov or via the department website at www.tpwd.texas.gov.

The amendments are proposed under Parks and Wildlife Code, Chapter 13, which authorizes the commission to promulgate rules governing the conservation, preservation, and use of state property, the activities of park users (including camping, swimming, boating, fishing, or other recreational activities), the regulation of traffic and parking; and conduct which endangers the health or safety of park users or their property.

The proposed amendment affects Parks and Wildlife Code, Chapter 13.

§59.131. Definitions.

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

(1) - (10) (No change.)

(11) Motor Vehicle--For purposes of this subchapter, a motor vehicle does not include a wheelchair, a motorized wheelchair, or a motorized mobility device. A motor vehicle is a motor-powered [~~motor powered~~] vehicle, including, but not limited to:

(A) any motor-driven [~~motor driven~~] or propelled vehicle required to be registered under the laws of this state;

(B) - (G) (No change.)

(H) an electric bicycle as defined in Transportation Code, §664.001; or

(I) (No change.)

(12) - (20) (No change.)

§59.134. Rules of Conduct in Parks.

(a) - (j) (No change.)

(k) Motor Vehicle Use, Possession and Operation.

(1) Operation. Except as provided in this subsection for the operation and use of electric bicycles, it [~~It~~] is an offense for any person to:

(A) - (C) (No change.)

(2) Parking. Except as specifically provided in this subsection for electric bicycles, it [~~It~~] is an offense for any person to:

(A) - (B) (No change.)

(3) - (4) (No change.)

(5) Trail use.

(A) It is an offense for any person to operate or use a motor vehicle or a bicycle on an unpaved road, trail, or path not designated and posted for use by such a motor vehicle or bicycle or use the trail in a manner that is dangerous to a person or animal.

(B) Unless specifically prohibited by posted signage or printed instructions, the operation and use of electric bicycles is permitted on trails, roads (paved and unpaved), and paths.

(i) The department may restrict any trail, road (paved or unpaved), or path to specific classes of electric bicycles.

(ii) It is an offense to operate or use an electric bicycle under this paragraph unless it has been lawfully labeled as required under Transportation Code, Chapter 664, to indicate the class of the electric bicycle.

(iii) A person using an electric bicycle provided by this paragraph may park the electric bicycle next to the trail, road, or path being used, provided such parking is performed in a safe manner and does not obstruct or otherwise impede the use of the trail, road, or path by other park users.

(l) - (q) (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 31, 2022.

TRD-202203369
James Murphy
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 389-4775

♦ ♦ ♦

CHAPTER 65. WILDLIFE
SUBCHAPTER F. PERMITS FOR AERIAL MANAGEMENT OF WILDLIFE AND EXOTIC SPECIES

31 TAC §65.151, §61.152

The Texas Parks and Wildlife Department (TPWD) proposes amendments to 31 TAC §65.151, concerning Definitions, and §65.152, concerning General Rules.

The proposed amendments would clarify that it is lawful to use unmanned aerial vehicles (UAVs, or "drones") at night to locate feral hogs for purposes of lethal control.

Under federal law (16 U.S.C. §742j-1, commonly referred to as the Airborne Hunting Act, or AHA) it is unlawful to shoot or attempt to shoot or intentionally harass any bird, fish, or other animal from aircraft (including drones) except for certain specified reasons, including protection of wildlife, livestock, and human health except as may be provided by state law pursuant to federal authority. Parks and Wildlife Code, Chapter 43, Subchapter G, is the statutory authority for regulating airborne wildlife management in Texas; under Parks and Wildlife Code §43.109, the Parks and Wildlife Commission is authorized to promulgate regulations governing the management of wildlife by the use of aircraft.

The recent advent and popularity of drones has resulted in a number of inquiries to the department regarding their use at night, particularly with respect to the lethal control of feral hogs. Feral hogs are an extremely destructive nuisance species, causing great damage to agricultural crops and wildlife habitats across the state, and the department vigorously encourages the public to control feral hog populations in order to protect native wildlife and their habitats. Current rules prohibit the take of wildlife or exotic animals (including members of the swine

family, such as feral hogs) from aircraft at night (defined as the hours between one half-hour after sunset and one-half hour before sunrise). The department wishes to clarify that although wildlife and exotic animals may not be taken by means of drones at any time, it is lawful to use drones solely for purposes of locating feral hogs, including at night. The proposed rules also would clarify that any person who operates a drone pursuant to an aerial wildlife permit must possess the permit while doing so, and that any person who participates in the capture, take, shooting, or attempted capture, take, or shooting of feral hogs as a result of the use of a drone to locate feral hogs for purposes of eventual take or capture is a gunner for the purposes of the subchapter, and all reporting and recordkeeping requirements of the subchapter apply to such persons.

Robert Macdonald, regulations coordinator, has determined that for each of the first five years that the rules as proposed are in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rules.

There will be no fiscal implications for persons required to comply with the rules as proposed.

Mr. Macdonald also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be regulatory clarity.

Under 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. 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 the proposed rules will not result in any direct economic costs to any small businesses, micro-businesses, or rural communities; therefore, the department has determined that neither the economic impact statement nor the regulatory flexibility analysis described in Government Code, Chapter 2006, is required.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rules 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 rules.

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 rules.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rules 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; not create a new regulation; 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 rules may be submitted to Assistant Commander Stormy King, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 552-3465; email: stormy.king@tpwd.texas.gov or via the department website at www.tpwd.texas.gov.

The amendments are proposed under Parks and Wildlife Code, §43.109, which provides the commission with authority to make regulations governing the management of wildlife or exotic animals by the use of aircraft under this subchapter, including forms and procedures for permit applications; procedures for the management of wildlife or exotic animals by the use of aircraft; limitations on the time and the place for which a permit is valid; establishment of prohibited acts; rules to require, limit, or prohibit any activity as necessary to implement Parks and Wildlife Code, Chapter 43, Subchapter G.

The proposed amendments affect Parks and Wildlife Code, Chapter 43, Subchapter G.

§65.151. Definitions.

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

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

(6) Gunner--

(A) A Landowner, Agent, or Subagent who captures, takes, shoots, or attempts to capture, take, or shoot wildlife or exotic animals from an aircraft; and

(B) any person who participates in the capture, take, shooting, or attempted capture, take, or shooting of feral hogs as a result of the use of a drone to locate feral hogs for purposes of eventual take or capture.

(7) - (12) (No change.)

(13) Unmanned Aerial Vehicle (UAV, or drone)--An aircraft that is remotely controlled or flown by an operator who is not physically present in the aircraft while it is flying.

§65.152. General Rules.

(a) A person who holds an AMP is authorized to engage in the management of wildlife and exotic animals by the use of aircraft only on the tract(s) of land specified in the LOA. The AMP must be carried in an aircraft when the aircraft is engaged in activities authorized by the AMP, unless the aircraft is a UAV, in which case the AMP shall be in possession of the operator.

(b) - (d) (No change.)

(e) It is lawful for a pilot operating under a valid AMP or AMP holder to use a UAV at any time solely for the purpose of locating feral hogs; however, no person may take or attempt to take feral hogs from a UAV.

(f) [~~(e)~~] These rules do not exempt any person from the requirement for other licenses or permits required by statute or rule of the commission.

(g) [~~(f)~~] The department may waive the fee requirements of this subchapter for an employee of a governmental entity acting in the scope and course of official duties.

(h) [~~(g)~~] The department will not approve an LOA for the take of feral hogs on a tract of land where feral hogs have been released or liberated by or with the approval of the Landowner or Agent for the purpose of being hunted.

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 31, 2022.

TRD-202203372
James Murphy
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 389-4775

♦ ♦ ♦

TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 9. TEXAS COMMISSION ON JAIL STANDARDS

CHAPTER 273. HEALTH SERVICES

37 TAC §273.2

The Texas Commission on Jail Standards proposes amendments to 37 TAC §273.2, relating to the duties of county jailers following inmate miscarriage or of inmate physical or sexual assault. HB 1307 of the 87th Legislative Session amended Local Government Code Sec. 351.048 to require that, as soon as practicable after receiving a report of a miscarriage or physical or sexual assault of a pregnant inmate while in the custody of a county jail, the sheriff shall ensure that an obstetrician or gynecologist and a mental health professional promptly review the health care services provided to the prisoner; and order additional health care services, including obstetrical and gynecological services and mental health services, as appropriate. HB 1307 did not explicitly require the Commission to adopt a rule to implement this law; however, the Commission has decided that having the statute reflected in the administrative code rule will assist jails to comply with the statute.

Executive Director Brandon Wood has determined that for each year of the first five years that the proposed amendment will be in effect, there will be no fiscal implications to state or local governments from enforcing and administering the proposed amendment.

Mr. Wood has determined that during the first five years that the sections will be in effect:

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

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

(3) implementation of the proposed amendment will not require an increase or decrease in future legislative appropriations;

(4) the proposed amendment will not affect fees paid to the agency;

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

(6) the proposed amendment will not repeal an existing rule;

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

(8) TCJS has insufficient information to determine the proposed amendment's effect on the state's economy.

Mr. Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities to comply with the amendment, as they will not be required to alter their business practices, and the rule does not impose any additional costs on those required to comply with the rule.

There are no anticipated economic costs to persons who are required to comply with this section as proposed.

Texas Government Code, §2001.0045 does not apply to this proposal because the amendment is necessary to implement legislation, and the Legislature has not specifically stated that §2001.0045 applies to HB 1307.

Mr. Wood has determined that for each year of the first five years the rule is in effect, the public will benefit from the adoption of the amendment because the Commission anticipates that compliance with the rule will improve the likelihood of favorable healthcare outcomes for such inmates.

TCJS has determined that this 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 §2007.043 of the Government Code.

Comments on the proposed rule may be submitted in writing to William Turner, P.O. Box 12985, Austin, Texas 78711, Fax (512) 463-3185, or e-mail at will.turner@tcjs.state.tx.us.

The amendment is proposed under statutory authority of Government Code, Chapter 511, which authorizes the Texas Commission on Jail Standards to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails. This proposal does not affect other rules or statutes.

The proposal implements provisions of HB 1307 of the 87th Legislative Session.

§273.2. Health Services Plan.

Each facility shall have and implement a written plan, approved by the Commission, for inmate medical, mental, and dental services. The plan shall:

(1) provide procedures for regularly scheduled sick calls;

(2) provide procedures for referral for medical, mental, and dental services;

(3) provide procedures for efficient and prompt care for acute and emergency situations;

(4) provide procedures for long-term, convalescent, and care necessary for disabled inmates;

(5) provide procedures for medical, to include obstetrical and gynecological care, mental, nutritional requirements, special housing and appropriate work assignments and the documented use of restraints during labor, delivery and recovery for known pregnant inmates. A sheriff/operator shall notify the commission of any changes in policies and procedures in the provision of health care to pregnant prisoners. A sheriff/operator shall notify the commission of any changes in policies and procedures in the placement of a pregnant prisoner in

administrative separation. As soon as practicable after receiving a report of a miscarriage or physical or sexual assault of a pregnant inmate while in the custody of a county jail, the sheriff shall ensure that an obstetrician or gynecologist and a mental health professional promptly:[;]

(A) review the health care services provided to the prisoner; and

(B) order additional health care services, including obstetrical and gynecological services and mental health services, as appropriate.

(6) provide procedures for the control, distribution, secured storage, inventory, and disposal of prescriptions, syringes, needles, and hazardous waste containers;

(7) provide procedures for the distribution of prescriptions in accordance with written instructions from a physician by an appropriate person designated by the sheriff/operator;

(8) provide procedures for the control, distribution, and secured storage of over-the-counter medications;

(9) provide procedures for the rights of inmates to refuse health care in accordance with informed consent standards for certain treatments and procedures (in the case of minors, the informed consent of a parent, guardian, or legal custodian, when required, shall be sufficient);

(10) provide procedures for all examinations, treatments, and other procedures to be performed in a reasonable and dignified manner and place;

(11) provide that adequate first aid equipment and patient evacuation equipment be on hand at all times;

(12) provide procedures that shall require that a qualified medical professional shall review as soon as possible any prescription medication an inmate is taking when the inmate is taken into custody. These procedures shall include providing each prescription medication that a qualified medical professional or mental health professional determines is necessary for the care, treatment, or stabilization of an inmate with mental illness;

(13) provide procedures that shall give inmates the ability to access a mental health professional at the jail or through a telemental health service 24 hours a day and approved by the Commission by August 31, 2020. If a mental health professional is not present at the county jail at the time or available by telemental health services, then require the jail to provide the inmate access to, at a minimum, a qualified mental health professional (as defined by 25 TAC, §412.303(48)) within a reasonable time;

(14) provide procedures that shall give prisoners the ability to access a health professional at the jail or through a telehealth service 24 hours a day or, if a health professional is unavailable at the jail or through a telehealth service, provide for a prisoner to be transported to access a health professional and approved by the Commission by August 31, 2020; and

(15) provide procedures to train staff to identify when a pregnant inmate is in labor and provide access to appropriate care. Inmates shall be promptly transported to a local hospital when they state that they are in labor or are determined by a person at the level of emergency medical technician or above to be in labor.

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 31, 2022.

TRD-202203343
Brandon Wood
Executive Director
Texas Commission on Jail Standards
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 463-5505

♦ ♦ ♦

CHAPTER 297. COMPLIANCE AND ENFORCEMENT

The Texas Commission on Jail Standards proposes the repeal of Title 37, Chapter 297, relating to compliance and enforcement. The Commission desires to change Chapter 297, create 3 new rules within Chapter 297, and to change the numerical order of existing rules within Chapter 297. Because rule numbers may not be amended but must be repealed and adopted anew with new numbers, the proposed changes necessitate the repeal of the entire contents of Chapter 297. Consequently, the Commission proposes to repeal Chapter 297.

Following this repeal, the Commission proposes new Chapter 297, also relating to compliance and enforcement but with substantive and significant changes. The proposed rule would implement HB 1545 of the 87th Legislative Session, which added Gov. Code § 511.00902. The new rule would alter the minimum frequency of jail inspections and require that they be determined by priority as required by state law and other factors. The new rule would require that all inspections be unannounced and that 10% of reinspections be selected randomly for a comprehensive inspection. The new rule would require that jails receiving two or more notices of non-compliance within a period of eighteen consecutive months to be subject to increased monitoring, as defined. The new rule would subject to immediate enforcement action jails that fail to submit reports or that are found non-compliant while under increased monitoring. The new rule creates graduated enforcement actions at 3-month intervals up to 12 months.

Executive Director Brandon Wood has determined the proposal will have no fiscal implications to state or local governments for each year of the first five subsequent years.

TCJS has determined that during the first five years following the proposal:

(1) The proposal will not create or eliminate a government program;

(2) TCJS has insufficient information to determine whether implementation of the proposed repeal and adoption will affect the number of employee positions;

(3) TCJS has insufficient information to determine whether implementation of the proposal will not require an increase or decrease in future legislative appropriations;

(4) The proposal will not affect fees paid to the agency;

(5) The proposal does not create a new regulation;

(6) The proposal does not repeal existing legislation;

(7) The proposal will not change the number of individuals subject to the repealed rule; and

(8) TCJS has insufficient information to determine the proposal's affect on the state's economy.

Mr. Wood has also determined that the proposal will cause no adverse economic effect on small businesses, micro-businesses, or rural communities, because the it does not require them to alter their business practices and does not result in additional costs on those impacted by the proposed repeal.

There are no anticipated economic costs to persons who are impacted by the proposal.

Texas Government Code, §2001.0045 does not apply to this proposal because it would not impose a cost on regulated persons; the proposal would reduce the burden or responsibilities imposed on regulated persons by the rule being repeal; is necessary in order to subsequently propose a new rule that will protect the health, safety, and welfare of the residents of this state; and is necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

Mr. Wood has determined that for each year of the first five years subsequent to the proposal, the public will benefit by prioritizing its inspections to concentrate on those jails that show a greater likelihood of coming into non-compliance.

TCJS has determined that this proposal would 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, would not constitute a taking under §2007.043 of the Government Code.

Comments may be submitted in writing to William Turner, P.O. Box 12985, Austin, Texas 78711, Fax 512-463-3185, or e-mail at will.turner@tcjs.state.tx.us.

37 TAC §§297.1 - 297.14

This is proposed under statutory authority of Government Code, Chapter 511, which authorizes the Texas Commission on Jail Standards to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails. This proposal does not affect other rules or statutes.

The proposal implements HB 1545 of the 87th Legislative Session.

§297.1. Regular Local Inspections.

§297.2. Regular Commission Inspections.

§297.3. Inspection Reports.

§297.4. Certification.

§297.5. Notice of Noncompliance/Administrative Order.

§297.6. Response by Officials.

§297.7. Commission Review of Compliance.

§297.8. Remedial Order by Commission.

§297.9. Other Commission Remedies.

§297.10. Review of Commission Action.

§297.11. Request for Administrative Hearing.

§297.12. County Contract with Private Entity for Jail Facilities.

§297.13. Municipal Contract with Private Entity for Jail Facilities.

§297.14. Contract with Other States for Housing Non-Texas Inmates.

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 31, 2022.

TRD-202203345
Brandon Wood
Executive Director
Texas Commission on Jail Standards
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 463-5505

♦ ♦ ♦

37 TAC §§297.1 - 297.17

New rules are proposed under the authority of Government Code, Chapter 511, which authorizes the Texas Commission on Jail Standards to adopt reasonable rules and procedures establishing minimum standards for the construction, equipment, maintenance, and operation of county jails.

This proposed change does not affect other rules or statutes.

§297.1. Regular Local Inspections.

During intervals of at least four months and at least two times each year, the sheriff/operator shall inspect each facility for which he/she is responsible inquiring into the security, control, conditions, and state of compliance with the rules of the Commission. The owner of each facility is encouraged to make similar periodic inspections.

§297.2. Commission Inspections.

The frequency and extent to which facilities under Commission jurisdiction are inspected will be determined by the inspection priority of each facility. Commission staff shall perform at least one comprehensive and one limited inspection of each facility under Commission jurisdiction every twenty-four months. Limited compliance inspections and special inspections shall be used when deemed appropriate by the inspection priority of the jail. The Commission staff shall at any time have access to all parts of each facility; the books, records, data, documents, and accounts pertaining to each facility and to the inmates confined therein; and shall have the right and authority to interview any of the officials of the facility or inmates therein. The sheriff/operator shall assist staff by all means at their disposal to enable them to perform the functions, powers, and duties of their office.

§297.3 Inspection Priority Assessment.

The inspection priority of each jail shall be determined utilizing the assessment factors as required, but not limited to, Government Code, sec 511.0085 and other factors as determined by the Commission.

§297.4. Inspection Reports.

Within 45 days of each inspection by Commission staff, the owner and sheriff/operator responsible for the facility inspected shall be furnished with a report of the results of the inspection, and a copy of such report shall be filed with the Commission.

§297.5. Certification.

Upon completion of a comprehensive inspection, those facilities that meet Minimum Jail Standards shall be issued a certificate of compliance. The certificate of compliance shall remain in effect until a notice of non-compliance is issued.

§297.6. Notice of Noncompliance.

(a) When the Commission finds that a facility is not in compliance with state law, Minimum Jail Standards, or conditions necessitate administrative remedies, it shall issue a notice of noncompliance to the owner and sheriff/operator responsible for the facility that is not in compliance. Such notice shall be sent to such officials by certified mail, return receipt requested. A copy of such notice of noncompliance shall be sent to the Governor.

(b) The notice of noncompliance shall:

(1) specify the minimum standards established by state law or the rules of the Commission with which the facility fails to comply or administrative remedies;

(2) shall provide a reasonable time, not to exceed 30 days, within which appropriate corrective measures shall be initiated; and

(3) shall provide a reasonable time, not to exceed one year within which appropriate corrective measures shall be completed.

§297.7. Response by Officials.

Upon receipt of a notice of noncompliance, the responsible officials shall initiate appropriate corrective measures within the time prescribed by the Commission (which shall not exceed 30 days) and shall complete the same within a reasonable time (not to exceed one year) as prescribed by the notice of noncompliance. Within 30 days following receipt of the notice of noncompliance, the responsible officials shall report to the Commission the corrective measures initiated and/or completed to correct a deficiency set forth in the notice of noncompliance.

§297.8 Reinspection.

Following a determination that the deficiency(s) set forth in the notice of non-compliance have been corrected, the owner and sheriff/operator responsible for the facility shall formally request a re-inspection. All re-inspections will be unannounced and no less than 10% of facilities under the Commission's jurisdiction that request re-inspection will be randomly selected for a comprehensive inspection.

§297.9. Commission Review of Compliance.

(a) If a response is not received from the responsible officials or if a response does not offer remedies addressing all the items of noncompliance, the Commission may request that officials appear at a regular or special meeting of the Commission to present evidence of corrective action to be taken. Following the officials' presentation, the Commission may require the officials to appear before the Commission at a future date to report on compliance progress, may issue a remedial order, or may deem that no further action is required.

(b) If a notice of noncompliance is issued to a facility operated by a private entity under Section 351.101 or 361.061, Local Government Code, the compliance status of the facility shall be reviewed at the next meeting of the Commission.

(c) After the issuance of a notice of non-compliance, the jail's compliance status will be reviewed as required by the Commission's monthly compliance assessment review.

(d) A jail that has been issued two or more notices of non-compliance within a period of eighteen consecutive months will be subject to increased monitoring to include:

(1) Submission of monthly status reports on a form prescribed by the Commission and supporting documentation as requested by the Commission to determine status; and

(2) Two unannounced comprehensive inspections within twelve months from the date that the increased monitoring commenced.

(e) If the jail fails to submit the monthly reports or fails one of these two full inspections, the jail will be subject to immediate enforcement action.

§297.10 Commission Enforcement Action.

(a) A jail that has not requested reinspection and has not been issued a certificate of compliance within three months of the issuance of a notice of non-compliance will be required to provide updates on their progress to regain compliance. With written concurrence from the County Judge, the Sheriff shall submit to the Commission the corrective measures completed and expected completion date to correct the deficiency(s) set forth in the notice of noncompliance if the jail has not been issued a certificate of compliance within three months of the issuance of a notice of non-compliance.

(b) A jail that has not requested reinspection and has not been issued a certificate of compliance within six months of the issuance of the notice of noncompliance shall appear before the Commission at its next regularly scheduled or special called meeting. The sheriff and county judge shall appear in order to present evidence of corrective action taken and completion date. Following the official's presentation, the Commission may issue a remedial order or may deem that no further action is required.

(c) A jail that has not requested reinspection and has not been issued a certificate of compliance within nine months of the issuance of the notice of noncompliance will be subject to a comprehensive inspection and shall appear before the Commission at its next regularly scheduled or special called meeting. The sheriff and county judge shall appear in order to present evidence of corrective action taken and completion date. Following the official's presentation, the Commission may issue a remedial order or may deem that no further action is required.

(d) A jail that has not requested reinspection and has not been issued a certificate of compliance within twelve months of the issuance of the notice of noncompliance shall appear before the Commission at its next regularly scheduled or special called meeting. A remedial order shall be issued requiring compliance with minimum standards.

§297.11. Remedial Order by Commission.

(a) If the Commission determines that the responsible officials receiving a notice of noncompliance fail to initiate corrective measures within the time prescribed, the Commission may, by remedial order, delivered by certified mail, return receipt requested or by personal service to the responsible officials, declare that the facility in question or any portion thereof be closed, that further confinement of inmates or classifications of inmates in the noncomplying facility or any portion thereof be prohibited, that all or any number of the inmates then confined be transferred to and maintained in another designated facility, or any combination of such remedies.

(b) The remedial order of the Commission shall be in writing and shall specifically identify each minimum standard with which the facility has failed to comply. Such remedial order shall become final and effective 15 days after its receipt by the responsible officials, provided, however, that if a review of Commission action §297.13 of this title (relating to Review of Commission Action) or request for administrative hearing §297.14 of this title (relating to Request for Administrative Hearing) on such remedial order is requested, the enforcement of such remedial order shall be stayed until such time as the Commission has rendered its decision following its hearing.

(c) If a remedial order is issued, the Commission shall furnish the sheriff/operator with a list of qualified facilities to which the inmates may be transferred. The sheriff/operator of the facility shall immediately transfer the number of inmates necessary to bring the facility into compliance to a facility that agrees to accept the inmates. The agreement shall be in writing and shall be signed by the sheriff/operator transferring the inmates and the sheriff/operator receiving the inmates. A facility transferring inmates under this subsection shall immediately remove the inmates from the receiving facility if the sheriff/operator of the receiving facility requests their removal in writing. The owner responsible for the noncomplying facility shall bear the liability for and the cost of transportation and maintenance of inmates transferred to or from a noncomplying facility by order of the Commission. The costs

of transportation and maintenance shall be determined by agreement between the participating jurisdictions and shall be paid into the treasury of the entity providing transportation and/or maintenance.

(d) When a remedial order is issued to terminate a contract for housing inmates not sentenced in a Texas court, the responsible officials shall initiate action to terminate the contract and transfer the effected inmates. A copy of the remedial order shall be provided the sending state.

(e) Upon the issuance of a Certificate of Compliance, the remedial order shall be reviewed at the next regularly scheduled meeting of the Commission.

§297.12. Other Commission Remedies.

In addition to or in lieu of the remedial order remedies described in §511.104 of this title (relating to Remedial Order by Commission), the Commission may institute an action in its own name to enforce or enjoin the violation of its orders, rules or procedures, or the Local Government Code, Chapter 351. An action brought pursuant to this section is in addition to any other action, proceeding, or remedy provided by law and may be brought in a district court of Travis County, Texas. A suit brought under this section shall be given preferential setting and shall be tried by the Court, without a jury, unless the responsible officials request a jury, in accordance with the Local Government Code, Chapter 351. The Commission shall be represented by the attorney general in such actions.

§297.13. Review of Commission Action.

(a) Any responsible official disagreeing with any remedial order or action on an application for variance of the Commission, within 15 days after the date thereof, may request in writing an appearance before the Commission to review the action taken by the Commission. The request shall include information on the circumstances to be reviewed.

(b) The request for review shall be effective if postmarked within 15 days from the date of the remedial order or action on application for variance, or if it is otherwise received by the Commission within such 15-day time period. The request for review shall be directed to the Executive Director.

(c) Review of Commission action may determine that the remedial order or application for variance request may continue to be effective as issued, may be amended, or may be rescinded. Any action affected by this section shall be effective immediately.

§297.14 Request for Administrative Hearing.

(a) If the responsible officials disagree with a Commission action and have exhausted all remedies under §297.13 of this title (relating to Review of Commission Action), the officials may request, within 15 days after the date thereof, an administrative hearing under Chapter 301 of this title (relating to Rules of Practice in Contested Cases), upon the determination of matters of fact or law with which they disagree.

(b) The request for hearing shall be effective if post marked within 15 days from the date of the remedial order or action on application for variance, or if it is otherwise received by the Commission within such 15-day time period. The request for hearing shall be directed to the chairman of the Commission and shall contain the following statements:

(1) the legal authority and jurisdiction under which the hearing should be held;

(2) the particular statutes, sections of statutes, and rules involved;

(3) a short, plain recital of the errors of fact or law for which review is sought, stating in detail the facts justifying the amendment or reversal of the order or action of the Commission; and

(4) the name and address of the person or representative to whom notices or other written communications shall be directed, and the name and address of the person or representative who will appear at the hearing and the name and address of the person or persons on whose behalf he will appear.

(c) A request for hearing, if not made in the time and manner herein provided, shall be deemed waived, and in such event the remedial order or action on application for variance of the Commission shall become final.

(d) Upon the receipt of a timely request for hearing, the Commission shall request a hearing be scheduled by the State Office of Administrative Hearings.

(e) If the administrative law judge issues a proposal for decision indicating the Commission action is justified, the administrative law judge shall include in the proposal a finding of the costs, fees, expenses, and reasonable and necessary attorney's fees the state and Commission incurred in bringing the proceeding. The board may adopt the finding for costs, fees, and expenses and make the finding a part of the final order entered in the proceeding. Proceeds collected from a finding made under this subsection shall be paid to the Commission.

§297.15 County Contract with Private Entity for Jail Facilities.

(a) The Commissioners court of a county may contract with a private vendor to provide for the financing, design, construction, leasing, operation, purchase, maintenance, or management of a facility for the confinement of persons accused or convicted of an offense.

(b) Contracts for these purposes shall comply with Local Government Code, §§351.101-351.104 (concerning county contract with private entity for jail facilities).

(c) If the contract includes construction of a new facility or renovation of an existing facility, the construction documents shall be submitted and reviewed in accordance with Chapter 257 of this title (relating to Construction Approval Rules).

(d) Facility operational plans, as required by the Commission, shall be developed by the private operator of the facility in consultation with the sheriff and shall be approved by the sheriff, in writing, prior to submission to the Commission for approval. Approval by the sheriff shall not be unreasonably withheld. Revised plans shall similarly be submitted when there is a change of sheriffs, operator, types of persons being confined, or operational procedures.

(e) The sheriff shall exercise regular on-site monitoring over the private jail facility, in accordance with the Local Government Code, §351.103 (concerning Contract Requirements). The specifics of such on-site monitoring, including the resolution of disputes, disagreements, or deficiencies shall be provided for in the contract and facility operational plans.

§297.16 Municipal Contract with Private Entity for Jail Facilities.

(a) The governing body of a municipality may contract with a private vendor to provide for the financing, design, construction, leasing, operation, purchase, maintenance, or management of a facility for the confinement of persons accused or convicted of an offense.

(b) Contracts for these purposes shall comply with the Local Government Code, §§361.061-361.067 (concerning municipal contract for jail facilities).

(c) If the contract includes construction of a new facility or renovation of an existing facility, the construction documents shall be

submitted and reviewed in accordance with Chapter 257 of this title (relating to Construction Approval Rules).

(d) Facility operational plans, as required by the Commission, shall be developed by the private operator and approved by the municipality, in writing, prior to submission to the Commission for approval. Revised plans shall be submitted when there is a change of operators, types of persons being confined, or operational procedures.

(e) The municipality shall exercise regular on-site monitoring over the private operation of the facility, in accordance with the Local Government Code, §361.062 (concerning Contract Requirements). The specifics of such on-site monitoring, including the resolution of disputes, disagreements, or deficiencies shall be provided for in the contract and facility operational plans.

§297.17 Contract with Other States for Housing Non-Texas Inmates §511.0095.

(a) The only entities, other than the state, that are authorized to operate a correctional facility to house in this state, inmates convicted of offenses against the laws of another state of the United States are:

(1) a county or municipality; and

(2) a private vendor operating a correctional facility under a contract with a county under Subchapter F, Chapter 351, Local Government Code, or a municipality under Subchapter E, Chapter 361, Local Government Code.

(b) A private vendor operating a correctional facility in this state may not enter into a contract for housing out-of-state inmates. A county Commissioners court or the governing body of a municipality may enter into a contract with another state or a jurisdiction in another state for housing out-of-state inmates.

(c) At a minimum all contracts shall:

(1) require facility compliance with Minimum Jail Standards;

(2) require that all inmates confined pursuant to the contract be released within the jurisdiction of the sending entity;

(3) require that all inmates records concerning classification, to include conduct records, be reviewed by the receiving entity prior to transfer of the inmate;

(4) require that the sending entity determine inmate custody level in accordance with Chapter 271 of this title (relating to Classification and Separation of Inmates) to ensure that custody level assignments do not exceed the construction security level availability;

(5) require that inmates with a record of institutional violence involving the use of a deadly weapon or a pattern of violence while confined in the sending state, escape, or attempted escape from secure custody are not eligible for transfer unless a specific waiver has been granted by the Commission;

(6) require that all appropriate medical information be provided prior to transfer, to include certification of tuberculosis screening or treatment;

(7) require provisions for termination of contract within 90 days by receiving entity; and

(8) require termination of contract if so ordered by the Commission, pursuant to the Government Code, §511.096.

(d) The receiving entity shall develop and implement a written procedure outlining the coordination of law enforcement activities in the case of riot, rebellion, escape, or other situations requiring assistance from city, county, or state law enforcement agencies. The Commission may require the receiving entity or sending state to reimburse the state for emergency assistance. The procedure shall be submitted to the Commission for approval.

(e) The receiving entity shall provide the Commission with a statement of custody level capacity and availability.

(f) All operational requirements shall meet or exceed Texas Minimum Jail Standards and require Commission approval prior to implementation.

(g) All receiving entities shall maintain a certificate of compliance from the Commission.

(h) Copies of unsigned and signed contracts, along with addenda, shall be submitted to the Commission for review and approval respectively. Signed contracts between a private vendor and receiving entity shall be provided by the vendor for review and approval. The vendor shall also provide a biographical history for review.

(i) The receiving entity shall promptly notify the Commission of any major incidents, including escapes.

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 31, 2022.

TRD-202203346
Brandon Wood
Executive Director
Texas Commission on Jail Standards
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 463-5505

♦ ♦ ♦

PART 15. TEXAS FORENSIC SCIENCE COMMISSION

CHAPTER 651. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES
SUBCHAPTER A. ACCREDITATION

37 TAC §651.4

The Texas Forensic Science Commission ("Commission") proposes an amendment to 37 Texas Administrative Code §651.4 to remove the College of American Pathologist's ("CAP") Forensic Drug Testing Program and the Substance Abuse and Mental Health Services Administration ("SAMHSA") of the Department of Health and Human Services from the Commission's list of recognized accreditation programs for forensic analysis in Texas criminal actions. Under the revised rule, any laboratory seeking to conduct forensic testing for the primary purpose of determining the connection of evidence to a criminal action may obtain accreditation by ANSI-ASQ National Accreditation Board (ANAB) or the American Association for Accreditation. The amendments are necessary to reflect adoptions made by the Commission at its July 22, 2022, quarterly meeting. The amendments are made in accordance with the Commission's accreditation authority under Tex. Code. Crim. Proc. art. 38.01§4-d.

Fiscal Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendment will be in effect, there will be no fiscal impact to state or local govern-

ments as a result of the enforcement or administration of the proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposal. The amendment removes recognition of two accrediting bodies, CAP and SAMHSA. These bodies accredit laboratories that perform testing for a primary purpose other than determining the connection of evidence to a criminal action (e.g., for medical practice or in civil or administrative proceedings). Testing that is conducted for a primary purpose other than determining the connection of evidence to a criminal action is expressly exempt from accreditation requirements under article 38.35 of the Texas Code of Criminal Procedure. Under the revised rule, any laboratory seeking to conduct forensic testing for the primary purpose of determining the connection of evidence to a criminal action may obtain accreditation by ANSI-ASQ National Accreditation Board (ANAB) or the American Association for Accreditation.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendment does not impose any direct costs or fees on municipalities in rural communities.

Public Benefit/Cost Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission has also determined that for each year of the first five years the proposed amendment is in effect, the anticipated public benefit will be assurance of the recognition of forensic analysis accreditation programs in criminal actions are consistent in scope and focus.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code § 2006.002(c) and (f). Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendment will not have an adverse economic effect on any small or micro business because there are no anticipated economic costs to any person or laboratory who is required to comply with the rule as proposed. The amendment removes recognition of two accrediting bodies, CAP and SAMHSA. These bodies accredit laboratories that perform testing for a primary purpose other than determining the connection of evidence to a criminal action (e.g., for medical practice or in civil or administrative proceedings). Testing that is conducted for a primary purpose other than determining the connection of evidence to a criminal action is expressly exempt from accreditation requirements under article 38.35 of the Texas Code of Criminal Procedure. Under the rule, any laboratory seeking to conduct forensic testing for the primary purpose of determining the connection of evidence to a criminal action may obtain accreditation by ANSI-ASQ National Accreditation Board (ANAB) or the American Association for Accreditation.

Takings Impact Assessment. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for the first five-year period, implementation of the proposed amendments will have no government growth impact as described in Title 34, Part 1, Texas Administrative Code §11.1. Pursuant to the analysis required by Government Code 2001.221(b), 1) the proposed rule does not create or eliminate a government program; 2) implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions; 3) implementation of the proposed rule does not increase or decrease future legislative appropriations to the agency; 4) the proposed rule does not require a fee; 5) the proposed rule does not create a new regulation; 6) the proposed rule does not increase or decrease the number of individuals subject to the rule's applicability; and 7) the proposed rule has a neutral effect on the state's economy. The amendment removes recognition of two accrediting bodies, CAP and SAMHSA. These bodies accredit laboratories that perform testing for a primary purpose other than determining the connection of evidence to a criminal action (e.g., for medical practice or in civil or administrative proceedings). Testing that is conducted for a primary purpose other than determining the connection of evidence to a criminal action is expressly exempt from accreditation requirements under article 38.35 of the Texas Code of Criminal Procedure. Any laboratory seeking to conduct forensic testing for the primary purpose of determining the connection of evidence to a criminal action may obtain accreditation by ANSI-ASQ National Accreditation Board (ANAB) or the American Association for Accreditation as set forth in the rule.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Tomlin, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by October 17, 2022 to be considered by the Commission.

Statutory Authority. The amendment is proposed under Tex. Code Crim. Proc. art 38.01 § 4-d.

Cross reference to statute. The proposal affects 37 Tex. Admin. Code §§ 651.4.

§651.4. List of Recognized Accrediting Bodies.

(a) The Commission recognizes the accrediting bodies in this subsection, subject to the stated discipline or category of analysis limitations:

(1) ANSI-ASQ National Accreditation Board (ANAB)--recognized for accreditation of all disciplines which are eligible for accreditation under this subchapter as well as for the administration of the American Board of Forensic Toxicology (ABFT).

~~[(2) Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services (HHS/SAMSHA), formerly known as the National Institute on Drug Abuse of the Department of Health and Human Services (HHS/NIDA)--recognized for accreditation of toxicology discipline in the category of analysis for Urine Drug Testing for all classes of drugs approved by the accrediting body.~~

~~(3) College of American Pathologists (CAP) Forensic Drug Testing Accreditation Program only--recognized for accreditation of toxicology discipline.]~~

(2) [~~(4)~~] American Association for Laboratory Accreditation (A2LA)--recognized for accreditation of all disciplines which are eligible for accreditation under this chapter.

(b) If an accrediting body is recognized under subsection (a) of this section and the recognized body approves a new discipline, category of analysis or procedure, the Commission may temporarily recognize the new discipline, category of analysis or procedure. A temporary approval shall be effective for 120 days.

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 September 1, 2022.

TRD-202203454
Leigh Tomlin
Associate General Counsel
Texas Forensic Science Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 936-0661

♦ ♦ ♦

SUBCHAPTER C. FORENSIC ANALYST LICENSING PROGRAM

31 TAC §651.207

The Texas Forensic Science Commission ("Commission") proposes an amendment to 37 Texas Administrative Code §651.207 to emphasize the duty for licensees to report any changes in address or employment to the Commission. The amendments are necessary to reflect adoptions made by the Commission at its July 22, 2022, quarterly meeting. The amendments are made in accordance with the Commission's forensic analyst licensing authority under Tex. Code. Crim. Proc. art. 38.01 §4-a(d) to establish the qualifications for a forensic analyst license and the Commission's rulemaking authority under Code of Criminal Procedure, Article 38.01 § 3-a, which directs the Commission to adopt rules necessary to implement Code of Criminal Procedure, Article 38.01.

Fiscal Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. The proposed amendment expresses the duty for licensees to provide updated address or employment information to the Commission in order to receive timely notices from the Commission.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendments do not impose any direct costs or fees on municipalities in rural communities. The proposed amendment expresses the already-existing obligation for licensees to provide updated address or employment information to the Commission so the licensee may receive timely notice from the Commission as necessary.

Public Benefit/Cost Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be a better understanding of the already-existing obligation for forensic analyst licensees to provide updated address or employment information to the Commission so that licensees may receive timely notices from the Commission as necessary.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code § 2006.002(c) and (f), Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendments will not have an adverse economic effect on any small or micro business because the rule does not impose any economic costs to these businesses. The proposed amendment expresses the already-existing obligation for licensees to provide updated address or employment information to the Commission so the licensee may receive timely notice from the Commission as necessary.

Takings Impact Assessment. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043. The proposed amendment expresses the already-existing obligation for licensees to provide updated address or employment information to the Commission so the licensee may receive timely notice from the Commission as necessary.

Government Growth Impact Statement. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for the first five-year period, implementation of the proposed amendment will have no government growth impact as described in Title 34, Part 1, Texas Administrative Code §11.1. Pursuant to the analysis required by Government Code 2001.221(b), 1) the proposed amendment does not create or eliminate a government program; 2) implementation of the proposed amendment does not require the creation of new employee positions or the elimination of existing employee positions; 3) implementation of the proposed amendment does not increase or decrease future legislative appropriations to the agency; 4) the proposed amendment does not require a fee; 5) the proposed amendment does not create a new regulation; 6) the proposed amendment does not increase or decrease the number of individuals subject to the rule's applicability; and 7) the proposed amendment has a neutral effect on the state's economy. The amendment does not expand any forensic analyst licensing requirement under the current program, but rather expresses an already-existing duty for forensic analyst licensees to provide updated address or employment information to the Commission so the licensee may receive timely notice from the Commission as necessary.

Requirement for Rule Increasing Costs to Regulated Persons. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that there are no anticipated increased costs to regulated persons as the proposed amendment expresses an already-existing obligation for licensees to provide updated address or employment information to the Commission.

The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Tomlin, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by October 16, 2022, to be considered by the Commission.

Statutory Authority. The amendment is proposed under Tex. Code Crim. Proc. art 38.01 §§ 4-a(d) and 3-a.

Cross reference to statute. The proposal establishes new rule 37 Texas Administrative Code §651.207.

§651.207. Forensic Analyst Licensing Requirements, Including License Term, Fee and Procedure for Denial of Application and Reconsideration.

(a) Issuance. The Commission may issue an individual's Forensic Analyst License under this section.

(b) Application. Before being issued a Forensic Analyst License, an applicant shall:

(1) demonstrate that he or she meets the definition of Forensic Analyst set forth in this subchapter;

(2) complete and submit to the Commission a current Forensic Analyst License Application form;

(3) pay the required fee(s) as applicable:

(A) Initial Application fee of $220 for Analysts and $150 for Technicians/Screeners;

(B) Biennial renewal fee of $200 for Analysts and $130 for Technicians/Screeners;

(C) Temporary License fee of $100;

(D) Provisional License fee of $110 for Analysts and $75 for Technicians/Screeners;

(E) License Reinstatement fee of $220;

(F) *De Minimis* License fee of $200 per ten (10) licenses;

(G) Uncommon Forensic Analysis License fee of $200 per ten (10) licenses; and/or

(H) Special Exam Fee of $50 for General Forensic Analyst Licensing Exam, required only if testing beyond the three initial attempts or voluntarily taking the exam under the Unaccredited Forensic Discipline Exception described in subsection (g)(5)(C) of this section; [~~]and~~

(4) provide accurate and current address and employment information to the Commission and update the Commission within five (5) business days of any change in address or change of employment. Licensees are required to provide a home address, email address, and employer name and address on an application for a license; and

(5) [~~(4)~~] provide documentation that he or she has satisfied all applicable requirements set forth under this section.

(c) Minimum Education Requirements.

(1) Seized Drugs Analyst. An applicant for a Forensic Analyst License in seized drugs must have a baccalaureate or advanced degree in chemical, physical, biological science, chemical engineering or forensic science from an accredited university.

(2) Seized Drugs Technician. An applicant for a Forensic Analyst License limited to the seized drug technician category must have a minimum of an associate's degree or equivalent.

(3) Toxicology (Toxicology Analyst (Alcohol Only, Non-interpretive), Toxicology Analyst (General, Non-interpretive), Toxicologist (Interpretive)). An applicant for a Forensic Analyst License in toxicology must have a baccalaureate or advanced degree in a chemical, physical, biological science, chemical engineering or forensic science from an accredited university.

(4) Toxicology Technician. An applicant for a Forensic Analyst License limited to the toxicology technician category must have a minimum of an associate's degree or equivalent.

(5) Forensic Biology (DNA Analyst, Forensic Biology Screener, Nucleic Acids other than Human DNA Analyst, Forensic Biology Technician). An applicant for any category of forensic biology license must have a baccalaureate or advanced degree in a chemical, physical, biological science or forensic science from an accredited university.

(6) Firearm/Toolmark Analyst. An applicant for a Forensic Analyst License in firearm/toolmark analysis must have a baccalaureate or advanced degree in a chemical, physical, biological science, engineering or forensic science from an accredited university.

(7) Firearm/Toolmark Technician. An applicant for a Forensic Analyst License limited to firearm/toolmark technician must have a minimum of a high school diploma or equivalent degree.

(8) Materials (Trace) Analyst. An applicant for a Forensic Analyst License in materials (trace) must have a baccalaureate or advanced degree in a chemical, physical, biological science, chemical engineering or forensic science from an accredited university. A Materials (Trace) Analyst performing only impression evidence analyses must have a minimum of a high school diploma or equivalent degree.

(9) Materials (Trace) Technician. An applicant for a Forensic Analyst License limited to materials (trace) technician must have a minimum of a high school diploma or equivalent degree.

(10) Foreign/Non-U.S. degrees. The Commission shall recognize equivalent foreign, non-U.S. baccalaureate or advanced degrees. The Commission reserves the right to charge licensees a reasonable fee for credential evaluation services to assess how a particular foreign degree compares to a similar degree in the United States. The Commission may accept a previously obtained credential evaluation report from an applicant or licensee in fulfillment of the degree comparison assessment.

(11) If an applicant does not meet the minimum education qualifications outlined in this section, the procedure in subsection (f) or (j) of this section applies.

(d) Specific Coursework Requirements.

(1) Seized Drugs Analyst. An applicant for a Forensic Analyst License in seized drugs must have a minimum of sixteen-semester credit hours (or equivalent) in college-level chemistry coursework above general coursework from an accredited university. In addition to the chemistry coursework, an applicant must also have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission.

(2) Toxicology. An applicant for a Forensic Analyst License in toxicology must fulfill required courses as appropriate to the analyst's role and training program as described in the categories below:

(A) Toxicology Analyst (Alcohol Only, Non-interpretive). A toxicology analyst who conducts, directs or reviews the alcohol analysis of forensic toxicology samples, evaluates data, reaches conclusions and may sign a report for court or investigative purposes, but does not provide interpretive opinions regarding human performance must complete a minimum of sixteen-semester credit hours (or equivalent) in college-level chemistry coursework above general coursework from an accredited university.

(B) Toxicology Analyst (General, Non-interpretive). A toxicology analyst who conducts, directs or reviews the analysis of forensic toxicology samples, evaluates data, reaches conclusions and may sign a report for court or investigative purposes, but does not provide interpretive opinions regarding human performance must

complete a minimum of sixteen-semester credit hours (or equivalent) in college-level chemistry coursework above general coursework that includes organic chemistry and two three-semester credit hour (or equivalent) college-level courses in analytical chemistry and/or interpretive science courses that may include Analytical Chemistry, Chemical Informatics, Instrumental Analysis, Mass Spectrometry, Quantitative Analysis, Separation Science, Spectroscopic Analysis, Biochemistry, Drug Metabolism, Forensic Toxicology, Medicinal Chemistry, Pharmacology, Physiology, or Toxicology.

(C) Toxicologist (Interpretive). A toxicologist who provides interpretive opinions regarding human performance related to the results of toxicological tests (alcohol and general) for court or investigative purposes must complete a minimum of sixteen-semester credit hours (or equivalent) in college-level chemistry coursework above general coursework that includes organic chemistry, one three-semester credit hour (or equivalent) course in college-level analytical chemistry (Analytical Chemistry, Chemical Informatics, Instrumental Analysis, Mass Spectrometry, Quantitative Analysis, Separation Science or Spectroscopic Analysis) and one three-semester credit hour (or equivalent) college-level courses in interpretive science (Biochemistry, Drug Metabolism, Forensic Toxicology, Medicinal Chemistry, Pharmacology, Physiology, or Toxicology).

(D) An applicant for a toxicology license for any of the categories outlined in subparagraphs (A) - (C) of this paragraph must have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission.

(3) DNA Analyst. An applicant for a Forensic Analyst License in DNA analysis must demonstrate he/she has fulfilled the specific requirements of the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing effective September 1, 2011. An applicant must also have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission.

(4) Firearm/Toolmark Analyst. An applicant must have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission. No other specific college-level coursework is required.

(5) Materials (Trace) Analyst. An applicant for a Forensic Analyst License in materials (trace) for one or more of the chemical analysis categories of analysis (chemical determination, physical/chemical comparison, gunshot residue analysis, and fire debris and explosives analysis) must have a minimum of sixteen-semester credit hours (or equivalent) in college-level chemistry coursework above general coursework from an accredited university. In addition to chemistry coursework for the chemical analysis categories, all materials (trace) license applicants must also have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission. An applicant for a Forensic Analyst License in materials (trace) limited to impression evidence is not required to fulfill any specific college-level coursework requirements other than the statistics requirement.

(6) Exemptions from specific coursework requirements. The following categories of licenses are exempted from coursework requirements:

(A) An applicant for the technician license category of any forensic discipline set forth in this subchapter is not required to fulfill any specific college-level coursework requirements.

(B) An applicant for a Forensic Analyst License limited to forensic biology screening, nucleic acids other than human DNA and/or Forensic Biology Technician is not required to fulfill the Federal Bureau of Investigation's Quality Assurance Standards for Forensic DNA Testing or any other specific college-level coursework requirements.

(e) Requirements Specific to Forensic Science Degree Programs. For a forensic science degree to meet the Minimum Education Requirements set forth in this section, the forensic science degree program must be either accredited by the Forensic Science Education Programs Accreditation Commission (FEPAC) or if not accredited by FEPAC, it must meet the minimum curriculum requirements pertaining to natural science core courses and specialized science courses set forth in the FEPAC Accreditation Standards.

(f) Waiver of Specific Coursework Requirements and/or Minimum Education Requirements for Lateral Hires, Promoting Analysts and Current Employees. Specific coursework requirements and minimum education requirements are considered an integral part of the licensing process; all applicants are expected to meet the requirements of the forensic discipline(s) for which they are applying or to offer sufficient evidence of their qualifications as described below in the absence of specific coursework requirements or minimum education requirements. The Commission Director or Designee may waive one or more of the specific coursework requirements or minimum education requirements outlined in this section for an applicant who:

(1) has five or more years of credible experience in an accredited laboratory in the forensic discipline for which he or she seeks licensure; or

(2) is certified by one or more of the following nationally recognized certification bodies in the forensic discipline for which he or she seeks licensure;

(A) The American Board of Forensic Toxicology;

(B) The American Board of Clinical Chemistry;

(C) The American Board of Criminalistics;

(D) The International Association for Identification; or

(E) The Association of Firearm and Toolmark Examiners; and

(3) provides written documentation of laboratory-sponsored training in the subject matter areas addressed by the specific coursework requirements.

(4) An applicant must request a waiver of specific coursework requirements and/or minimum education requirements at the time the application is filed.

(5) An applicant requesting a waiver from specific coursework requirements and/or minimum education requirements shall file any additional information needed to substantiate the eligibility for the waiver with the application. The Commission Director or Designee shall review all elements of the application to evaluate waiver request(s) and shall grant a waiver(s) to qualified applicants.

(g) General Forensic Analyst Licensing Exam Requirement.

(1) Exam Requirement. An applicant for a Forensic Analyst License must pass the General Forensic Analyst Licensing Exam administered by the Commission.

(A) An applicant is required to take and pass the General Forensic Analyst Licensing Exam one time.

(B) An applicant may take the General Forensic Analyst Licensing Exam no more than three times. If an applicant fails the General Forensic Analyst Licensing Exam or the Modified Gen-

eral Forensic Analyst Licensing Exam three times, the applicant has thirty (30) days from the date the applicant receives notice of the failure to request special dispensation from the Commission as described in subparagraph (C) of this paragraph. Where special dispensation is granted, the applicant has 90 days from the date he or she receives notice the request for exam is granted to successfully complete the exam requirement. However, for good cause shown, the Commission or its Designee at its discretion may waive this limitation.

(C) Requests for Exam. If an applicant fails the General Forensic Analyst Licensing Exam or Modified General Forensic Analyst Licensing Exam three times, the applicant must request in writing special dispensation from the Commission to take the exam more than three times. Applicants may submit a letter of support from their laboratory director or licensing representative and any other supporting documentation supplemental to the written request.

(D) If an applicant sits for the General Forensic Analyst Licensing Exam or the Modified General Forensic Analyst Licensing Exam more than three times, the applicant must pay a $50 exam fee each additional time the applicant sits for the exam beyond the three initial attempts.

(E) Expiration of Provisional License if Special Dispensation Exam Unsuccessful. If the 90-day period during which special dispensation is granted expires before the applicant successfully completes the exam requirement, the applicant's provisional license expires.

(2) Modified General Forensic Analyst Licensing Exam. Technicians in any discipline set forth in this subchapter may fulfill the General Forensic Analyst Licensing Exam requirement by taking a modified exam administered by the Commission.

(3) Examination Requirements for Promoting Technicians. If a technician passes the modified General Forensic Analyst Licensing Exam and later seeks a full Forensic Analyst License, the applicant must complete the portions of the General Forensic Analyst Exam that were not tested on the modified exam.

(4) Credit for Pilot Exam. If an individual passes the Pilot General Forensic Analyst Licensing Exam, regardless of his or her eligibility status for a Forensic Analyst License at the time the exam is taken, the candidate has fulfilled the General Forensic Analyst Licensing Exam Requirement of this section should he or she later become subject to the licensing requirements and eligible for a Forensic Analyst License.

(5) Eligibility for General Forensic Analyst Licensing Exam and Modified General Forensic Analyst Licensing Exam.

(A) Candidates for the General Forensic Analyst Licensing Exam and Modified General Forensic Analyst Licensing Exam must be employees of a crime laboratory accredited under Texas law to be eligible to take the exam.

(B) Student Examinee Exception. A student is eligible for the General Forensic Analyst Licensing Exam one time if the student:

(i) is currently enrolled in an accredited university as defined in §651.202 of this subchapter (relating to Definitions);

(ii) has completed sufficient coursework to be within 24 semester hours of completing the requirements for graduation at the accredited university at which the student is enrolled; and

(iii) designates an official university representative who will proctor and administer the exam at the university for the student.

(C) Crime Laboratory Management and Unaccredited Forensic Discipline Exception. An Employee of a crime laboratory accredited under Texas law who is either part of the crime laboratory's administration or management team or authorized for independent casework in a forensic discipline listed below is eligible for the General Forensic Analyst Licensing Exam and Modified General Forensic Analyst Licensing Exam:

(i) forensic anthropology;

(ii) the location, identification, collection or preservation of physical evidence at a crime scene;

(iii) crime scene reconstruction;

(iv) latent print processing or examination;

(v) digital evidence (including computer forensics, audio, or imaging);

(vi) breath specimen testing under Transportation Code, Chapter 724, limited to analysts who perform breath alcohol calibrations; and

(vii) document examination, including document authentication, physical comparison, and product determination.

(h) Proficiency Monitoring [~~Testing~~] Requirement.

(1) An applicant must demonstrate participation in the employing laboratory's process for intra-laboratory comparison, inter-laboratory comparison, [~~be routinely~~] proficiency testing, or observation-based performance monitoring requirements [~~proficiency-tested~~] in compliance [~~accordance~~] with and on the timeline set forth by the laboratory's accrediting body's proficiency monitoring [~~body proficiency testing~~] requirements as applicable to the Forensic Analyst or Forensic Technician's specific forensic discipline and job duties.

(2) A signed certification by the laboratory's authorized representative that the applicant has satisfied the applicable proficiency monitoring requirements, including any intra-laboratory comparison, inter-laboratory comparison, proficiency testing, or observation-based performance monitoring requirements of the laboratory's accrediting body as of the date of the analyst's application must be provided on the Proficiency Monitoring Certification [~~Proficiency Testing Certification~~] form provided by the Commission. The licensee's authorized representative must designate the specific forensic discipline in which the Forensic Analyst or Forensic Technician actively performs forensic casework or is currently authorized to perform supervised or independent casework by the laboratory or employing entity. [~~For applicants not yet required to be proficiency tested pursuant to the timeline set forth by the accrediting body, the laboratory's authorized representative shall so certify on the form provided by the Commission.~~]

(i) License Term and Fee.

(1) A Forensic Analyst License shall expire two years from the date the applicant is granted a license.

(2) Application Fee. An applicant or licensee shall pay the following fee(s) as applicable:

(A) Initial Application fee of $220 for Analysts and $150 for Technicians/Screeners;

(B) Biennial renewal fee of $200 for Analysts and $130 for Technicians/Screeners;

(C) Temporary License fee of $100;

(D) Provisional License fee of $110 for Analysts and $75 for Technicians/Screeners;

(E) License Reinstatement fee of $220;

(F) *De Minimis* License fee of $200 per ten (10) licenses; or

(G) Uncommon Forensic Analysis License fee of $200 per ten (10) licenses.

(3) An applicant who is granted a provisional license and has paid the required fee will not be required to pay an additional initial application fee if the provisional status is removed within one year of the date the provisional license is granted.

(j) Procedure for Denial of Application and Reconsideration.

(1) Application Review. The Commission Director or Designee must review each completed application and determine whether the applicant meets the qualifications and requirements set forth in this subchapter.

(2) Denial of Application. The Commission, through its Director or Designee, may deny an application if the applicant fails to meet any of the qualifications or requirements set forth in this subchapter.

(3) Notice of Denial. The Commission, through its Director or Designee, shall provide the applicant a written statement of the reason(s) for denial of the application.

(4) Request for Reconsideration. Within twenty (20) days of the date of the notice that the Commission has denied the application, the applicant may request that the Commission reconsider the denial. The request must be in writing, identify each point or matter about which reconsideration is requested, and set forth the grounds for the request for reconsideration.

(5) Reconsideration Procedure. The Commission must consider a request for reconsideration at its next meeting where the applicant may appear and present testimony.

(6) Commission Action on Request. After reconsidering its decision, the Commission may either affirm or reverse its original decision.

(7) Final Decision. The Commission, through its Director or Designee, must notify the applicant in writing of its decision on reconsideration within fifteen (15) business days of the date of its meeting where the final decision was rendered.

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 September 1, 2022.

TRD-202203472
Leigh Tomlin
Associate General Counsel
Texas Forensic Science Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 936-0661

♦ ♦ ♦

37 TAC §651.208

The Texas Forensic Science Commission ("Commission") proposes an amendment to 37 Texas Administrative Code §651.208 to clarify that crime laboratory managers must be actively performing forensic casework and participating in any applicable accreditation monitoring requirements, including intra-laboratory or inter-laboratory comparisons, proficiency testing, or observation-based performance monitoring requirements of the laboratory's accrediting body to continue licensure as a forensic analyst or forensic technician and to correct the number of days before a license expires (from 90 to 60 days) that a licensee can renew a forensic analyst license in the Commission's Learning Management System software program. The amendments are necessary to reflect adoptions made by the Commission at its July 22, 2022 quarterly meeting. The amendments are made in accordance with the Commission's forensic analyst licensing authority under Code of Criminal Procedure, Article 38.01 § 4-a, which directs the Commission to adopt rules to establish the qualifications for a forensic analyst license and the Commission's rulemaking authority under Code of Criminal Procedure, Article 38.01 § 3-a, which directs the Commission to adopt rules necessary to implement Code of Criminal Procedure, Article 38.01.

Fiscal Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. The proposed amendments clarify that current licensure applies only to *currently active* forensic analysts in the State, not individuals who may still be working in a forensic or crime laboratory setting but are not performing forensic analysis. The Commission emphasizes the importance of maintaining proficiency as an analyst or technician performing forensic analysis in any forensic discipline and clarifies the rule to ensure only active, proficient, and competent forensic analysts are licensed by the Commission. The rule does not impose any mandatory requirements.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendments do not impose any direct costs or fees on municipalities in rural communities. The rule emphasizes the importance of maintaining proficiency as an analyst or technician performing forensic analysis in any forensic discipline and clarifies the rule to ensure only active, proficient, and competent forensic analysts are licensed by the Commission. The rule does not impose any new or mandatory requirements.

Public Benefit/Cost Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be further assurance that only active, proficient, and competent forensic analysts may be licensed by the Commission and testifying or performing forensic analysis in Texas criminal cases.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code § 2006.002(c) and (f), Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendments will not have an adverse economic effect on any small or micro business because the rule does not impose any economic costs to these businesses. The rule emphasizes the importance of proficiency as an analyst or technician performing forensic analysis in criminal cases in any forensic discipline and clarifies only active, proficient, and competent forensic analysts may be licensed by the Commission. The rule does not impose any new or mandatory requirements.

Takings Impact Assessment. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has

determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for the first five-year period, implementation of the proposed amendment will have no government growth impact as described in Title 34, Part 1, Texas Administrative Code §11.1. Pursuant to the analysis required by Government Code 2001.221(b), 1) the proposed rule does not create or eliminate a government program; 2) implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions; 3) implementation of the proposed rule does not increase or decrease future legislative appropriations to the agency; 4) the proposed rule does not require a fee; 5) the proposed rule does not create a new regulation; 6) the proposed rule does not increase or decrease the number of individuals subject to the rule's applicability; and 7) the proposed rule has a neutral effect on the state's economy. The amendment does not expand any forensic analyst licensing requirement under the current program, but rather clarifies forensic analysts must be actively performing casework to remain actively licensed by the Commission.

Requirement for Rule Increasing Costs to Regulated Persons. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that there are no anticipated increased costs to regulated persons as the proposed amendments do not impose any new or mandatory requirements to persons or crime laboratories subject to the Commission's jurisdiction.

The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Tomlin, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by October 16, 2022 to be considered by the Commission.

Statutory Authority. The amendment is proposed under Code of Criminal Procedure, Article 38.01 §§ 4-a(c) and (3)-a.

Cross reference to statute. The proposal amends current rule 37 Texas Administrative Code §651.208.

§651.208. Forensic Analyst and Forensic Technician License Renewal

(a) Renewal. The Commission may renew an individual's Forensic Analyst or Forensic Technician License up to 60 [~~90~~] days before to the expiration of the individual's two-year license term.

(b) Expiration. A Forensic Analyst or Forensic Technician License or renewed Forensic Analyst or Forensic Technician License expires two years from the date the initial application was granted.

(c) Effective date. A renewed Forensic Analyst or Forensic Technician License takes effect on the date the licensee's previous license expires.

(d) Application. An applicant for a Forensic Analyst or Forensic Technician License renewal shall complete and submit to the Commission a current Forensic Analyst or Forensic Technician License Renewal Application provided by the Commission, pay the required fee, attach documentation of fulfillment of Continuing Forensic Education and other requirements set forth in this section.[~~,~~]

(e) Proficiency Monitoring Certification Form for Renewal Applicants Employed by an Accredited Laboratory. An applicant for a Forensic Analyst or Forensic Technician License renewal must provide an updated copy of the Commission's Proficiency Monitoring [~~Testing~~] Certification form demonstrating the applicant participates in the laboratory's process for intra-laboratory comparison, inter-laboratory comparison, proficiency testing, or observation-based performance monitoring requirements in compliance with and on the timeline set forth by the laboratory's accrediting body's requirements as applicable to the Forensic Analyst or Forensic Technician's specific forensic discipline and job duties. The form must be:

(1) signed by the licensee's authorized laboratory representative; and

(2) designate the specific forensic discipline in which the Forensic Analyst or Forensic Technician actively performs forensic casework or is currently authorized to perform supervised or independent forensic casework. [~~, and complete the mandatory online legal and professional responsibility update described in this section.~~]

(f) Proficiency Monitoring Certification Form for Renewal Applicants Not Employed at an Accredited Laboratory or at an Accredited Laboratory in a Forensic Discipline Not Covered by the Scope of the Laboratory's Accreditation.

(1) An applicant for a Forensic Analyst or Forensic Technician license renewal who is employed by an entity other than an accredited laboratory or performs a forensic examination or test at an accredited laboratory in a forensic discipline not covered by the scope of the laboratory's accreditation must provide:

(A) an updated copy of the Commission's Proficiency Monitoring Certification form demonstrating the applicant participates in the laboratory or employing entity's process for intra-laboratory comparison, inter-laboratory comparison, proficiency testing, or observation-based performance monitoring requirements in compliance with and on the timeline set forth by the laboratory or employing entity's Commission-approved process for proficiency monitoring as applicable to the Forensic Analyst or Forensic Technician's specific forensic discipline and job duties:

(i) signed by the licensee's authorized laboratory representative; and

(ii) designating the specific forensic discipline in which the Forensic Analyst or Forensic Technician actively performs forensic casework or is currently authorized to perform supervised or independent forensic casework;

(B) written proof of the Forensic Science Commission's approval of the laboratory or employing entity's proficiency monitoring activities or exercise(s) as applicable to the applicant's specific forensic discipline and job duties; and

(C) written documentation of performance in conformance with expected consensus results in compliance with and on the timeline set forth by the laboratory or employing entity's Commission-approved proficiency monitoring activities or exercise(s) as applicable to the applicant's specific forensic discipline and job duties.

(g) [~~(e)~~] Continuing Forensic Education Including Mandatory Legal and Professional Responsibility Update:

(1) Forensic Analyst and Forensic Technician Licensees must complete a Commission-sponsored mandatory legal and professional responsibility update by the expiration of each two-year license cycle as provided by the Commission. Forensic Technicians are not required to complete any other continuing forensic education requirements listed in this section.

(2) Mandatory legal and professional responsibility training topics may include training on current and past criminal forensic legal issues, professional responsibility and human factors, courtroom testimony, disclosure and discovery requirements under state and federal law, and other relevant topics as designated by the Commission.

(3) All forensic analysts shall be required to satisfy the following Continuing Forensic Education Requirements by the expiration of each two-year license cycle:

(A) Completion of thirty-two (32) continuing forensic education hours per 2-year license cycle.

(B) Sixteen (16) hours of the thirty-two (32) must be discipline-specific training, peer-reviewed journal articles, and/or conference education hours. If a licensee is licensed in multiple forensic disciplines, at least eight (8) hours of discipline-specific training in each forensic discipline are required, subject to the provisions set forth in subsection (f) of this section.

(C) The remaining sixteen (16) hours may be general forensic training, peer-reviewed journal articles, and/or conference education hours that include hours credited for the mandatory legal and professional responsibility training.

(4) Continuing forensic education programs will be offered and/or designated by the Commission and will consist of independent, online trainings, readings, and participation in recognized state, regional, and national forensic conferences and workshops.

(5) Approved continuing forensic education hours are applied for credit on the date the program and/or training is delivered.

(h) [~~(f)~~] Timeline for Exemption from Supplemental Continuing Forensic Education Requirements. Where a current licensee adds a forensic discipline to the scope of his or her license, the following continuing forensic education requirements apply for the supplemental forensic discipline:

(1) If the supplemental forensic discipline is added less than six (6) months prior to the expiration of the analyst's current license, no additional discipline-specific training is required for the supplemental forensic discipline.

(2) If the supplemental forensic discipline is added six (6) months or more but less than eighteen (18) months prior to the expiration of the analyst's current license, four (4) additional discipline-specific training hours are required for the supplemental forensic discipline.

(3) If the supplemental forensic discipline is added eighteen (18) months or more prior to the expiration of the analyst's current license, eight (8) additional discipline-specific training hours are required for the supplemental forensic discipline.

(i) [~~(g)~~] If an applicant fails to fulfill any or all of the requirements pertaining to license renewal, continuing forensic education and the mandatory legal and professional responsibility update, the applicant may apply to the Commission for special dispensation on a form to be provided on the Commission's website. Upon approval by the Commission, the applicant may be allowed an extension of time to fulfill remaining continuing forensic education requirements.

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 September 1, 2022.

TRD-202203470
Leigh Tomlin
Associate General Counsel
Texas Forensic Science Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 936-0661

♦ ♦ ♦

37 TAC §651.222

The Texas Forensic Science Commission ("Commission") proposes amendments rule to 37 Texas Administrative Code §651.222 to clarify that voluntary licensees working at accredited crime laboratories in a forensic discipline not covered by the crime laboratory's scope of accreditation must comply with the same monitoring requirements (including intra-laboratory comparison, inter-laboratory comparison, proficiency testing, or observation-based performance monitoring) of voluntary licensees working in unaccredited crime laboratories. The amendments are necessary to reflect adoptions made by the Commission at its July 22, 2022 quarterly meeting. The amendments are made in accordance with the Commission's forensic analyst licensing authority under Tex. Code. Crim. Proc. art. 38.01 § 4-a(c) to establish voluntary licensing programs for forensic examinations or tests not subject to accreditation requirements and the Commission's rulemaking authority under Code of Criminal Procedure, Article 38.01 § 3-a, which directs the Commission to adopt rules necessary to implement Code of Criminal Procedure, Article 38.01.

Fiscal Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendments will be in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the amendments. The proposed amendments clarify the requirements for monitoring requirements applicable to licensees who are practicing in forensic disciplines not required to be accredited in a laboratory otherwise accredited in different forensic disciplines.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendments do not impose any direct costs or fees on municipalities in rural communities. There are no mandatory requirements for the voluntary forensic analyst licensing program, or the amendments established herein.

Public Benefit/Cost Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit is better clarification for forensic analysts and other criminal justice stakeholders on the requirements for individual analyst accreditation monitoring compliance to maintain licensure as a Forensic Analyst in Texas.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code § 2006.002(c) and (f), Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendments will not have an adverse economic effect on any small or micro business because the rule does not impose any economic costs to these businesses. There are no mandatory requirements under the Commission's volun-

tary forensic analyst licensing program or under the rule amendments proposed herein.

Takings Impact Assessment. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043. The proposed amendments clarify the requirements for monitoring applicable to licensees who are practicing in unaccredited disciplines in a laboratory otherwise accredited in different forensic disciplines. There are no mandatory requirements under the Commission's voluntary forensic analyst licensing program or under the rule amendments proposed herein.

Government Growth Impact Statement. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for the first five-year period, implementation of the proposed amendment will have no government growth impact as described in Title 34, Part 1, Texas Administrative Code §11.1. Pursuant to the analysis required by Government Code 2001.221(b), 1) the proposed amendments do not create or eliminate a government program; 2) implementation of the proposed amendments do not require the creation of new employee positions or the elimination of existing employee positions; 3) implementation of the proposed amendments do not increase or decrease future legislative appropriations to the agency; 4) the proposed amendments do not require a fee; 5) the proposed amendments do not create a new regulation; 6) the proposed amendments do not increase or decrease the number of individuals subject to the rule's applicability; and 7) the proposed amendments have a neutral effect on the state's economy. The amendments do not expand any mandatory or voluntary forensic analyst licensing requirement under the current programs, but rather provide clarity that voluntary licensees working at accredited crime laboratories in forensic disciplines not covered by the crime laboratory's scope of accreditation must comply with the same accreditation monitoring requirements of voluntary licensees working in unaccredited crime laboratories to remain proficient in their forensic disciplines.

Requirement for Rule Increasing Costs to Regulated Persons. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that there are no anticipated increased costs to regulated persons as the proposed amendments do not impose any fees or costs.

The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Tomlin, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by October 16, 2022 to be considered by the Commission.

Statutory Authority. The amendments are proposed under Tex. Code Crim. Proc. art 38.01 §§ 4-a(c) and (3)-a.

Cross reference to statute. The proposal amends rule 37 Texas Administrative Code §651.222.

§651.222. Voluntary Forensic Analyst Licensing Requirements Including Eligibility, License Term, Fee and Procedure for Denial of Initial Application or Renewal Application and Reconsideration

(a) Issuance. The Commission may issue an individual's voluntary forensic analyst license for forensic examinations or tests not subject to accreditation under this section.

(b) The following forensic disciplines are eligible for a voluntary forensic analyst license:

(1) forensic anthropology; and

(2) document examination, including document authentication, physical comparison, and product determination.

(c) Application. Before being issued a voluntary forensic analyst license, an applicant shall complete and submit to the Commission a current forensic analyst license application and provide documentation that he or she has satisfied all applicable requirements set forth under this section.

(d) Minimum Education Requirements.

(1) Document Examination Analyst. An applicant for a voluntary forensic analyst license in document examination must have a high school diploma or equivalent degree or higher (i.e., baccalaureate or advanced degree).

(2) Forensic Anthropologist. An applicant for a voluntary forensic analyst license in forensic anthropology must be certified by the American Board of Forensic Anthropology (ABFA), including fulfillment of any minimum education requirements required to comply with and maintain ABFA certification at the time of the candidate's application for a license.

(3) Foreign/Non-U.S. degrees. The Commission shall recognize equivalent foreign, non-U.S. baccalaureate or advanced degrees. The Commission reserves the right to charge licensees a reasonable fee for credential evaluation services to assess how a particular foreign degree compares to a similar degree in the United States. The Commission may accept a previously obtained credential evaluation report from an applicant or licensee in fulfillment of the degree comparison assessment.

(e) Specific Coursework Requirements.

(1) General Requirement for Statistics. An applicant for any voluntary forensic analyst license must have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission.

(2) Forensic Discipline Specific Coursework Requirements.

(A) Document Examination Analyst. An applicant for a voluntary forensic analyst license must have a three-semester credit hour (or equivalent) college-level statistics course from an accredited university or a program approved by the Commission. No other specific college-level coursework is required.

(B) Forensic Anthropologist. An applicant for a voluntary forensic analyst license in forensic anthropology must be certified by the American Board of Forensic Anthropology (ABFA), including fulfillment of any specific coursework requirements required to comply with and maintain ABFA certification at the time of the candidate's application for a license.

(3) Exemptions from Specific Coursework Requirements. Previously Licensed Document Examination Analyst Exemption. An applicant for a voluntary forensic analyst license previously licensed by the Commission when licensure was mandatory for the discipline is exempt from any specific coursework requirements in this subsection.

(f) General Forensic Analyst Licensing Exam Requirement for Voluntary License Applicants.

(1) Exam Requirement. An applicant for a voluntary forensic analyst license must pass the General Forensic Analyst Licensing Exam administered by the Commission.

(A) An applicant is required to take and pass the General Forensic Analyst Licensing Exam one time.

(B) An applicant may take the General Forensic Analyst Licensing Exam no more than three times. If an applicant fails the General Forensic Analyst Licensing Exam three times, the applicant has thirty (30) days from the date the applicant receives notice of the failure to request special dispensation from the Commission as described in subparagraph (C) of this paragraph. Where special dispensation is granted, the applicant has 90 days from the date he or she receives notice the request for exam is granted to successfully complete the exam requirement. However, for good cause shown, the Commission or its Designee at its discretion may waive this limitation

(C) Requests for Exam. If an applicant fails the General Forensic Analyst Licensing Exam three times, the applicant must request in writing special dispensation from the Commission to take the exam more than three times. Applicants may submit a letter of support from their laboratory director or licensing representative and any other supporting documentation supplemental to the written request.

(D) If an applicant sits for the General Forensic Analyst Licensing Exam more than three times, the applicant must pay a $50 exam fee each additional time the applicant sits for the exam beyond the three initial attempts.

(2) Credit for Pilot Exam. If an individual passes a Pilot General Forensic Analyst Licensing Exam, regardless of his or her eligibility status for a voluntary or mandatory Forensic Analyst License at the time the exam is taken, the candidate has fulfilled the General Forensic Analyst Licensing Exam Requirement of this subsection.

(g) Proficiency Monitoring [~~Proficiency Testing~~] Requirement.

(1) Requirement for Applicants Employed by an Accredited Laboratory. An applicant who is employed by an accredited laboratory must demonstrate the applicant participates in the laboratory's process for intra-laboratory comparison, inter-laboratory comparison, proficiency testing, or observation-based performance monitoring requirements in compliance with and on the timeline set forth by the laboratory's accrediting body's proficiency monitoring requirements as applicable to the Forensic Analyst's or Forensic Technician's specific forensic discipline and job duties [~~be routinely proficiency-tested in accordance with and on the timeline set forth by the laboratory's accrediting body proficiency testing requirements~~].

(2) Requirement for Applicants Not Employed at an Accredited Laboratory or at an Accredited Laboratory in an Unaccredited Forensic Discipline. An applicant who is employed by an entity other than an accredited laboratory or performs a forensic examination or test at an accredited laboratory in a forensic discipline not covered by the scope of the laboratory's accreditation must demonstrate the applicant participates in the laboratory or employing entity's process for intra-laboratory comparison, inter-laboratory comparison, proficiency testing, or observation-based performance monitoring requirements in compliance with and on the timeline set forth by the laboratory or employing entity's Commission-approved process for proficiency monitoring as applicable to the Forensic Analyst's or Forensic Technician's specific forensic discipline and job duties. [~~must provide proof of successful completion of annual external proficiency testing. If no external proficiency testing is available in the forensic discipline for which the applicant seeks licensure, the applicant must provide proof of successful completion of inter-organizational comparison exercise(s) established with at least one other entity.~~]

(3) A signed certification by the laboratory or entity's authorized representative that the applicant has satisfied the applicable proficiency monitoring requirements, including any intra-laboratory comparison, inter-laboratory comparisons, proficiency testing, or observation-based performance monitoring requirements in paragraph (1) or (2) of this subsection as of the date of the analyst's application must be provided on the Proficiency Monitoring [~~Proficiency Testing~~] Certification form provided by the Commission. The licensee's authorized representative must designate the specific forensic discipline in which the Forensic Analyst or Forensic Technician actively performs forensic casework or is currently authorized to perform supervised or independent casework. [~~For applicants not yet required to be proficiency tested pursuant to the timeline set forth by the accrediting body, the laboratory's authorized representative shall so certify on the form provided by the Commission.~~]

(4) Applicants [~~not~~] employed by an entity other than an accredited laboratory or performing forensic examinations or tests at an accredited laboratory in a discipline not covered by the scope of the laboratory or employing entity's accreditation must include [~~submit~~] written proof of the Forensic Science Commission's approval described in (5) of this subsection [~~successful completion of external proficiency testing from a Commission-recognized proficiency test provider~~] with the Proficiency Monitoring Certification form required in (3) of this subsection. The applicant must include written documentation of performance in conformance with expected consensus results for the laboratory or employing entity's Commission-approved activities or exercise(s) as applicable to the applicant's specific forensic discipline and job duties in compliance with and on the timeline set forth by the laboratory or employing entity's Commission-approved process for proficiency monitoring.

(5) Applicants [~~not~~] employed by an entity other than an accredited laboratory or performing forensic examinations or tests at an accredited laboratory in a discipline not covered by the scope of the laboratory or employing entity's accreditation seeking approval of a proficiency monitoring activities or exercise(s) [~~inter-organizational comparison exercise(s)~~] must seek prior approval of the activities or exercise(s) from the Commission [~~and provide written documentation that the applicant performed in conformance with expected consensus results for the comparison exercise(s)~~] in compliance with and on the timeline set forth by the laboratory or employing entity's Commission-approved process for proficiency monitoring.

(h) License Term and Fee.

(1) A Voluntary Forensic Analyst license shall expire two years from the date the applicant is granted a license.

(2) Application Fee. A voluntary Forensic Analyst license applicant or current voluntary licensee shall pay the following fee(s) as applicable:

(A) Initial Application fee of $220;

(B) Biennial renewal fee of $200;

(C) License Reinstatement fee of $220; or

(D) Special Exam Fee of $50 for General Forensic Analyst Licensing Exam, required only if testing beyond the three initial attempts; and

(i) Voluntary Forensic Analyst License Renewal. Renewal of a Voluntary Forensic Analyst License. Applicants for renewal of a Voluntary Forensic Analyst License must comply with §651.208 (Forensic Analyst and Forensic Technician License Renewal) of this subchapter.

(j) Voluntary Forensic Analyst License Expiration and Reinstatement. Expiration and Reinstatement of a Voluntary Forensic Analyst License. A Voluntary Forensic Analyst must comply with § 651.209 of this subchapter (Forensic Analyst and Forensic Technician License Expiration and Reinstatement).

(k) Procedure for Denial of Initial Application or Renewal Application and Reconsideration.

(1) Application Review. The Commission Director or Designee must review each initial application or renewal application and determine whether the applicant meets the qualifications and requirements set forth in this subchapter. If a person who has applied for a voluntary forensic analyst license does not meet the qualifications or requirements set forth in this subchapter and has submitted a complete application, the Director or Designee must consult with members of the Licensing Advisory Committee before denying the application.

(2) Denial of Application. The Commission, through its Director or Designee, may deny an initial or renewal application if the applicant fails to meet any of the qualifications or requirements set forth in this subchapter.

(3) Notice of Denial. The Commission, through its Director or Designee, shall provide the applicant a written statement of the reason(s) for denial of the initial or renewal application.

(4) Request for Reconsideration. Within twenty (20) days of the date of the notice that the Commission has denied the application, the applicant may request that the Commission reconsider the denial. The request must be in writing, identify each point or matter about which reconsideration is requested, and set forth the grounds for the request for reconsideration.

(5) Reconsideration Procedure. The Commission must consider a request for reconsideration at its next meeting where the applicant may appear and present testimony.

(6) Commission Action on Request. After reconsidering its decision, the Commission may either affirm or reverse its original decision.

(7) Final Decision. The Commission, through its Director or Designee, must notify the applicant in writing of its decision on reconsideration within fifteen (15) business days of the date of its meeting where the final decision was rendered.

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 September 1, 2022.

TRD-202203471
Leigh Tomlin
Associate General Counsel
Texas Forensic Science Commission
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 936-0661

♦ ♦ ♦

TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 3. RESPONSIBILITIES OF STATE FACILITIES

SUBCHAPTER G. ELECTRONIC MONITORING

40 TAC §§3.701 - 3.708

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 Texas Administrative Code (TAC) Title 40, Part 1, and will be repealed or administratively transferred to 26 TAC, Health and Human Services, as appropriate. Until such action is taken, the rules in 40 TAC, 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 40 TAC Part 1. Therefore, the Executive Commissioner of HHSC proposes the repeal of 40 TAC Chapter 3, Subchapter G, Electronic Monitoring, which comprises of §3.701, concerning Electronic Monitoring; §3.702, concerning Information Regarding Electronic Monitoring; §3.703, concerning Request to Conduct Electronic Monitoring; §3.704, concerning Annual Consent of Other Individuals; §3.705, concerning Capacity to Request or Consent to Electronic Monitoring; §3.706, concerning Conducting Electronic Monitoring; §3.707, concerning Required Facility Notice and Accommodation; and §3.708, concerning Reporting Abuse, Neglect, or Exploitation.

BACKGROUND AND PURPOSE

The proposed repeal of 40 TAC Chapter 3, Subchapter G deletes the rules as no longer necessary because content of the rules is being proposed in 26 TAC Chapter 965, Electronic Monitoring In An Individual's Bedroom In A State Supported Living Center, simultaneously in this issue of the *Texas Register.*

SECTION-BY-SECTION

The rules in 40 TAC Chapter 3, Subchapter G are no longer necessary and is repealed. New rules regarding electronic monitoring are proposed in 26 TAC Chapter 965.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the repeals will be in effect, there is no 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 repeals will not create or eliminate a government program;

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

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

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

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

(6) the proposed repeals will repeal existing rules;

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

(8) the proposed repeals 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 no adverse economic effect on small businesses, micro-businesses, or rural communities because the repeals apply only to state government.

LOCAL EMPLOYMENT IMPACT

The proposed repeals will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these repeals because the repeals do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Laura Cazabon-Braly, Associate Commissioner for State Supported Living Centers, has determined that for each year of the first five years the repeals are in effect, the public benefit will be easier to understand rules regarding electronic monitoring, which will be adopted in 26 TAC Chapter 965.

Trey Wood has also determined that for the first five years the repeals are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed repeals because the rules apply only to state government.

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 HHSC, Health and Specialty Care System Mail Code E619, P.O. Box 13247, Austin, Texas 78711-3247, or by email to Healthandspecialtycare@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 22R030" in the subject line.

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, Texas Health and Safety Code §555.154, which requires the Executive Commissioner to prescribe by rule the forms to be used to notify residents upon admission of the option to conduct electronic monitoring, Texas Health and Safety Code §555.155, which requires the Executive Commissioner to adopt guidelines to determine who may request electronic monitoring on behalf of a resident, Texas Health and Safety Code §555.156, which requires the Executive Council to adopt rules regarding the retention of consent forms for electronic monitoring, and Texas Health and Safety Code §555.160, which requires the Executive Council to prescribe the format and content of a notice posted at the facility advising that the rooms of some residents may be monitored electronically.

The repeals affect Texas Government Code §531.0055 and Texas Health and Safety Code §§555.154, 555.155, 555.156, and 555.160.

§3.701. Electronic Monitoring.

§3.702. Information Regarding Electronic Monitoring.

§3.703. Request to Conduct Electronic Monitoring.

§3.704. Annual Consent of Other Individuals.

§3.705. Capacity to Request or Consent to Electronic Monitoring.

§3.706. Conducting Electronic Monitoring.

§3.707. Required Facility Notice and Accommodation.

§3.708. Reporting Abuse, Neglect, or Exploitation.

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 31, 2022.

TRD-202203348
Karen Ray
Chief Counsel
Department of Aging of Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3049

♦ ♦ ♦

CHAPTER 8. CLIENT CARE--INTELLECTUAL DISABILITY SERVICES

SUBCHAPTER L. HUMAN IMMUNODEFICIENCY VIRUS (HIV) PREVENTION, TESTING, AND TREATMENT

40 TAC §§8.281 - 8.297

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 Texas Administrative Code (TAC) Title 40, Part 1, and will be repealed or administratively transferred to 26 TAC, Health and Human Services, as appropriate. Until such action is taken, the rules in 40 TAC 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 40 TAC Part 1. Therefore, the Executive Commissioner of HHSC proposes the repeal of 40 TAC Chapter 8, Subchapter L, Human Immunodeficiency Virus (HIV) Prevention, Testing, and Treatment, which comprises of §8.281, concerning Purpose; §8.282, concerning Application; §8.283, concerning Definitions; §8.284, concerning Policy Overview; §8.285, concerning Education; §8.286, concerning Screening for HIV Antibody; §8.287, concerning Counseling; §8.288, concerning Confidentiality of Test Results; §8.289, concerning Documentation of Test Results; §8.290, concerning Required Reporting of Test Results; §8.291, concerning Management of Exposure to Blood/Body Substances; §8.292, concerning Limitation of Client Activity; §8.293, concerning Personnel Issues; §8.294, concerning Responsibility and Resources; §8.295, concerning Exhibits; §8.296, concerning Reference; and 8.297, concerning Distribution.

BACKGROUND AND PURPOSE

The purpose of the proposal is to repeal HHSC rules from 40 TAC Chapter 8, Subchapter L. The proposed repeals delete the rules as no longer necessary because content of the rules have been added to proposed new rules in 26 TAC Chapter 985, Human Immunodeficiency Virus Prevention and Treatment in State Supported Living Centers. The new rules are proposed elsewhere in this issue of the *Texas Register.*

SECTION-BY-SECTION SUMMARY

The rules in 40 TAC Chapter 8, Subchapter L are no longer necessary and is repealed. New rules regarding HIV prevention and treatment in State Supported Living Centers are proposed in 26 TAC Chapter 985.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the repeals will be in effect, enforcing or administering the repeals do 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 repeals will be in effect:

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

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

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

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

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

(6) the proposed repeals will repeal existing rules;

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

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

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

Trey Wood has also determined there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The repeals do not apply to small or micro-businesses, or rural communities.

LOCAL EMPLOYMENT IMPACT

The proposed repeals will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these repeals because the repeals do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Laura Cazabon-Braly, Associate Commissioner for State Supported Living Centers (SSLCs), has determined that for each year of the first five years the repeals are in effect, the public benefit will be greater ease in finding HHSC rules.

Trey Wood has also determined that for the first five years the repeals are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed repeals because the rules because the repeals apply only to the State of Texas and therefore do not affect any other persons.

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 HHSC, Health and Specialty Care System, Mail Code E-619, P.O. Box 13247, Austin, Texas 78711-3247, or by email to HealthandSpecialtyCare@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 Repeal 22R029" in the subject line.

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 §531.008(c)(5), which requires the Executive Commissioner to establish a facilities division for the purpose of administering state facilities, including state hospitals and state supported living centers, and Texas Health and Safety Code §531.001(h), which provides that the Executive Commissioner is responsible for the planning, policy development, and resource development and allocation for and oversight of mental health and intellectual disability services in this state.

The repeals affect Texas Government Code §531.0055 and Texas Health and Safety Code §531.001(h).

§8.281. Purpose.
§8.282. Application.
§8.283. Definitions.
§8.284. Policy Overview.

§8.285. Education.
§8.286. Screening for HIV Antibody.
§8.287. Counseling.
§8.288. Confidentiality of Test Results.
§8.289. Documentation of Test Results.
§8.290. Required Reporting of Test Results.
§8.291. Management of Exposure to Blood/Body Substances.
§8.292. Limitation of Client Activity.
§8.293. Personnel Issues.
§8.294. Responsibility and Resources.
§8.295. Exhibits.
§8.296. References.
§8.297. Distribution.

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 31, 2022.

TRD-202203406
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-3049

♦ ♦ ♦

CHAPTER 9. INTELLECTUAL DISABILITY SERVICES--MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

SUBCHAPTER D. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)

40 TAC §§9.151, 9.152, 9.154 - 9.170, 9.186, 9.189 - 9.192

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 Texas Administrative Code (TAC), Title 40, Part 1, and will be repealed or administratively transferred to 26 TAC, 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. Therefore, the Executive Commissioner of HHSC proposes the repeal of §§9.151, 9.152, 9.154 - 9.170, 9.186, and 9.189 - 9.192 in 40 TAC Chapter 9, Subchapter D related to the Home and Community-based Services (HCS) Program and Community First Choice (CFC).

BACKGROUND AND PURPOSE

The purpose of the proposal is to repeal obsolete rules for the HCS Program, a Medicaid waiver program authorized under §1915(c) of the Social Security Act that provides services to individuals with intellectual disabilities. The rules in 40 TAC Chapter 9, Subchapter D govern the provision of HCS Program services. HHSC is proposing new rules regarding the HCS Program in 26 TAC Chapter 263 elsewhere in this issue of the *Texas Register.* The proposed rules address certain aspects of the HCS Program, including eligibility criteria; the maintenance of the HCS interest list; the process for the enrollment of applicants in the HCS Program; renewal and revision of an individual plan of care; requirements for reimbursement of a program provider; and requirements for a local intellectual and developmental disability authority in providing service coordination; and permanency planning requirements. Therefore, the rules in 40 TAC Chapter 9, Subchapter D that address the topics covered by the proposed new rules in 26 TAC Chapter 263 are no longer needed.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §§9.151, 9.152, 9.154 - 9.170, 9.186, and 9.189 - 9.192 removes rules covering topics that are addressed in new proposed rules.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the sections will be repealed:

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

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

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

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

(5) the proposed repeals will not create new rules;

(6) the proposed repeals will repeal existing rules;

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

(8) the proposed repeals 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 no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the proposed repeals. The proposed repeals do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the repealed rules.

LOCAL EMPLOYMENT IMPACT

The proposed repeals will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to the proposed repeals because the repeals do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Stephanie Stephens, State Medicaid Director, has determined that for each year of the first five years the repeals are in effect, the public will benefit from clearer rules that explain the policies and requirements of the HCS Program.

Trey Wood has also determined that for the first five years the repeals are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed repeals because the repeals will not require these persons to alter their current business practices.

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 HEARING

A public hearing to receive comments on this proposal will be held via GoToWebinar on September 26, 2022 at 1:00 p.m. (central time). The link to register for the GoToWebinar meeting is https://attendee.gotowebinar.com/register/5797564706801514763.

Persons requiring further information, special assistance, or accommodations should contact Olu Oguntade at (512) 438-4478.

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 HHSRulesCoordinationOffice@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 21R058" in the subject line.

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the HCS Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§9.151. Purpose.

§9.152. Application.

§9.154. Description of the HCS Program and CFC.

§9.155. Eligibility Criteria and Suspension of HCS Program Services and of CFC Services.

§9.156. Calculation of Co-payment.

§9.157. HCS Interest List.

§9.158. Process for Enrollment of Applicants.

§9.159. IPC.

§9.160. DADS Review of a Proposed IPC.

§9.161. LOC. Determination.

§9.162. Lapsed LOC.

§9.163. LON Assignment.

§9.164. DADS' Review of LON.

§9.165. Reconsideration of LON Assignment.

§9.166. Renewal and Revision of an IPC.

§9.167. Permanency Planning.

§9.168. CDS Option.

§9.169. Fair Hearing.

§9.170. Reimbursement.

§9.186. Program Provider's Right to Administrative Hearing.

§9.189. Referral to DFPS.

§9.190. LIDDA Requirements for Providing Service Coordination in the HCS Program.

§9.191. LIDDA Compliance Review.

§9.192. Service Limits.

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 September 1, 2022.

TRD-202203441
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-4478

♦ ♦ ♦

SUBCHAPTER N. TEXAS HOME LIVING (TXHML) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)

40 TAC §§9.551, 9.552, 9.554, 9.556, 9.558, 9.560 - 9.563, 9.566 - 9.568, 9.570, 9.571, 9.573 - 9.575, 9.582, 9.583

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 Texas Administrative Code (TAC) Title 40, Part 1, and will be repealed or administratively transferred to 26 TAC, Health and Human Services, as appropriate. Until such action is taken, the rules in 40 TAC, 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 40 TAC, Part 1. Therefore, the Executive Commissioner of HHSC proposes the repeal of §§9.551, 9.552, 9.554, 9.556, 9.558, 9.560 - 9.563, 9.566 - 9.568, 9.570, 9.571, 9.573 - 9.575, 9.582 and 9.583 in 40 TAC Chapter 9, Subchapter N, concerning Texas Home Living (TxHmL) Program and Community First Choice (CFC).

BACKGROUND AND PURPOSE

The purpose of the proposal is to repeal obsolete rules for the TxHmL Program, a Medicaid waiver program authorized under §1915(c) of the Social Security Act that provides services to individuals with intellectual disabilities. The rules in 40 TAC Chapter 9, Subchapter N govern the provision of TxHmL Program services. HHSC is proposing new rules regarding the TxHmL Program in 26 TAC Chapter 262 elsewhere in this issue of the *Texas Register.* The proposed rules address certain aspects of the TxHmL Program, including eligibility criteria; the maintenance of the TxHmL interest list; the process for the enrollment of applicants in the TxHmL Program; renewal and revision of an individual plan of care; requirements for reimbursement of a program provider; and requirements for a local intellectual and developmental disability authority in providing service coordination; and permanency planning requirements. Therefore, the rules in 40 TAC Chapter 9, Subchapter N that address the topics covered by the proposed new rules in 26 TAC Chapter 262 are no longer needed.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §§9.551, 9.552, 9.554, 9.556, 9.558, 9.560 - 9.563, 9.566 - 9.568, 9.570, 9.571, 9.573 - 9.575, 9.582 and 9.583 removes rules covering topics that are addressed in the proposed new rules in 26 TAC Chapter 262.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the sections will be repealed:

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

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

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

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

(5) the proposed repeals will not create new rules;

(6) the proposed repeals will repeal existing rules;

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

(8) the proposed repeals 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 no adverse economic effect on small businesses, micro-businesses, or rural communities required to comply with the proposed repeals. The proposed repeals do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the repealed rules.

LOCAL EMPLOYMENT IMPACT

The proposed repeals will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to the proposed repeals because the repeals do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Stephanie Stephens, State Medicaid Director, has determined that for each year of the first five years the repeals are in effect, the public will benefit from clearer rules that explain the policies and requirements of the TxHmL Program.

Trey Wood has also determined that for the first five years the repeals are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed repeals because the repeals will not require these persons to alter their current business practices.

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 HEARING

A public hearing to receive comments on this proposal will be held via GoToWebinar on September 26, 2022 at 1:00 p.m. (central time). The link to register for the GoToWebinar meeting is https://attendee.gotowebinar.com/register/5797564706801514763.

Persons requiring further information, special assistance, or accommodations should contact Olu Oguntade at (512) 438-4478.

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 701 W. 51st Street, Austin, Texas 78751; or emailed to HHSRulesCoordinationOffice@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 21R057" in the subject line.

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the HCS and TxHmL Programs.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§9.551. Purpose.
§9.552. Application.
§9.554. Description of the TxHmL Program and CFC.

§9.556. Eligibility Criteria for TxHmL Program Services and CFC Services.

§9.558. Individual Plan of Care (IPC).

§9.560. Level of Care (LOC) Determination.

§9.561. Lapsed Level of Care (LOC).

§9.562. Level of Need (LON) Assignment.

§9.563. DADS Review of Level of Need (LON).

§9.566. TxHmL Interest List.

§9.567. Process for Enrollment.

§9.568. Revisions and Renewals of Individual Plans of Care (IPCs), Levels of Care (LOCs), and Levels of Need (LONs) for Enrolled Individuals.

§9.570. Termination and Suspension of TxHmL Program Services and CFC Services.

§9.571. Fair Hearings.

§9.573. Reimbursement.

§9.574. Record Retention.

§9.575. Program Provider's Right to Administrative Hearing.

§9.582. Compliance with TxHmL Program Principles for LIDDAs.

§9.583. TxHmL Program Principles for LIDDAs.

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 31, 2022.

TRD-202203394

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: October 16, 2022

For further information, please call: (512) 438-4478

♦ ♦ ♦

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 and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC proposes the repeal of §§42.101 - 42.105, 42.201, 42.202, 42.211 - 42.217, 42.220, 42.221, 42.223, 42.231, 42.232, 42.241 - 42.249, 42.251, 42.252, 42.301, 42.401 - 42.411, 42.501 - 42.511, 42.601 - 42.606, 42.611 - 42.632, 42.641, and 42.651 in Texas Administrative Code Title 40 (40 TAC), Part 1, Chapter 42, concerning Deaf Blind with Multiple Disabilities (DBMD) Program and Community First Choice (CFC) Services.

BACKGROUND AND PURPOSE

The purpose of the proposal is to repeal all of the rules in 40 TAC Chapter 42. These rules govern the provision of DBMD Program services. The DBMD Program is a Medicaid waiver program authorized under §1915(c) of the Social Security Act. HHSC is proposing new rules governing the DBMD Program in 26 TAC Chapter 260 elsewhere in this issue of the *Texas Register.*

SECTION-BY-SECTION SUMMARY

The proposed repeal of 40 TAC, Chapter 42 removes rules governing the DBMD Program. New rules governing the DBMD Program are being proposed in 26 TAC Chapter 260.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

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

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

(5) the proposed repeals will not create new rules;

(6) the proposed repeals will repeal existing rules;

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

(8) the proposed repeals 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 no adverse economic effect on small businesses or micro-businesses to comply with the proposed repeals. The proposed repeals do not impose any additional costs on small businesses or micro-businesses that are required to comply with the rules. No rural communities contract with HHSC to be a DBMD program provider.

LOCAL EMPLOYMENT IMPACT

The proposed repeals will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to the proposed repeals because the repeals do not impose a cost on regulated persons.

PUBLIC BENEFIT AND COSTS

Stephanie Stephens, State Medicaid Director, has determined that for each year of the first five years the repeals are in effect, the public will benefit from clearer rules that explain the policies and requirements of the DBMD Program.

Trey Wood has also determined that for the first five years the repeals are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed repeals because the repeals will not require these persons to alter their current business practices.

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 HEARING

A public hearing to receive comments on this proposal will be held via GoToWebinar on September 26, 2022 at 1:00 p.m. (central time). The link to register for the webinar meeting is https://attendee.gotowebinar.com/register/5797564706801514763.

Persons requiring further information, special assistance, or accommodations should contact Kayatta Thomas at (737) 256-8490.

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 701 W. 51st Street, Austin, Texas 78751; or e-mailed to HHSRulesCoordinationOffice@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 21R134" in the subject line.

SUBCHAPTER A. INTRODUCTION

40 TAC §§42.101 - 42.105

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.101. Purpose.

§42.102. Application.

§42.103. Definitions.

§42.104. Description of Deaf Blind with Multiple Disabilities (DBMD) Waiver Program and CFC.

§42.105. Excluded Services.

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 31, 2022.

TRD-202203352
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER B. ELIGIBILITY, ENROLLMENT, AND REVIEW
DIVISION 1. ELIGIBILITY

40 TAC §42.201, §42.202

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.201. Eligibility Criteria for DBMD Program Services and CFC Services.

§42.202. DBMD Interest List.

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 31, 2022.

TRD-202203353
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 2. ENROLLMENT PROCESS

40 TAC §§42.211 - 42.217

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.211. Written. Offer of Enrollment in the DBMD Program.

§42.212. Process for Enrollment of an Individual.

§42.213. Program Provider Cannot Ensure Individual's Health and Welfare.
§42.214. Development of Enrollment Individual Plan of Care (IPC).
§42.215. Development of Enrollment Individual Program Plan (IPP).
§42.216. HHSC's Review of Request for Enrollment.
§42.217. Consumer Directed Services (CDS) Option.
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 31, 2022.

TRD-202203355
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 3. REVIEW

40 TAC §§42.220, 42.221, 42.223

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.220. Tracking Annual Renewal of an ID/RC Assessment and an IPC.
§42.221. Utilization Review of an IPC by HHSC.
§42.223. Renewal and Revision of an IPC and IPP.
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 31, 2022.

TRD-202203356
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 4. TRANSFER BETWEEN PROGRAM PROVIDERS

40 TAC §42.231, §42.232

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.231. Coordination of Transfers.
§42.232. Personal Leave for Individual Receiving Licensed Assisted Living or Licensed Home Health Assisted Living.
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 31, 2022.

TRD-202203357
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 5. DENIAL, SUSPENSION, REDUCTION, AND TERMINATION

40 TAC §§42.241 - 42.249

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.241. Denial of Request for Enrollment in the DBMD Program or of a DBMD Program Service or a CFC Service.
§42.242. Suspension of DBMD Program Services and CFC Services.
§42.243. Reduction of a DBMD Program Service or a CFC Service.
§42.244. Termination of DBMD Program Services and CFC Services With Advance Notice Due to Ineligibility or Leave from the State.
§42.245. Termination of DBMD Program Services and CFC Services With Advance Notice Due to Non-compliance with Mandatory Participation Requirements.
§42.246. Termination of DBMD Program Services and CFC Services Without Advance Notice.
§42.247. Termination of DBMD Program Services and CFC Services Without Advance Notice Due to Behavior Causing Immediate Jeopardy.
§42.248. Offering Access to Other Services.
§42.249. Individual Whose DBMD Program Services Are Terminated May Request Name be Added to DBMD Interest List.
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 31, 2022.

TRD-202203358
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 6. RIGHTS AND RESPONSIBILITIES OF AN INDIVIDUAL

40 TAC §42.251, §42.252

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.251. Individual's Right to a Fair Hearing.
§42.252. Mandatory Participation Requirements of an Individual.
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 31, 2022.

TRD-202203360
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER C. PROGRAM PROVIDER ENROLLMENT

40 TAC §42.301

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeal affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.301. Program Provider Compliance with Rules.
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 31, 2022.

TRD-202203361
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER D. ADDITIONAL PROGRAM PROVIDER PROVISIONS

40 TAC §§42.401 - 42.411

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.401. Protection of Individual.
§42.402. Qualifications of Program Provider Staff.
§42.403. Training.
§42.404. Service Delivery.
§42.405. Documentation of Services Delivered and Recordkeeping.
§42.406. Quality Assurance.
§42.407. Service Backup Plans.
§42.408. Protective Devices.
§42.409. Restraints.
§42.410. Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual.
§42.411. Requirements Related to the Abuse, Neglect, and Exploitation of an Individual.
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 31, 2022.

TRD-202203362
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER E. ASSISTANCE WITH PERSONAL FUNDS MANAGEMENT

40 TAC §§42.501 - 42.511

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.501. Request for Assistance with Personal Funds Management.

§42.502. Establishing a Trust Fund Account.

§42.503. Maintaining a Trust Fund Account.

§42.504. Individual's Access to Personal Funds.

§42.505. Petty Cash Fund.

§42.506. Trust Fund Transactions.

§42.507. Recurring Payments.

§42.508. Receipt for Direct Payment to Vendor from Trust Fund Account.

§42.509. Trust Fund Documentation.

§42.510. Trust Fund Refund.

§42.511. Trust Fund Procedures for Individual Transfer and Termination.

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 31, 2022.

TRD-202203363
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

SUBCHAPTER F. SERVICE DESCRIPTIONS AND REQUIREMENTS

DIVISION 1. ADAPTIVE AIDS

40 TAC §§42.601 - 42.606

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.601. Authorization Amount and Other Limits for Adaptive Aids.

§42.602. Requirements For Authorization to Purchase or Lease an Adaptive Aid.

§42.603. Requirements for Bids for an Adaptive Aid.

§42.604. Time Frames for Providing an Adaptive Aid.

§42.605. Cost Effective Delivery of Adaptive Aid.

§42.606. Requirements of Program Provider Following Provision of Adaptive Aid.

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 31, 2022.

TRD-202203364
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 2. MINOR HOME MODIFICATIONS

40 TAC §§42.611 - 42.620

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.611. Items or Services Purchasable as a Minor Home Modification.

§42.612. Authorization Limit for Minor Home Modifications and Amount for Repair and Maintenance.

§42.613. Requesting Authorization to Purchase a Minor Home Modification that Costs Less than $1,000.

§42.614. Requesting Authorization to Purchase a Minor Home Modification that Costs $1,000 or More.

§42.615. Specifications for a Minor Home Modification.

§42.616. Bid Requirements for a Minor Home Modification.

§42.617. Time Frames for Completion of Minor Home Modification.

§42618. Inspection of a Minor Home Modification.

§42.619. Repair or Replacement of a Minor Home Modification.

§42.620. Individual's Satisfaction with Minor Home Modification.

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 31, 2022.

TRD-202203367
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 3. REQUIREMENTS FOR OTHER DBMD PROGRAM SERVICES

40 TAC §§42.621 - 42.632

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.621. Behavioral Support.

§42.622. Chore Services.

§42.623. Case Management.

§42.624. Dental Treatment.

§42.625. Employment Services.

§42.626. Day Habilitation, Residential Habilitation, and CFC PAS/HAB.

§42.627. Intervener.

§42.628. Nursing.

§42.629. Orientation and Mobility.

§42.630. Residential Services.

§42.631. Respite.

§42.632. Therapies.

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 31, 2022.

TRD-202203368
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 4. ADDITIONAL REQUIREMENTS

40 TAC §42.641

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeal affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

§42.641. Non-Billable Time and Activities.

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 31, 2022.

TRD-202203371
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦

DIVISION 5. CFC ERS

40 TAC §42.651

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 system; Texas Human Resources Code §32.021, which authorizes the Executive Commissioner of HHSC to adopt rules necessary for the proper and efficient operation of the Medicaid program, including the DBMD Program.

The repeal affects Texas Government Code §531.0055 and Texas Human Resources Code §32.021.

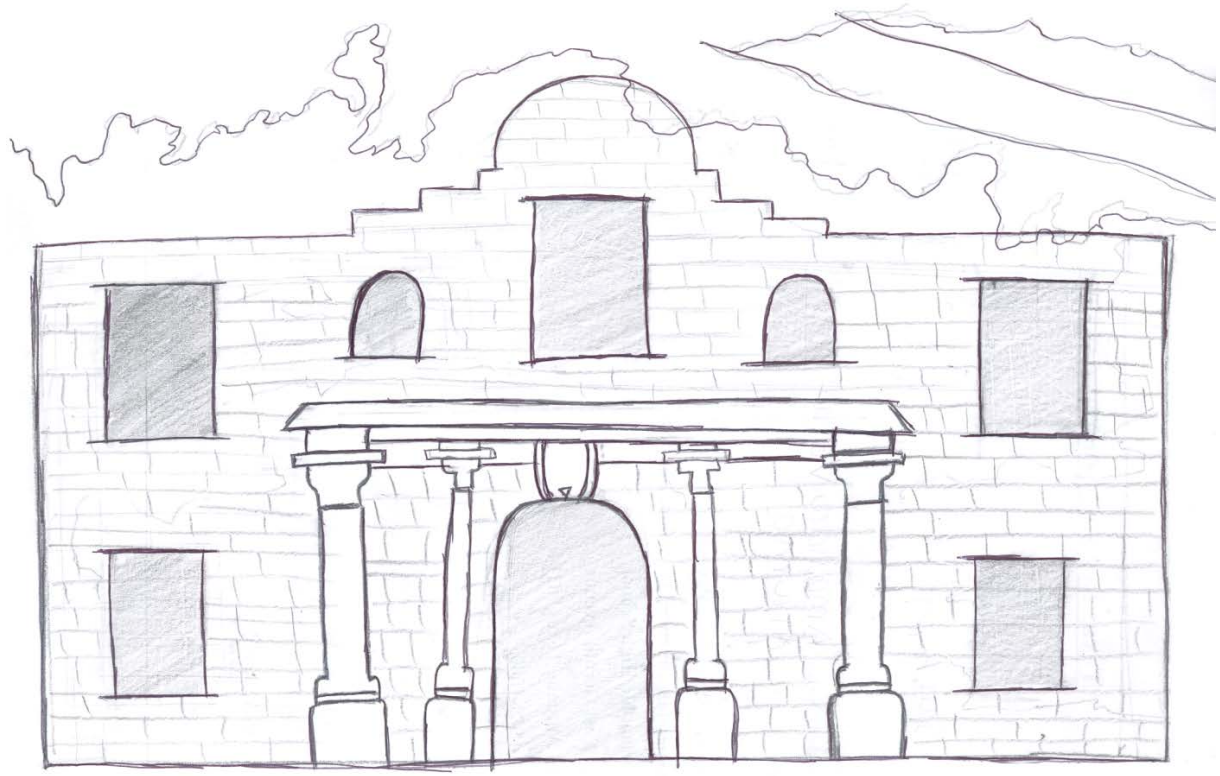
§42.651. CFC ERS.

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 31, 2022.

TRD-202203373
Karen Ray
Chief Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: October 16, 2022
For further information, please call: (512) 438-5077

♦ ♦ ♦



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 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 3. MEDICAID HOME HEALTH SERVICES

1 TAC §§354.1031, 354.1035, 354.1037, 354.1039, 354.1040, 354.1043

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts amendments to §354.1031, concerning General; §354.1035, concerning Recipient Qualifications for Home Health Services; §354.1037, concerning Written Plan of Care; §354.1039, Home Health Services Benefits and Limitations; §354.1040, concerning Requirements for Wheeled Mobility Systems; and §354.1043, concerning Competitive Procurement of Durable Medical Equipment (DME) and Supplies.

The amendments to §354.1031, §354.1035, §354.1037, §354.1039, §354.1040, and §354.1043 are adopted without changes to the proposed text as published in the June 10, 2022, issue of the *Texas Register* (47 TexReg 3361). These rules will not be republished.

BACKGROUND AND JUSTIFICATION

The purpose of the adoption is in response to recent federal legislation that prompted the Centers for Medicare & Medicaid Services (CMS) to issue interim final rule, CMS-5531-IFC (Interim Final Rule with Comment), to expand the healthcare workforce during the COVID-19 pandemic. CMS-5531-IFC is a permanent federal regulation that is not subject to the COVID-19 Public Health Emergency and became effective on May 8, 2020, with a retroactive application date of March 1, 2020.

To align the Medicaid home health services rules with CMS-5531-IFC, this adoption changes the requirement that a plan of care for covered Medicaid home health services can only be recommended, signed, and dated by a recipient's physician and allows a physician assistant (PA) or an advanced practice registered nurse who is licensed as a certified nurse practitioner (CNP) or clinical nurse specialist (CNS) to order home health services as described in the adopted rules.

COMMENTS

The 31-day comment period ended July 11,2022.

During this period, HHSC received comments regarding the proposed rules from three stakeholders. Comments were received from The American Association of Nurse Practitioners (AANP), APRN Alliance, and Texas Medical Equipment Providers Associations (TexMEP).

Comment: AANP supports the adopted rule and provided positive feedback for allowing nurse practitioners to order covered home health services, recommend, sign, and date plan of care. AANP expressed the adopted rule streamlines the home health care process and reduces the risk of costly complications resulting from the delays in care.

Response: HHSC appreciates the support from AANP.

Comment: APRN Alliance expressed concern that the phrase "certified nurse practitioner" as it appears in 1 TAC §354.1031(B)(I) is a title occasionally used in federal regulation, state law, and current agency rules and recommended HHSC removes the term "certified" from the adopted rules for clarity and consistency by updating the title to "nurse practitioner."

Response: HHSC declines to make the suggested change at this time because 22 TAC §221.2(a)(1)(B) lists "Certified Nurse Practitioner (CNP)" as one of four roles required by the Texas Board of Nursing for an advanced practice registered nurse (APRN).

Comment: APRN Alliance also recommended HHSC monitor additional changes at the federal level that would give Certified Nurse-Midwives (CNMs) and Certified Registered Nurse Anesthetists (CRNAs) prescriptive authority for home health services and durable medical equipment (DME).

Response: HHSC acknowledges this comment and HHSC regularly monitors changes at the federal level that may impact Medicaid policy.

Comment: TexMEP provided a statement expressing their understanding that the proposed rules are intended to bring Texas into compliance with the CMS Interim Final Rule (IFC, page 158) mandated by the CARES Act (page 138) passed in 2020. The commenter also provided a statement of TexMEP's understanding that the intent of the proposed rules will not limit, or repeal existing rules, that current business practices will not be altered, and the proposed rules will also decrease the administrative burden and demands on the provider or Member. The commenter also provided that their industry defines "Durable medical equipment" to mean "equipment, including repair and replacement parts for the equipment and supplies and services related to the equipment, that: is primarily and customarily used to serve a medical purpose; is prescribed by a treating health care provider for medical necessity; and includes ventilators, infusion pumps, complex rehabilitation technology, prostheses, medical devices,

and other medical equipment and related supplies and services prescribed by a treating health care provider."

Response: HHSC acknowledges the commenters feedback, however, declines to make any changes in response. HHSC's proposed definition of "Durable medical equipment (DME)" aligns with the federal description of medical equipment and appliances found in 42 CFR §440.70(b)(3)(ii).

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 and provision of services by the health and human services agencies, Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021, which provides HHSC with the authority to administer the federal medical assistance program in Texas and to adopt rules and standards for program administration.

The amendments reflect recent federal legislation implemented during the COVID-19 pandemic that prompted CMS to issue interim final rule, CMS-5531-IFC, to expand the healthcare workforce during the COVID-19 pandemic. CMS-5531-IFC is a permanent federal regulation that is not subject to the COVID-19 Public Health Emergency and became effective on May 8, 2020 with a retroactive application date of March 1, 2020.

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 September 1, 2022.

TRD-202203453
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Effective date: September 21, 2022
Proposal publication date: June 10, 2022
For further information, please call: (512) 438-4297

♦ ♦ ♦

TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 1. GENERAL PROCEDURES

SUBCHAPTER E. ADVISORY COMMITTEES

4 TAC §§1.201, 1.202, 1.204, 1.210, 1.212

The Texas Department of Agriculture (Department) adopts the repeal of 4 Texas Administrative Code, Chapter 1, Subchapter E, §1.201, concerning Citrus Budwood Advisory Council; §1.202, concerning Pest Management Zone Administrative Committees; §1.204, concerning Boll Weevil Foundation Rules Advisory Committee; §1.210, concerning Healthy Students = Healthy Families Advisory Committee, and §1.212, concerning Texas Bioenergy Policy Council and Committee. The repeals are adopted without changes to the proposed text as published in the July 29, 2022, issue of the *Texas Register* (47 TexReg 4399) and will not be republished.

The Department adopts the repeal of §1.201 because Section 19.005 of the Texas Agriculture Code provides for the composition, responsibilities, and oversight of the Citrus Budwood Advisory Council (Council). In addition, Senate Bill No. 703 (S.B. 703), 87th Legislature, Regular Session, 2021 amended Section 19.005 to exempt the Council from the duration requirements of Chapter 2110, Texas Government Code.

S.B. 703 repealed Section 74.003(d) of the Texas Agriculture Code, related to administrative committees for cotton pest management zones, which necessitates the repeal of corresponding rules.

S.B. 703 also repealed Section 74.120(d) of the Texas Agriculture Code, related to an advisory committee to assist the commissioner of agriculture in the development of rules to protect individuals, livestock, wildlife, and honeybee colonies on any premises in an eradication zone on which cotton plants are being grown that have been or are being treated to eradicate the boll weevil or the pink bollworm, which necessitates the repeal of corresponding rules.

The Department adopts the repeal of §1.210, related to the Healthy Students = Healthy Families Advisory Committee due to a determination that a business necessity no longer exists to support this committee's continuation.

Section 3 of Senate Bill No. 1731, 85th Legislature, Regular Session, 2017 abolished the Texas Bioenergy Policy Council and the Texas Bioenergy Research Committee, which necessitates the repeal of corresponding rules.

The Department received no comments on the proposed repeals.

The repeals are adopted under Section 12.016 of the Texas Agriculture Code, which provides that the Department may adopt rules as necessary for the administration of its powers and duties under the Code.

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 September 1, 2022.

TRD-202203475
Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Effective date: September 21, 2022
Proposal publication date: July 29, 2022
For further information, please call: (512) 936-9360

♦ ♦ ♦

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 1. ADMINISTRATION

SUBCHAPTER D. UNIFORM GUIDANCE FOR RECIPIENTS OF FEDERAL AND STATE FUNDS

10 TAC §1.407

The Texas Department of Housing and Community Affairs (the Department) adopts an amendment to 10 TAC Chapter 1, Subchapter D, Uniform Guidance for Recipients of Federal and State Funds, §1.407 Inventory Report, without changes to the proposed text as published in the July 1, 2022 issue of the *Texas Register* (47 TexReg 3773). The rule will not be republished.

The purpose of the amended section is to clarify requirements for participants of the Department's program relating to inventory to facilitate how this rule will be applied for the Community Resiliency Program.

Tex. Gov't Code §2001.0045(b) does not apply to the action because it was determined that no costs are associated with this action, and therefore no costs warrant being offset.

The Department has analyzed this rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Bobby Wilkinson, Executive Director, has determined that, for the first five years the amended section would be in effect:

1. The amended section does not create or eliminate a government program but relates to changes to existing regulations applicable to Department subrecipients.

2. The amended section does not require a change in work that would require the creation of new employee positions, nor are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The amended section does not require additional future legislative appropriations.

4. The amended section will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The amended section is not creating a new regulation.

6. The amended section will not expand, limit, or repeal an existing regulation.

7. The amended section will not increase or decrease the number of individuals subject to the rule's applicability.

8. The amended section will not negatively or positively affect the state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated the amended section and determined that the action will not create an economic effect on small or micro-businesses or rural communities. The Department has evaluated the rules and determined that none of the adverse effect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The amended section does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the amended sections as to their possible effects on local economies and has determined that for the first five years the amended sections would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule. Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that the rules pertain to all Subrecipients throughout the state, regardless of location, there are no "probable" effects of the amended rule on particular geographic regions.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Wilkinson has determined that, for each year of the first five years the amended section is in effect, the public benefit anticipated as a result of the amended section would be an updated and more germane rule. There will not be economic costs to individuals required to comply with the amended sections.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson also has determined that for each year of the first five years the amended sections are in effect, enforcing or administering the amendment does not have any foreseeable implications related to costs or revenues of the state or local governments.

g. SUMMARY OF PUBLIC COMMENT. The public comment period was held July 1, 2022, to July 22, 2022, to receive input on the amended section. No comment was received.

STATUTORY AUTHORITY. The amended section is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the amendment affect no other code, article, or statute. The amendment to the rule has been reviewed by legal counsel and found to be a valid exercise of the Department's legal authority.

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 September 1, 2022.

TRD-202203478
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Effective date: September 21, 2022
Proposal publication date: July 1, 2022
For further information, please call: (512) 475-3959

TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 3. OIL AND GAS DIVISION

16 TAC §3.66

The Railroad Commission of Texas (the "Commission") adopts new §3.66, relating to Weather Emergency Preparedness Standards, with changes to the proposed text as published in the July 15, 2022, issue of the *Texas Register* (47 TexReg 4042). The new section implements changes made by Senate Bill 3 from the 87th Texas Legislative Regular Session, 2021. The rule will be republished.

Senate Bill 3 is the 87th Legislature's sweeping response to the February 2021 Winter Weather Event ("Winter Storm Uri") in Texas and generally creates new law related to preparing for, preventing, and responding to weather emergencies and power outages. Senate Bill 3 requires several state agencies and regulated industries to make significant changes in response to Winter Storm Uri. This rulemaking implements Sections 5, 6, 21, and 22 of Senate Bill 3. Section 5 of Senate Bill 3 created new §86.044 of the Texas Natural Resources Code, which requires the Commission to adopt rules requiring certain gas supply chain facility operators to implement measures to prepare to operate during a weather emergency (i.e., "weatherize"). Section 6 of Senate Bill 3 amended §86.222 of the Texas Natural Resources Code to establish an enforcement process and penalties for violations of Commission rules adopted under §86.044. Similarly, Section 21 of Senate Bill 3 amends §121.2015 of the Texas Utilities Code to require the Commission to adopt rules requiring certain pipeline facility operators to implement measures to prepare to maintain service quality and reliability during extreme weather conditions (i.e., "weatherize"). Section 22 of Senate Bill 3 amends §121.206 of the Texas Utilities Code to establish an enforcement process and penalties for violations of Commission rules adopted under §121.2015.

The Commission received 139 comments on the proposal, eight from associations, 24 from companies/organizations, and 107 from individuals.

16 Texas Administrative Code §3.65

BTA Oil Producers, Inc. (BTA), Commission Shift, Diamondback E&P LLC (Diamondback), Discovery Operating, Inc. (Discovery), DM3R Oil and Gas LLC, Endeavor Energy Resources, LP (Endeavor), Formentera Operations LLC (Formentera), Henry Resources LLC (Henry), Five Stones Energy LLC (Five Stones), Kevin Audrain Oil Co., Momentum Operating (Momentum), Ogden Resources Corporation, Occidental (Oxy), Office of Public Utility Counsel (OPUC), Permian Basin Petroleum Association (PBPA), Pioneer Natural Resources USA Inc (Pioneer), Reverence Operating, Texas Alliance of Energy Producers (Alliance), Texas Independent Producers and Royalty Owners Association (TIPRO), Texas Oil and Gas Association (TXOGA), and 81 individuals submitted comments regarding the Commission's rule regarding critical designation of certain natural gas facilities and entities associated with providing natural gas in this state - 16 Texas Administrative Code §3.65, relating to Critical Designation of Natural Gas Infrastructure. Some of these comments were submitted as comments on §3.66 but the concerns expressed are more germane to §3.65.

The Commission appreciates these comments and will consider amendments to §3.65 to address these concerns. The Commission does not respond to comments relevant to §3.65 here, as they are outside the scope of this rulemaking to adopt new §3.66.

General Comments on §3.66

The following comments do not relate to any specific provision of proposed §3.66 but provide general feedback on the new rule.

OPUC suggested the Commission consider making §3.66 subject to periodic review, such as every 5 years. The Commission notes that staff members are consistently reviewing rules to determine whether updates are needed. Commission staff will review §3.66 as well.

Commission Shift asked that the Commission consider convening a conversation between operators each year to discuss methodologies for weatherization and evidence-based adaptive management techniques for Emergency Operations Plans (EOPs).

As discussed further below, the Commission plans to provide information on weatherization methodologies and will update that information periodically. The Commission engaged operators on weatherization methodologies last year and published a report on weatherization best practices as a result. The Commission agrees it would be beneficial to engage with operators any time the weatherization information is updated.

BTA, Five Stones, and Henry requested the Commission change §3.66 throughout to refer to dry natural gas because only dry gas is sent to electric generators and the change would ensure the rule addresses facilities materially contributing to power generation.

The Commission declines to make this change. Senate Bill 3 specifies that only certain gas supply chain facility operators and certain gas pipeline facility operators are required to comply with Commission rules adopted pursuant to §86.044 of the Texas Natural Resources Code and §121.2015 of the Texas Utilities Code (i.e., §3.66). The gas supply chain facility operators who must comply with §3.66 are those whose facilities are included on the electricity supply chain map created under §38.203 of the Texas Utilities Code and are designated as critical by the Commission in 16 Texas Administrative Code §3.65, which was adopted under Texas Natural Resources Code §81.073. Section 3.65 does not reference dry gas. Therefore, it would be inappropriate to refer to dry gas in §3.66.

One individual asked that the Commission ensure the Texas electric grid is connected to the rest of the country. Another individual asked that the Commission weatherize the grid and limit outages. Three other individuals commented that it is the Commission's responsibility to stabilize the grid and asked that rogue corporations be effectively penalized and regulated such that they do not consider fines as merely the cost of doing business.

The Commission declines to make any changes in response to these comments. The Commission has no jurisdiction over the electric grid. The Commission will do what Senate Bill 3 requires to ensure facilities over which it has jurisdiction implement measures to prepare to operate during a weather emergency.

Further, one individual expressed concern that the proposed rule does not contain requirements for wind or solar facilities. Another individual expressed concern that there are no regulations to reduce the Electric Reliability Council of Texas' (ERCOT) acquisition of wind and solar. The commenter believes these energy sources are unreliable and adding them to the Texas grid will defeat the purpose of any mandates to the oil and gas industry to weatherize.

The Commission notes that it does not have jurisdiction to regulate wind and solar facilities or to address ERCOT's acquisition of these energy sources. The Commission makes no changes in response to these comments.

The Lone Star Chapter of the Sierra Club (Sierra Club) asked the Commission to provide flexibility for operators who participate in electric load resource programs. The Sierra Club asked that these operators be required to weatherize but have flexibility.

The Commission disagrees. The Commission agrees that load resource programs are beneficial but declines to provide flexibility to operators who are required weatherize by Senate Bill 3. Load resource programs are administered by ERCOT and any flexibility is more appropriately addressed by ERCOT.

The Alliance and Diamondback expressed concern that without greater prioritization in the form of a floor or a multi-tiered effort to distinguish higher and lower priorities in the natural gas supply chain, the rule and actions by operators to comply with the rule will negatively impact overall production. Thus, these comments recommended that §3.66 or §3.65 be narrowed in focus to higher producing facilities, gas pipelines and storage facilities.

The Commission declines to make any changes to §3.66 in response to this comment but will consider these concerns in determining whether to amend §3.65.

The Alliance and TXOGA expressed concern with the proposed weatherization requirements in certain operations where weatherization is impractical, such as operating wells utilizing field gas for artificial lift. The comments note that field gas has a high potential for freezing and hydrate formation when exposed to the pressure drops of a gas lift system and ambient air temperatures in the 30s and below. Such pressure and temperature issues make it impossible to maintain sustained operations with a field gas artificial lift system during freezes, despite an operator taking preventive measures. This problem cannot be remedied by simply installing additional devices or equipment. Instead, the cost to retrofit an entire gas lift system to guarantee the sustained operation of these wells during a weather emergency would, in some cases, exceed the economic value of the remaining reserves. Thus, the operator would have to shut in otherwise economic wells resulting in waste contrary to Texas Natural Resources Code § 86.011. The comments recommended changes such as processes for administrative exceptions to the rule or exceptions obtained through a hearing at the Commission.

The Commission understands this concern but declines to make any changes in response to these comments. Gas supply chain facilities such as those described by the Alliance and TXOGA are required by Senate Bill 3 to weatherize if they are (1) included on the electricity supply chain map; and (2) are designated as critical by the Commission in 16 Texas Administrative Code §3.65. If a facility meets these two elements, it is required to weatherize regardless of economic or other concerns. Senate Bill 3 did not provide the Commission with the authority to address economic concerns. Further, §3.66 already provides operators flexibility because it requires operators to consider the type of facility while implementing measures to prepare for weather emergencies.

Permian Regulatory Solutions, Momentum, and one individual noted the new requirements are overly burdensome to small operators.

As mentioned above, the determination of which facilities are required to comply with §3.66 partly stems from which facilities are designated critical in §3.65. Section 3.65 currently excludes gas wells producing 15 Mcf per day or less and oil leases producing 50 Mcf per day or less. Several comments on §3.66 requested that those volumetric thresholds be increased. The Commission notes that it will consider these concerns in determining whether to amend §3.65.

Several commenters expressed opposition to the rule based on their belief that the Commission exceeded its authority granted by the Legislature. Incline Energy commented that the critical designation process and weatherization rules are outside of the Commission's authority granted in Senate Bill 3. Endeavor Energy commented that the Commission's rules effectively encompass all natural gas production, transmission, and adjacent facilities, regardless of criticality and, thus, the rules are at odds with the intent of the Legislature. Endeavor also commented that the Commission violated Texas law when it proposed §3.65 by failing to give all interested persons a reasonable opportunity to submit data, views, or arguments prior to implementing a new rule. Endeavor also stated that designations on the electricity supply chain map were not open to meaningful public comment. Earl Burns Inc. expressed concern that the electricity supply chain map is not made public.

The Commission disagrees with these comments. Comments regarding the Commission's critical designation rules are outside the scope of this rulemaking adopting new §3.66. However, the Commission notes that it provided public notice and comment in accordance with the Administrative Procedure Act when proposing §3.65 and the public was provided adequate notice to comment during §3.65's rulemaking. An informal public hearing was on also held during the public comment period for §3.65. The Electricity Supply Chain Security and Mapping Committee controls the process of mapping the electricity supply chain, and the Commission notes that Texas Utilities Code § 38.203 states that the electricity supply chain map is confidential. Comments related to the mapping process are beyond the scope of this rulemaking.

Discovery Operating expressed opposition to §3.66 because it believes the rule requires a facility to produce during a weather emergency. Conversely, nine individuals requested that the rule be revised to require operators to operate in inclement weather. One individual expressed concern that §3.66 requires operators to say they are prepared rather than be prepared.

The Commission disagrees with these comments and clarifies the requirements of §3.66 as follows. The Commission does not have authority to require an operator to operate and §3.66 does not require operation. Section 3.66 requires that operators of facilities described in §3.66(a) implement weather emergency preparation measures intended to ensure sustained operation during a weather emergency. This is consistent with the directive given to the Commission in Senate Bill 3, which requires that the Commission adopt rules requiring certain facilities to "implement measures to prepare to operate during a weather emergency." As noted by one individual, §3.66(d) requires operators who are required to comply to submit an attestation certifying that they have implemented the weather emergency preparation measures required by §3.66(c). Section 3.66(c) requires those measures be implemented. Therefore, §3.66 does not merely require that operators say they are prepared but requires preparation.

Relatedly, one individual submitted a comment disagreeing that weather emergencies lead to a loss of production. The individual believes that production loss is due to pipeline failures.

The Commission notes that Senate Bill 3 requires the Commission to adopt rules requiring certain facilities to implement measures to prepare to operate during a weather emergency. Section 3.66 implements this requirement by incorporating the concept of weather emergency.

Subsection (a) - Applicability

Texas Competitive Power Associates and two individuals expressed concern that §3.66 allows operators to decide not to operate during a weather emergency. These commenters understand that the Commission cannot force facilities to operate, but requested the Commission clarify who is required to comply and ensure compliance for those operators.

The Commission agrees that an operator may decide not to operate during a weather emergency. As noted by TCPA, the Commission does not have authority to force facilities to operate. However, §3.66 requires operators to implement the weather emergency preparation measures listed in §3.66(c). Implementing the weather emergency preparation measures is not optional for facilities required to comply with §3.66. The following facilities are required to comply with §3.66: (1) a gas supply chain facility that is included on the electricity supply chain map and is designated as critical in §3.65; (2) a gas pipeline facility that is included on the electricity supply chain map and that directly serves a natural gas electric generation facility operating solely to provide power to the electric grid for the Electric Reliability Council of Texas (ERCOT) power region or for the ERCOT power region and an adjacent power region. The Commission will ensure compliance by operators of these facilities through scheduled inspections and inspections to investigate weather-related forced stoppages.

The Commission received numerous comments regarding the electricity supply chain map.

Commission Shift, 76 individuals, the Alliance, Sierra Club, TXOGA, Texas Pipeline Association (TPA), and Formentera submitted comments requesting clarification regarding the applicability of §3.66 to facilities on the electricity supply chain map and the process for notifying operators that facilities they operate are included on the map.

PBPA, TIPRO, TXOGA, Henry, BTA, Diamondback, Five Stones, and Rockcliff Energy Operating (Rockcliff) requested the addition of language in subsection (a) to require the Commission to notify operators of their facility's inclusion on the map. They suggested a change in subsection (a)(1)(A) such that an operator is not subject to §3.66 until it receives notice from the Commission.

The Commission declines to incorporate the requested language. Upon adoption of §3.66, the Commission will send notices to operators with facilities included on the electricity supply chain map and include a list of the operator's relevant facilities. Commission Shift, Alliance, 76 individuals, and the Sierra Club suggested that the notification be provided via email rather than regular mail to ensure operators receive notice. The Commission agrees. It will provide notification of inclusion on the map via certified mail, first class mail, and email if the operator's email address is provided to the Commission.

It is the Commission's understanding that the Electricity Supply Chain Security and Mapping Committee will continue to periodically update the electricity supply chain map. The Commission recognizes that those changes may impact a facility's obligation to comply with certain Commission rules. Thus, the Commission will continue to provide notice to operators of an operator's facilities on the map as the electricity supply chain map is updated.

PBPA expressed concerns about the accuracy of the mapping process and the accuracy of the map. As mentioned in the previous paragraph, it is the Commission's understanding that the Mapping Committee will work to ensure the map is up to date and improved as necessary.

Regarding enforcement of new §3.66, the Commission notes that operators of facilities described in subsection (a) are required to comply with the rule's requirements by December 1, 2022. Commission Shift and Sierra Club asked whether a facility is subject to the rule's requirements if a facility included on the map has not been included on an operator's Form CI-D required under §3.65. Section 3.65 requires bi-annual filing of the Form CI-D by March 1 and September 1 of each year. It is the Commission's understanding that the map will be updated continually even between official adoption timelines. In other words, updates will be adopted at set times during the year. Those updates will prompt notification from the Commission to operators with facilities on the most current version of the map. If possible, those notifications will be issued prior to the bi-annual filing deadlines in §3.65. Further explanation regarding the enforcement process is provided in the discussion of comments on subsections (e), (f), and (g) below.

TIPRO, Henry, BTA, Diamondback, Five Stones, Formentera, and Rockcliff asked that the Commission revise subsection (a) to exempt a facility from §3.66 if the facility produces under the production thresholds indicated in §3.65. Similarly, the Alliance asked that §3.66 only apply to gas supply chain facilities that are both included on the electricity supply chain map and designated critical by the Commission in §3.65. TXOGA, Endeavor, and Pioneer requested clarification on whether a facility needs to weatherize if it produces below the volume threshold in §3.65 but is on the electricity supply chain map.

The Commission declines to adopt any changes to §3.66 but will consider these comments and may clarify the requirements of §3.65 in a future rulemaking. The Commission notes that a facility that is not designated critical in §3.65, including a facility producing under the production thresholds, would not meet §3.66(a)(1)(B) and, therefore, would not be subject to the weatherization requirements of §3.66.

The Joint Texas Electric Utilities also asked that §3.66 be adopted in a manner that requires facilities deemed critical customers under §3.65 to comply with §3.66.

The Commission partly agrees. If the facility that is designated a critical customer under §3.65 is also included on the electricity supply chain map, then the facility is required to comply with §3.66.

The Joint Texas Electric Utilities also requested adding new subsection (a)(3) to state that §3.66 applies to any facility designated a critical customer under §3.65, even if that facility is not included subsection (a)(1) or (a)(2).

The Commission declines to incorporate the requested change. Senate Bill 3 states that a gas supply chain facility must also be on the electricity supply chain map, in addition to being designated critical, to be subject to the requirements of §3.66. To require that critical customer status is the only requirement for weather emergency preparedness would ignore a portion of Senate Bill 3. Similarly, Senate Bill 3 is clear that a gas pipeline facility's critical designation status has no bearing on whether the facility must implement measures to prepare for a weather emergency; the only relevant inquiry for a gas pipeline facility is whether the facility is on the electricity supply chain map and directly serving power generation facilities. The Commission does note in response to the Joint Texas Electric Utilities that

a facility on the electricity supply chain map is not eligible for a critical designation exception under §3.65.

The Alliance expressed concerns with facilities located in prorated fields. The limitation of a gas allowable during an energy emergency requires due consideration by the Commission to either remove these limitations or consider whether prorated fields should not be subject to weatherization requirements. This is due to operators regularly shutting in their wells temporarily when allowables will be exceeded for the month. This rule should not penalize operators requiring significant investments for compliance when other Commission rules will necessitate their closure, in some instances prior to or during an energy emergency.

The Commission understands this concern and will consider allowing flexibility regarding allowables in the event of a weather emergency.

The Commission makes no changes to subsection (a) based on the comments.

Subsection (b) - Definitions

Regarding the definition of critical component, CrownQuest Operating (CrownQuest), PBPA, Ovintiv, and TXOGA requested the Commission add language regarding components on equipment rented or leased from a third party, to clarify that weatherization is required only on susceptible components, whether operator owned or leased, not on the whole piece of third-party equipment.

The Commission agrees that the intent of the definition is to address components, whether operator owned or leased, and adopts §3.66(b)(1) with a change to clarify the intent.

TXOGA asked that the Commission also add language limiting the definition of critical component to components over which the Commission has contractual authority to control. Endeavor expressed a similar concern, stating that leased equipment must generally be maintained in the same state as it was received.

The Commission declines to incorporate this language. The Commission understands that an operator may not have authority to weatherize critical components on equipment that is leased from a third-party. However, the operator should do what is within its authority to ensure critical components are protected in accordance with §3.66, and this includes maintenance and operation of third-party equipment. It is the operator's responsibility to ensure its facility complies with §3.66.

Pioneer requested clarification regarding critical components on multi-well oil leases in order for field inspectors to properly identify which facilities are included in an operator's weather preparedness efforts and which are omitted as a non-critical subsystem.

The Commission notes that the determination of what constitutes a weather-related forced stoppage will be conducted at the facility level, not at a critical component level. However, operators shall identify and protect critical components of a facility to ensure its sustained operation during a weather emergency. The Commission recommends describing determinations such as those referenced in the comment in the operator's Weather Emergency Readiness Attestation to ensure applicable Commission staff members, including field inspectors, are sufficiently informed.

An individual asked that the list of weather conditions in the definition of critical component be revised to include extended periods of low sunlight. The commenter noted that many locations have equipment that relies on a solar battery system in case of a power outage and that system can fail during periods of cloudy weather.

The Commission declines to incorporate the requested change because it does not consider a low sunlight a weather emergency. Though the commenter is correct that the solar battery system is susceptible to weather-related interruptions, generally a solar battery system is used as a contingency and it is not critical to the sustained operation of the facility.

PBPA commented that a different standard is applied for the consideration of critical components than is applied for an operator elsewhere in §3.66. While later in the rule operators would be required to consider the implications of a "forced stoppage," in the definition of critical component operators are required to consider the "occurrence of which is likely to significantly hinder sustained operation." It would be more consistent for operators to consider an occurrence that is likely to be linked to a weather-related forced stoppage rather than the potential to significantly hinder sustained operations.

The Commission disagrees. The critical component definition discusses the component's influence on sustained operations. Sustained operations is the standard in later portions of the rule as well. §3.66(c)(1)(A) states that an operator shall implement weather emergency preparation measures intended to "ensure the sustained operation of a gas supply chain facility or a gas pipeline facility during a weather emergency."

Regarding the definition of "gas supply chain facility," CrownQuest and PBPA asked that the Commission revise the definition to mirror the language in subsection (b)(2) and reference the Commission rules under which the relevant gas supply chain facilities are regulated.

The Commission disagrees. The definitions of "gas supply chain facility" and "gas pipeline facility" are taken directly from Senate Bill 3.

Regarding the definition of "major weather-related forced stoppage" in subsection (b)(4), the Atmos Cities Steering Committee (ACSC), Atmos Pipeline Texas (APT), Commission Shift, 76 individuals, TIPRO, Sierra Club, Henry, BTA, Diamondback, Five Stones, and Rockcliff commented that the proposed definition gives the Critical Infrastructure Division (CID) director too much discretion. The commenters requested that objective criteria be added to guide the director's determination. CrownQuest requested the Commission revise subsection (b)(4) because operators will not know whether a major stoppage occurs until after a weather emergency. APT suggested aligning the definition of "major" with the volumetric thresholds proposed in subsection (f), relating to when an immediate notification of a weather-related forced stoppage is required.

The Commission agrees that objective criteria should be added and adopts the definition of "major weather-related forced stoppage" with revisions to incorporate the volumes proposed in subsection (f). Thus, a major weather-related forced stoppage is defined as a weather-related forced stoppage during a weather emergency that is the result of the deliberate disregard of §3.66 or that results in: (A) a loss of production exceeding 5,000 Mcf of natural gas per day per oil lease; (B) a loss of production exceeding 5,000 Mcf of natural gas per day per gas well; (C) a loss of gas processing capacity exceeding 200 MMcf per day; (D) a loss of storage withdrawal capacity exceeding 200 MMcf per day; or (E) a loss of transportation capacity exceeding 200 MMcf per day. A weather-related forced stoppage that qualifies as a ma-

jor weather-related forced stoppage prompts two requirements. First, a major weather-related forced stoppage is required to be reported within one hour of discovery, as required by §3.66(f)(2). Second, a major-weather related forced stoppage that is a violation of §3.66 triggers a requirement to obtain a weather emergency preparation assessment, as required by §3.66(f)(4). To ensure weather-related forced stoppages are interpreted to include major weather-related forced stoppages where appropriate, the Commission also adopts changes to §3.66 to add several references to major weather-related forced stoppage alongside weather-related forced stoppage.

PBPA requested that the definition major-weather related forced stoppage be revised to require intentional and deliberate disregard of the section that is not corrected in the manner prescribed by the rule. Similarly, Henry, BTA, Diamondback, Five Stones, and Rockcliff commented that the definition should be based on an operator's intentional conduct. An operator should not be penalized if it attempts in good faith to produce during a weather emergency in compliance with the rule.

The Commission disagrees. Section 3.66 requires an operator to implement weather emergency preparation measures. If an operator produces during a weather emergency, it most likely is not experiencing a weather-related forced stoppage. However, if a weather-related forced stoppage occurs during a weather emergency, an attempt to produce will not prevent enforcement action because the relevant inquiry regarding whether the facility is in violation is whether the operator implemented emergency preparation measures in accordance with §3.66(c).

TXOGA asked that the Commission include "during a weather emergency" in the definition of "major weather-related forced stoppage."

The Commission agrees and adopts §3.66(b)(4) with a change to clarify that a major-weather related forced stoppage occurs during a weather emergency.

Regarding the definition of "repeated weather-related forced stoppage," PBPA, TIPRO, Henry, BTA, Diamondback, Five Stones, Formentera, and Rockcliff requested that a repeated weather-related forced stoppage only occur if a major weather-related forced stoppage occurs more than once in a calendar year. These commenters note adding "major" will ensure the violations captured by a repeat designation are those that impact public safety and not those that are minor or immaterial.

The Commission disagrees. The requirement in §3.66(f) that requires contracting for a weather emergency preparation assessment is taken directly from Senate Bill 3. Senate Bill 3 requires the assessment for a facility that experiences either a repeat or major interruption. Thus, the Commission finds that defining repeated weather-related forced stoppage to only include major weather-related forced stoppages is inconsistent with the statutory language.

PBPA and the Sierra Club suggested amending the definition of repeated weather-related forced stoppage to apply to more than one weather-related forced stoppage within a season, rather than within a calendar year. Sierra Club noted that a stoppage may occur in December and January during the same winter season.

The Commission agrees with these comments and adopts the definition in §3.66(b)(5) with a change to define repeated weather-related forced stoppage as more than one weather-related forced stoppage in a 12-month period.

TXOGA requested that the definition be revised to ensure a weather-related forced stoppage is not classified as a repeated weather-related forced stoppage if the operator experiences an additional weather-related forced stoppage while trying to resolve its first weather-related forced stoppage.

The Commission disagrees this change is needed. The designation of repeated weather-related forced stoppage will only occur if, after review, the facility is determined to be in violation of §3.66. Therefore, the additional requirement applicable to a facility with a repeated weather-related forced stoppage (i.e., the requirement to obtain a weather emergency preparedness assessment) will not be triggered immediately upon more than one weather-related forced stoppage, but after more than one weather-related forced stoppage determined to be in violation of §3.66 within a 12-month period.

Regarding the definition of "sustained operation" in subsection (b)(3), TCPA requested that the Commission revise the definition to ensure operators maintain operations during weather emergencies and operators account for both known and reasonably anticipated forced stoppages.

The Commission declines to make this change. The Commission finds that "reasonably anticipated" may provide those required to comply with an excuse if they did not reasonably anticipate the weather-related forced stoppage. The language is unclear and may prompt a failure to prepare.

Ovintiv requested a revision to the definition of sustained operation to allow flexibility for operational downtime experienced while acting as a reasonably prudent operator.

The Commission disagrees because §3.66 already contemplates operational downtime. Subsection (f), which contains the requirement to report a weather-related forced stoppage, only requires the report if the stoppage meets the definition of a weather-related forced stoppage and the operator is unable to resolve the stoppage within 24 hours of the stoppage.

Endeavor and OPUC commented that the definition of sustained operation fails to clearly define "safe operation." Endeavor stated this unnecessarily creates safety risks to operators' personnel.

The Commission has incorporated additional language in subsection (c) to address this concern.

TIPRO, Henry, BTA, Diamondback, Five Stones, and Rockcliff requested the Commission amend the definition of weather-related forced stoppage to include the term "weather emergency."

The Commission agrees that the relevant timeframe for determining a weather-related forced stoppage is during a weather emergency and adopts the definition with that change.

TXOGA asked that the Commission expressly provide that anticipated outages are exempt from the definition of "weather-related forced stoppage" if previously disclosed to the Commission. TXOGA noted that despite an operator's best efforts to weatherize facilities and equipment, drops in production are inevitable, particularly during cold weather events and in fields utilizing field gas for artificial lift, but they are also predictable. TXOGA suggested adding language that outages described in the definition of weather-related forced stoppage do not include outages caused by utility curtailment or other loss of service that are outside the operator's control.

The Commission declines to add the requested language. The Commission notes that an operator of a gas supply chain facility or gas pipeline facility subject to §3.66 would not be subject to an enforcement action for a weather-related forced stoppage caused by factors outside the operator's control if the operator is otherwise compliant with §3.66. However, the Commission does not agree that this language should be added to narrow the definition of weather-related forced stoppage.

Similarly, CrownQuest asked that the definition of "weather emergency" be revised to reflect there is no liability for issues outside the operator's control.

The Commission agrees that an operator will not be subject to enforcement for a weather-related forced stoppage caused by factors outside the operator's control if the operator is otherwise compliant with §3.66. However, the Commission declines to make any changes to the definition of "weather emergency" due to this comment.

Sierra Club asked that the definition of weather emergency be revised to include additional weather extremes such as wildfires, droughts, hurricanes, or other weather extremes.

The Commission declines to make the requested change. Section 3.66 requires operators to implement weather emergency preparation measures intended to ensure sustained operations during a weather emergency. The Commission finds that certain weather events or weather-related events cannot reasonably be prepared for such that it would be inappropriate and unsafe to require the implementation of weather emergency preparation measures. Wildfires and hurricanes are two examples of such events.

TXOGA also requested high winds, lightning, and fires be expressly excluded from the definition of weather emergency.

The Commission declines to make the requested change. The definition already excludes weather conditions that cannot be reasonably mitigated such as tornadoes, floods, or hurricanes. This is not an exclusive list of the types of weather conditions that cannot be reasonably mitigated. The Commission agrees that lightning and fires are also types of conditions that cannot reasonably be mitigated but does not agree all of these events need to be listed in the definition.

During the comment period, the Commission received additional feedback from the state climatologist. The Commission clarifies that the term "freezing precipitation" in the definition of weather emergency includes freezing drizzle, freezing rain, sleet, ice pellets, snow, and snow pellets. It does not include hail or graupel.

CrownQuest, Alliance, Pioneer, Oxy, and TXOGA requested clarification on when a weather emergency occurs. Specifically, CrownQuest, the Alliance, TIPRO, TXOGA, and Formentera requested the Commission notify operators of a weather emergency. Oxy and TXOGA asked that a weather emergency be limited to events that result in firm load shed, not those that have the potential to result in firm load shed.

The Commission notes that the comments relating to events with the potential to result in firm load shed are more appropriately addressed in §3.65. The Commission will consider these comments if it engages in future rulemaking on §3.65.

The Commission agrees with CrownQuest, the Alliance, TIPRO, TXOGA, and Formentera and will issue a notice to operators when a weather emergency occurs such that reporting under subsection (f) of §3.66 will be required.

Regarding the definition of "weatherization," CrownQuest, TXOGA, TIPRO, Henry, BTA, Diamondback, Five Stones, and Rockcliff noted that the definition seems inconsistent with the requirements in subsection (c) and asked that the Commission ensure consistency between subsections. TIPRO, Henry, BTA, Diamondback, Five Stones, and Rockcliff requested removal of language regarding implementation of processes or the installation of equipment, so that the definition would not be interpreted to require those actions.

The Commission agrees that the definition should be clarified to be more consistent with the requirements in subsection (c) but declines to remove the language regarding implementation of processes or installation of equipment. The Commission adopts the definition with changes to incorporate requirements in proposed subsection (c)(2) that are part of required weatherization rather than listing those actions separately. The revised definition of weatherization is "the iterative cycle of preparedness for sustained operation during weather emergencies that includes (A) correcting critical component failures that occurred during previous weather emergencies; (B) installing equipment to mitigate weather-related operational risks; and (C) internal inspection, self-assessment, and implementation of processes to identify, test, and protect critical components."

Subsection (c) - Weather Emergency Preparedness Standards

ACSC requested confirmation that compliance is required by December 1, 2022.

That is correct. Section 3.66 requires compliance by December 1 of each year as certified in the operator's Weather Emergency Readiness Attestation due on the same date.

PBPA, Endeavor, Pioneer, and Ovintiv expressed concerns with the December 1 deadline given challenges in acquiring new equipment. The comments asked that the Commission consider this factor in evaluating the steps operators will be able to undertake and allow a delayed or tiered implementation plan beginning with wells producing the largest volumes of natural gas on the supply chain. TXOGA also commented requesting consideration of supply chain constraints.

The Commission recommends that any constraints in implementing the requirements of §3.66 be noted in an operator's Weather Emergency Readiness Attestation. The Commission understands that certain factors are outside an operator's control. However, the Commission declines to revise §3.66 to allow a delayed implementation.

PBPA commented on §3.66(c)(1) requesting a change to require weatherizing critical components for the sustained operation of a gas supply chain or gas pipeline facility rather than implementing weather emergency preparation measures.

The Commission disagrees and keeps the proposed language because Senate Bill 3 uses the same terms - it requires an operator to "implement measures to prepare to operate during a weather emergency." In addition, including the term "weatherization" in subsection (c)(1) as requested by PBPA could be interpreted to limit the list of required weather emergency preparation measures in subsection (c)(2), which include training and consideration of health, safety, and the environment. The Texas Caucus on Climate, Environment, and the Energy Industry commented that the Commission should expand its interpretation of Senate Bill 3 to require more than physical measures. The Caucus asked the Commission to include establishing standard business practices of continuing normal operations during weather

emergencies. The Commission finds that the rule as adopted incorporates this request. The new definition of weatherization includes internal inspection, self-assessment, and implementation of processes to identity, test, and protect critical components. As mentioned above, the list of required preparation measures in subsection (c)(2) also includes measures beyond physical preparedness.

TIPRO, Henry, BTA, Diamondback, Five Stones, and Rockcliff requested subsection (c)(1)(A) be revised to "prevent weather-related forced stoppage of a gas supply chain facility or a gas pipeline facility during a weather emergency" because the revised language removes the implication that the Commission is requiring operation. Discovery Operating also requested revisions to avoid the suggestion that the Commission is requiring operation.

The Commission declines to incorporate the requested change. The language in subsection (c)(1)(A) does not require operation, it requires implementation of weather emergency preparation measures intended to ensure sustained operation during a weather emergency. Further, the language requested by these commenters is already encompassed in the definition of sustained operation, which is defined as safe operation of a gas pipeline facility or gas supply chain facility such that the facility does not experience a weather-related forced stoppage.

Regarding §3.66(c)(1)(B), Henry, BTA, Diamondback, and Five Stones requested changes to promote consistency with other sections of the rule. They suggested changing "cold weather conditions" to "weather emergencies" because cold weather conditions are included in the definition of weather emergency. Also, they asked the Commission to narrow the scope of subsection (c)(1)(B) to only include repeated weather-related forced stoppages so that only the problematic stoppages are corrected.

The Commission agrees with the first suggestion and adopts the requested change. A corresponding change is also adopted in §3.66(d)(3). However, the Commission disagrees that the provision should be limited to repeated weather-related forced stoppages and declines to add "repeated" to subsection (c)(1)(B).

Regarding §3.66(c)(2), which states, "weather emergency preparation measures required by paragraph (1) of this subsection shall include," Henry, Diamondback, BTA, and Five Stones requested the language be changed to "weather emergency preparation measures required by paragraph (1) of this subsection may include but are not limited to."

The Commission disagrees that the weather emergency preparation measures in subsection (c)(2) should be optional and declines to adopt the requested change.

TXOGA requested two additions to the list in subsection (c)(2). First, TXOGA requested adding a requirement to consider the risk to the health and safety of employees and protection of the environment. Second, TXOGA requested a requirement to consider measures proportionate to the volume of gas that may be impacted by a weather emergency.

The Commission agrees that consideration of employee health and safety and protection of the environment shall be considered by an operator in implementing weather emergency preparation measures. The Commission adopts subsection (c)(2)(B) to incorporate this requirement. The Commission declines to adopt the second requested change regarding consideration of measures proportionate to the volume of gas that may be impacted during a weather emergency. Facility-specific considerations are outlined by the Commission in proposed subsection (c)(2)(D), which is adopted as subsection (c)(2)(C).

Proposed §3.66(c)(2)(C) required emergency operations planning using a risk-based approach to identify, test, and protect the critical components of the facility. APT, CrownQuest, PBPA, TXOGA, Henry, BTA, Diamondback, and Five Stones requested that the Commission clarify the meaning of risk-based approach or, in the alternative, remove language requiring a risk-based approach.

The Commission agrees that this language is unclear and removes this language in the adopted version. Thus, the requirements in proposed subsection (c)(2)(D) are now adopted as subsection (c)(2)(C). The Commission's revised definition of "weatherization" incorporates the Commission's intent for requirements to identify, test, and protect a facility's critical components.

Discovery Operating commented that the requirement to identify, test, and protect critical components is difficult because operators may not be able to simulate conditions to accomplish a test.

As mentioned above, the testing requirement is relocated in the adopted version of §3.66 such that it is included in the definition of weatherization. The Commission recognizes that weatherization measures including testing may be different depending on the facility. The requirement to weatherize is found in subsection (c)(2)(C) and states that weatherization, which includes testing, shall be conducted using methods a reasonably prudent operator would take given the type of facility, the age of the facility, the facility's critical components, the facility's location, and weather data for the facility's county or counties such as data developed for the Commission by the state climatologist. Thus, an operator shall test critical components in accordance with the reasonably prudent operator standard given the facility-specific considerations in adopted §3.66(c)(2)(C).

The Commission received many comments on proposed §3.66(c)(2)(D), which required weatherization of a gas supply chain or gas pipeline facility and included a list of potential weatherization methods and weatherization data for operators to consider.

Oxy, Alliance, TXOGA, TPA, Endeavor, and Ovintiv asked for clarification on the applicability of the weatherization measures and recommended various revisions to achieve greater clarity. Oxy and the Alliance requested "commercially reasonable measures that a prudent operator would take in accordance with industry-accepted practices given the type and age of the facility including. . ." TXOGA and Ovintiv recommended "weatherization of the facility considering industry-accepted methods considered by the operator to be appropriate and effective to the facility based on the type of facility, the facility's critical components, the facility's location, and weather data for the facility's county or counties." And TPA suggested "weatherization of the facility using economically feasible methods that are reasonably applicable to the facility based on the type of facility, the facility's critical components . . ."

Relatedly, CrownQuest, PBPA, Discovery, Alliance, TIPRO, TXOGA, Henry, BTA, Diamondback, Endeavor, Five Stones, Ovintiv, and an individual requested that the Commission reconsider the list of specific weatherization methods because it does not provide a clear directive for operators. PBPA, Alliance, TIPRO, TXOGA, Henry, BTA, Diamondback, Five Stones, Pioneer, and Rockcliff recommended that instead of including potential weatherization methods in the rule, the Commission publish guidance that outlines practices. The commenters stated this approach

will afford the Commission greater ability to communicate changing technology or practices.

The Commission agrees that publishing weatherization methods on its website is more appropriate and will allow the Commission to better communicate with operators as conditions or information change. The Commission adopts subsection (c) to remove the list of weatherization methods. New subsection (c)(2)(C) states that the Commission will periodically publish weatherization practices.

The Commission also agrees with comments requesting clarification of the weatherization requirement, especially considering the removal of the weatherization methods list. The Commission disagrees that language regarding "commercially-reasonable measures" or "economically feasible methods" should be incorporated. The Commission understands that weather emergency preparedness will impose costs on operators required to comply §3.66. However, the Commission finds that the language in adopted §3.66 provides operators sufficient flexibility and Senate Bill 3 does not authorize the Commission to consider economic considerations preventing proper preparation. The Commission adopts subsection (c)(2)(C) to require weatherization of a gas supply chain or gas pipeline facility "using methods a reasonably prudent operator would take given the type of facility, the age of the facility, the facility's critical components, the facility's location, and weather data for the facility's county or counties such as data developed for the Commission by the state climatologist." The Commission adopts this provision with "weather data . . . such as" rather than the proposed language of "weather data . . . including" in response to comments from APT, Oxy, and TXOGA requesting clarification on whether the weather data from the climatologist must be considered or is only one type of data that may be considered. The Commission agrees that the weather data provided by the state climatologist is merely a consideration. The weather data provided is based on historical extremes and the Commission does not intend that operators weatherize their facilities in accordance with historical extremes. However, historical information is helpful in determining appropriate weatherization methods in the facility's county or counties.

The Commission received several comments on the proposed weather data table in §3.66(c)(2)(D). ACSC asked that the table be modified to account for additional emergency weather risks due to climate change factors. Sierra Club noted that the table does not contain weather predictions and suggested the Commission revise the table or revisit the rules occasionally to determine if any updates to the table are required. TXOGA requested the table be removed because it does not contain weather predictions. However, if the table remains, TXOGA asked that the data's purpose be clarified. Similarly, PBPA asked that the Commission clarify that the weather information provided is a consideration, not a required weatherization standard.

The Commission agrees that the weather data would be more helpful if included in the Commission's publication on weatherization practices which will be issued as stated in the adopted version of §3.66(c)(2)(C). Including weather data outside §3.66 will allow the Commission to continue to work with the state climatologist and ensure operators have up-to-date data on weather patterns in the counties in which their facilities operate. The Commission adopts §3.66(c) without the proposed weather data table. Subsection (c)(2)(C) states that the Commission may include weather data developed for the Commission by the state climatologist in its publication of weatherization practices.

Subsection (d) - Weather Emergency Readiness Attestation

Comments from Commission Shift, Alliance, Henry, BTA, Diamondback, Five Stones, and Rockcliff noted the similarity of the attestation to the Emergency Operations Plan (EOP) required to be submitted to the Commission in accordance with Texas Utilities Code §186.008, which was created by Senate Bill 3. Commission Shift requested clarification regarding whether the weather readiness attestation required by §3.66(d) is the same as the EOP required by §186.008. Alliance, Henry, BTA, Diamondback, Five Stones, and Rockcliff suggested the Commission revise subsection (d) to incorporate the EOP requirement.

The Commission notes that the Weather Emergency Readiness Attestation required by subsection (d) is distinct from the EOP requirement in Texas Utilities Code §186.008. The Weather Emergency Readiness Attestation is a certification from an operator required to comply with §3.66 that it has implemented the required weather emergency preparation measures described in subsection (c) of §3.66. The EOP requirement is not incorporated into this rulemaking. The Commission understands the two requirements caused confusion but declines to include the EOP requirement in §3.66 because it was not contemplated in the proposal.

PBPA, Alliance, TIPRO, TXOGA, Henry, BTA, Diamondback, Five Stones, Pioneer, and Rockcliff requested that the Weather Emergency Readiness Attestation requirements be revised to be more consistent with typical language on forms required by the Commission, such as the Form P-5 Organization Report. Similarly, Endeavor asked the Commission to remove the requirement for an officer to sign the attestation.

The Commission agrees and revises the language in §3.66(d)(1) to be more consistent with other Commission forms. The Weather Emergency Readiness Attestation is still required to state that the operator implemented the weather emergency preparation measures required in subsection (c). However, where the proposed version required an authorized officer to sign the attestation, the new language requires an attestation by an authorized representative.

CrownQuest requested that the list of potential critical components be removed or clarified. CrownQuest and TXOGA suggested reorganizing the list if it is retained so that critical components from different facilities along the supply chain are not listed together.

Upon further review of the critical component list, the Commission agrees that it may cause confusion and adopts subsection (d) without the list. The list was intended to provide guidance on the sections that could be incorporated in an operator's Weather Emergency Readiness Attestation. As such, the critical component list may be more appropriately incorporated into published Commission guidance or templates for attestations. Because the list is removed, the Commission adopts subsection (d)(2) with a change requiring the attestation to include a description of the weatherization methods utilized by the operator to weatherize each type of facility.

TXOGA asked that subsection §3.66(d)(3) be revised to only require a description of non-privileged corrective actions, that cold weather conditions be revised to extreme cold weather conditions, and that descriptions of corrective actions be limited to those that could have a similar impact in future extreme cold weather conditions.

The Commission notes that §3.66(d)(3) is adopted with a change to reflect changes made to §3.66(c)(1)(B), which remove language related to cold weather conditions and instead

reference previous weather emergencies. The Commission declines to incorporate the other requested language. If sharing certain information with the Commission violates a legal privilege, the Commission encourages operators to provide as much information as possible without violating the privilege. The Commission disagrees that the operator's description of weather-related forced stoppages should be limited to those that could have a similar impact in future weather emergencies. Relatedly, OPUC requested that reporting on corrective actions taken to mitigate previous weather-related forced stoppages be required in each Weather Emergency Readiness Attestation, not just the first attestation due on December 1, 2022. The Commission finds that the assessment of future weather-related forced stoppages is encompassed in the weather emergency preparation measures required by §3.66(c) and, therefore, declines to incorporate OPUC's changes in subsection (d)(3). Subsection (d)(3) ensures the Commission has information on weather-related forced stoppages that occurred prior to implementation of Commission weatherization rules. That information is only required in the first attestation.

TXOGA asked the Commission to add new subsection (d)(1)(D) to allow an operator to describe in its attestation the weather data it relied upon if it relied upon data other than that provided by the state climatologist.

The Commission agrees that the Weather Emergency Readiness Attestation may include this type of information but does not believe this language in necessary in the rule. The Commission encourages operators submitting an attestation to include any information they believe is useful to demonstrate compliance with §3.66.

Oxy, Alliance, TIPRO and TXOGA also requested changes to allow operators to incorporate in their Weather Emergency Readiness Attestations a schedule for implementing required emergency preparation measures after December 1, 2022 to the extent the operator is unable to complete all requirements of subsection (c) by that date.

The Commission does not agree that operators should be able to delay implementation of weatherization requirements. However, the Commission understands supply chain and other constraints may prevent timely weatherization of all facilities subject to §3.66. The Commission refers these commenters to revisions in subsection (e), which provide information on which facilities will be prioritized for inspection purposes. The Commission notes that violations will stem from one of two places. Commission Shift requested clarification on a similar statement from the proposal preamble. First, a violation could stem from a scheduled inspection (outside of a weather emergency and after the December 1 deadline for compliance) after which a facility is determined to be out of compliance with §3.66. Second, a violation could result from an inspection conducted as part of an investigation into a reported weather-related forced stoppage or major weather-related forced stoppage that occurs during a weather emergency. If the investigation determines the stoppage is due to an operator's failure to comply with §3.66, the facility will be issued a notice of violation. Notices of violation are discussed in more detail below.

CrownQuest, PBPA, and TXOGA expressed concerns regarding confidentiality of the Weather Emergency Readiness Attestation and other information filed pursuant to §3.66. Some comments stated that the Legislature took great care to prevent the disclosure of certain information, like the electricity supply chain map, from being public and the Commission should follow that lead in creating an inherent confidentiality of these facilities as well as the methods by which they safely operated.

The Commission understands these concerns but has no authority to treat information as inherently confidential unless the Legislature deems the information confidential by law. However, the Commission adopts §3.66 with a change to move instructions for filing confidential information from proposed subsection (d)(2) to new subsection (h). This will clarify that any information, not just the attestation, can be filed confidentially with the Commission. If an operator deems certain information confidential, subsection (h) requires that the operator file two copies of the information required under §3.66 - one complete copy and one copy redacted for public inspection. This will reduce the burden on Commission staff and operators and decrease the time needed to compile responsive information for a Texas Public Information Act (PIA) request. However, the Commission will still follow the process required under the PIA when it receives a PIA request for any information marked confidential.

ACSC notes that confidentiality claims should be limited and requests that the Commission publicly disclose weather-related forced stoppage information on its website as well as information on violations of §3.66.

The Commission notes that the amount of confidentiality claims is unknown at this time. It will consider ACSC's comment as it begins to receive required filings.

Subsection (e) - Inspections

Sierra Club requested the Commission inspect critical infrastructure for weatherization readiness at least once every two years and not just in response to a weather-related forced stoppage during a weather emergency. ACSC asked for more information on the risk-based inspection prioritization process required by Senate Bill 3.

The Commission plans to inspect facilities for compliance with §3.66 on a rotating basis and not just in response to a weather-related forced stoppage or major weather-related forced stoppage. The Commission adopts subsection (e) with changes to clarify the Commission's inspection process. The revisions state that beginning December 1, 2022, the Commission will inspect facilities to ensure compliance with this section and will prioritize inspections of oil leases and gas wells producing greater than 5,000 mcf per day of natural gas and facilities storing, processing, or transporting greater than 200 MMcf per day of natural gas. The Commission will further prioritize inspections in descending order in accordance with a facility's production volume or storage, processing, or transportation capacity. This is consistent with Senate Bill 3's requirement that the Commission shall prioritize based on risk level, as determined by the Commission.

Subsection (f) - Notifications and other requirements for gas supply chain facilities and gas pipeline facilities.

The Commission received numerous comments on proposed subsection (f), which was titled "Weather-related forced stoppages by a gas pipeline facility or gas supply chain facility." The Commission adopts subsection (f) with several changes, including a change to the title to better reflect the contents of the subsection.

First, the Commission reorganizes subsection (f) to separate the notification requirements based on how soon the notification is required.

Subsection (f)(1) addresses notification of weather-related forced stoppages or forced stoppages caused by a loss of electricity that occur during a weather emergency. These notifications are required immediately upon the expiration of 24 hours from discovery of the stoppage if the stoppage is not resolved within that 24-hour period.

The Commission added language to clarify that the notification requirement is triggered if a weather-related forced stoppage occurs during a weather emergency. This language was added in response to comments from PBPA, Oxy, Alliance, TXOGA, and Ovintiv. The Commission also added language requiring notification of forced stoppages due to a loss of electricity in addition to weather-related forced stoppages. The Texas Caucus on Climate, Environment, and the Energy Industry and one individual commented that the Commission should require notice for all stoppages, including curtailments, and that the Commission should not allow operators to circumvent the reporting requirement by internally classifying an outage as not weather related. The Commission agrees that forced stoppages caused by a loss of electricity, such as a curtailment, should be reported to the Commission. The Commission includes that language in new subsection (f)(1) and (f)(2). The Commission also adopts new subsection (f)(3) to allow notifications of forced stoppages to include information such as any third-party issues that may have directly contributed to the stoppage, if applicable.

PBPA requested clarification regarding how the Commission will handle multiple stoppages within a 24-hour period. The 24-hour clock will begin from when the facility experiences the first weather-related forced stoppage or forced stoppage caused by a loss of electricity. If the stoppage is not resolved within 24-hours, the operator must notify the Commission.

TIPRO, Henry, BTA, Diamondback, and Five Stones asked that the notification requirements only be triggered when a reduction in production is caused by an unexpected weather emergency so that operators are not penalized for degradations of production from non-weather-related forced stoppages or third-party failures.

The Commission notes that notification of a forced stoppage is required when a forced stoppage occurs during a weather emergency. The Commission will issue a notice to operators when a weather emergency occurs. Further, a weather-related forced stoppage is defined as an "unanticipated or unplanned" outage due to weather conditions. Therefore, the Commission believes the rule already addresses these concerns.

Oxy, PBPA, Alliance, TXOGA, and Ovintiv also asked for clarification regarding whether a weather-related forced stoppage caused by third party failures will prompt a violation for the operator of the facility that experienced the stoppage. These commenters requested language be added to subsection (f) to clarify that an operator is not responsible for third-party failures.

Regarding operators being penalized for things outside their control, the Commission refers the commenters to language proposed in subsection (f) and adopted in subsection (g) that states if a major weather-related forced stoppage or a weather-related forced stoppage was caused by a gas supply chain facility's or gas pipeline facility's failure to adhere to the requirements of this section, the facility's operator will be subject to an enforcement action. Conversely, a major weather-related forced stoppage or weather-related forced stoppage not caused by the facility's failure to adhere to the requirements of §3.66 will not prompt an enforcement action for the facility's operator. The Commission declines to add the requested change in subsection (f).

TXOGA suggested that notification "on" the Commission's 24-hour emergency telephone number be changed to notification "through" the Commission's 24-hour emergency telephone number.

The Commission agrees and adopts the requested change in subsection (f)(1).

Regarding proposed language requiring immediate notification for weather-related forced stoppages resulting in a certain volume of loss, APT, TIPRO, Henry, BTA, Diamondback, Five Stones, and Rockcliff asked that the Commission distinguish between reporting requirements applicable to producers, transporters, and other sectors.

As noted in the section relating to comments on subsection (b), the Commission agrees with comments that the volumes proposed in subsection (f) as those triggering an immediate notification to the Commission should be used to define a major weather-related forced stoppage. Because the volumes of loss proposed in subsection (f) are incorporated in the definition of major weather-related forced stoppage, the Commission removes the volumes from subsection (f) and instead refers to a major weather-related forced stoppage. This change also addresses the comments from APT, TIPRO, Henry, BTA, Diamondback, Five Stones, and Rockcliff noted in the previous paragraph.

New subsection (f)(2) addresses notification of major weather-related forced stoppages and forced stoppages caused by a loss of electricity that result in the same volume of loss or capacity as a major weather-related forced stoppage. In other words, a forced stoppage due to a loss of electricity that results in: a loss of production exceeding 5,000 Mcf of natural gas per day per oil lease; a loss of production exceeding 5,000 Mcf of natural gas per day per gas well; a loss of gas processing capacity exceeding 200 MMcf per day; a loss of storage withdrawal capacity exceeding 200 MMcf per day; or a loss of transportation capacity exceeding 200 MMcf per day.

Subsection (f)(2) requires notification of these stoppages within one hour of discovery.

Commission Shift requested clarification from the Commission on how it defines "immediate" in relation to the 24-hour timeframe in proposed subsection (f).

Proposed subsection (f) used the term "immediate" for both types of notifications. The Commission understands that this could cause confusion. The Commission makes no changes to the term immediate in new subsection (f)(1). Notifications required under subsection (f)(1) shall be made immediately upon the expiration of 24 hours from discovery of the stoppage if the stoppage is not resolved within that 24-hour period.

Subsection (f)(2) is adopted with a change to remove the term immediate and instead requires notification of the stoppages described in subsection (f)(2) within one hour of discovery. This timeframe is consistent with other notifications required by the Commission, such as notification of pipeline safety incidents.

Commission Shift requested the Commission use the same units when describing thresholds of gas (i.e., either designate all thresholds in Mcf or all in MMcf).

The Commission disagrees. Different units are commonly used for different types of facilities and are also used in §3.65. Thus, the Commission chooses to make the two rules consistent.

Proposed subsection (f)(2) contained a requirement that a facility that experiences repeated or major weather related-forced stoppages as defined in subsection (b) contract with a qualified engineer to obtain an assessment of the operator's weather emergency preparation measures. This requirement was incorporated to ensure consistency with Senate Bill 3. However, CrownQuest, Discovery, Diamondback, PBPA, TIPRO, and TXOGA noted that the Commission's requirement went beyond what was required in the statute and requested the Commission revise the language to allow consultation with a Commission employee rather than require a qualified engineer. Conversely, Henry, BTA, Five Stones, and Rockcliff asked that the Commission revise "qualified engineer" to "registered professional engineer" to ensure consistency with other Commission rules.

The Commission agrees that Senate Bill 3 does not require contracting with a qualified engineer. Senate Bill 3 states that the operator of a facility that experiences repeated or major forced interruptions shall contract with a person who is not an employee of the operator. The Commission declines to allow an operator subject to this requirement to consult with a Commission employee. The statutes added by Senate Bill 3 (Natural Resources Code §86.044 and Utilities Code §121.2015) require *contracting* with a person. The Commission interprets the term "contract" to exclude consultation with a Commission employee. However, the Commission adopts subsection (f)(4) with a change to allow contracting with a person with related experience.

Henry, BTA, Diamondback, Five Stones, and Rockcliff asked that the Commission add language to clarify that the requirement to contract with a person under subsection (f)(4) is only applicable after a hearing and final order. Endeavor requested that the requirement in subsection (f)(4) not apply if the stoppage was due to an electricity failure or other third-party failure.

The Commission declines to incorporate the requested changes. However, the Commission notes that the requirement in subsection (f)(4) will not be triggered immediately but only upon a determination that the applicable weather-related forced stoppage/stoppages were due to an operator's failure to comply with §3.66.

Henry, BTA, Diamondback, Five Stones, and Rockcliff requested the Commission give operators the option of filing the engineer's assessment and operator's corrective action plan as confidential.

The Commission agrees. This comment is addressed by the relocated language in subsection (h).

Subsection (g) - Enforcement

PBPA, TIPRO, Henry, BTA, Diamondback, and Five Stones recommended the Commission change references to "person" in subsection (g) to "operator" for consistency.

The Commission agrees and adopts subsection (g) with the requested change.

Henry, BTA, Diamondback, and Five Stones asked that subsection (g)(1) be revised to state that a violation that is not remedied within a reasonable amount of time will only be referred to the Office of the Attorney General after notice and opportunity for hearing.

The Commission agrees and adopts subsection (g) with the requested change.

Commission Shift and Endeavor asked the Commission to clarify what the Commission considers to be a reasonable amount of time to come into compliance.

The Commission's position is that a reasonable amount of time will depend on the circumstances of the violation.

PBPA, TXOGA, and Ovintiv asked that the Commission incorporate language clarifying that operators will be given notice, hearing, and an opportunity to appeal as allowed in all other enforcement actions at the Commission.

The Commission has incorporated language in subsections (g)(1) and (2) to clarify that the Commission will provide notice of a violation by certified mail and the notice will give the operator 30 days to request a hearing.

Commission Shift asked whether the Commission will use the schedule of time out of compliance in the Classification Table or if the Commission will consider each day a violation occurs to be a separate violation as stated in proposed subsection (g). TCPA noted that proposed subsection (g) should be revised to be consistent with the statutory language, which states that each day a violation "continues" may be considered a separate violation.

The Commission agrees with TCPA and adopts subsection (g)(1) and (g)(2) with changes to ensure consistency with applicable statutory language. Natural Resources Code §86.222, relating to gas supply chain facilities, does not include language permitting the Commission to treat each day a violation continues as a separate violation. Therefore, the Commission removes that language from subsection (g)(1). Because the Commission does not have authority to treat each day a separate violation for gas supply chain facility violations, the Commission will use the time out of compliance factors for gas supply chain facility violations. However, Texas Utilities Code §121.206 allows the Commission to consider each day a violation continues as a separate offense. Therefore, the Commission retains this option for violations by gas pipeline facility operators.

ACSC asked that the Commission outline penalties for failure to fully cooperate with inspectors.

The Commission is not aware that this situation frequently occurs such that the rule should be revised. The Commission declines to adopt the requested change.

Endeavor asked for more guidance as to what will warrant the maximum $1,000,000 fine.

The Commission notes that, in accordance with Natural Resources Code §86.222, a penalty in an amount that exceeds $5,000 may be recovered only if the violation is included in the highest class of violations in the classification system. According to the Classification Table, only violations with a total factor value of 15 points or more will be eligible for the $1,000,000 penalty. The higher the total factor value, the more likely the Commission will recommend a higher penalty to the Attorney General when the violation is referred for penalty assessment, which will ultimately be assessed by the district court.

ACSC requested that subsection (g) include language stating that the Commission maintains full authority to classify any violation under the rule as a top-tier Class A violation, notwithstanding any other language in §3.66.

The Commission declines to adopt this change and instead will utilize the classification table in assessing penalty amounts.

Commission Shift, 76 individuals, TCPA, and Sierra Club asked that the potential penalties be higher than the potential cost of non-compliance.

The Commission finds that the potential penalties will encourage compliance. Points for each factor value will be accumulated in calculating the total. Operators who intentionally choose not to comply with §3.66 may be considered Class A violators. Therefore, the Commission declines to make any changes in response to these comments.

Classification Table in Subsection (g)

ACSC, Commission Shift, Sierra Club, and 77 individuals asked that the Classification Table be revised to allow a lower point total to result in the highest class such that more violations may be assessed a penalty of greater than $5,000.

The Commission notes that it will not be difficult for a violation to be classified as Class A in accordance with the table. For example, an operator of a facility, regardless of size, who fails to take any measures to comply with §3.66, makes no effort to remedy its violation resulting in an extended time out of compliance, and creates an actual or potential hazard to health, safety, or economic welfare of the public has a total of 15 or more points. This total is achieved even without considering factors due to the facility's production volume or capacity.

Oxy, Alliance, and TXOGA asked that the table consider an operator's overall or statewide gas production. Oxy and TXOGA suggested that a line item be added to the classification table if an operator keeps a certain percentage of its aggregate production within Texas online in the event there are failures at a number of very lower tier, low-production leases and/or gas wells. Their comments suggested -2 for 70%, -3 for 80%, and -4 for 90%.

The Commission declines to incorporate the line items requested because an operator's amount of statewide production is likely unrelated to the amount of gas it contributes to the electricity supply chain. A facility subject to the requirements of §3.66 is on the electricity supply chain map and, therefore, a weather-related forced stoppage in violation of §3.66 has a potential impact to the electricity supply chain that is likely not resolved by the operator's ability to maintain production at facilities that are not on the electricity supply chain map.

However, the Commission agrees that an incentive may be given to operators to redirect gas to the supply chain or otherwise make up for the impact to the supply chain caused by the violation. Therefore, the Commission adopts the table with new rows to allow a credit of three points if, during the weather emergency in which the facility's violation occurred, the operator had no reduction in the natural gas supplied to the Texas electricity supply chain. For saltwater disposal well operators, an operator can obtain the credit by showing that during the weather emergency in which the facility's violation occurred, the disposal well operator had no reduction in saltwater disposal capacity made available to Texas electricity supply chain facilities.

TIPRO, Henry, BTA, Diamondback, Five Stones, and Rockcliff asked that the Commission include a factor of -4 for a good faith attempt to produce during a weather emergency.

The Commission disagrees. The relevant inquiry is whether the operator properly took measures to prepare during the weather emergency in accordance with §3.66. An operator that took no measures but then attempted in good faith to produce during the weather emergency should not receive a credit.

TXOGA and Ovintiv requested a line item of -15 for an operator's inability to remedy a violation due to conditions endangering safety of the operator's personnel.

The Commission declines to add the line item because the violation was issued due to a facility's failure to prepare not because of a facility's inability to remedy a violation. A -15 factor value would effectively remove all consequences of a failure to prepare in accordance with §3.66.

TIPRO, Henry, BTA, Diamondback, and Five Stones requested that production thresholds be updated to reflect the possibility of degradation of production. Specifically, comments requested the threshold for gas wells and oil leases be increased from 5,000 Mcf per day to 15,000 Mcf per day or a 40% reduction in lease production averaged over a three-month period.

The Commission declines to make the requested change. As discussed in the proposal for §3.66, the thresholds were chosen to correspond to thresholds for Tier 1 facilities in the Public Utility Commission's guidance to electric utilities regarding prioritizing critical natural gas supply chain facilities for load-shed purposes.

TIPRO, Henry, BTA, Diamondback, Five Stones, and Rockcliff commented that the violation factor "Hazard to health, safety, or economic welfare of the public" should be amended to "Actual hazard to health, safety, or economic welfare of the public."

The Commission agrees and adopts the table with that language.

The Commission appreciates all the comments submitted on the proposal.

The Commission summarizes the provisions adopted in §3.66 as follows. Adopted §3.66(a)(1) incorporates elements from §86.044 of the Natural Resources Code and adopted §3.66(a)(2) incorporates elements from Texas Utilities Code §121.2015.

Adopted §3.66(b) contains definitions for "gas pipeline facility" and "gas supply chain facility" to further clarify which facilities are subject to the requirements of §3.66. The definitions for "gas pipeline facility" and "gas supply chain facility" are consistent with Texas Utilities Code §121.2015 and Texas Natural Resources Code §86.044, respectively. A gas pipeline facility is a pipeline or pipeline facility regulated by the Commission under Texas Utilities Code Chapter 121. A gas supply chain facility is a facility that is used for producing, treating, processing, pressurizing, storing, or transporting natural gas as well as handling waste produced. These facilities include gas wells, oil leases producing casinghead gas, gas processing plants, underground natural gas storage, and saltwater disposal facilities.

A gas supply chain facility or gas pipeline facility must be included on the electricity supply chain map for §3.66 to apply to the facility. If the facility is not included on the map, the requirements of new §3.66 do not apply to the facility.

In addition to definitions for "gas supply chain facility" and "gas pipeline facility," adopted subsection (b) contains definitions for the following terms: critical component, major weather-related forced stoppage, repeated weather-related forced stoppage, sustained operation, weather emergency, weatherization, and weather-related forced stoppage.

Adopted subsection (c) contains the weather emergency preparedness standards for a gas supply chain facility or a gas pipeline facility subject to §3.66 as specified in subsection (a). By December 1st of each year, a gas supply chain facility operator or a gas pipeline facility operator shall implement weather emergency preparation measures intended to, first, ensure the sus-

tained operation of a gas supply chain facility or a gas pipeline facility during a weather emergency.

Adopted subsection (c)(1)(A) states that weather emergency preparation measures intended to ensure sustained operation are required during a weather emergency.

The definition of "weather emergency" ensures that the requirements of adopted §3.66 help achieve the purpose of Senate Bill 3, which aims to stabilize the electricity supply chain. Therefore, adopted §3.66 tasks operators of gas supply chain facilities and gas pipeline facilities with implementing measures to ensure sustained operation when weather conditions create a risk to the electricity supply chain.

As adopted in §3.66(c)(1)(B), by December 1st of each year, a gas supply chain facility operator or a gas pipeline operator shall also implement weather emergency preparation measures intended to correct known weather-related forced stoppages that prevented sustained operation of a facility because of previous weather emergencies.

Adopted §3.66(c)(2) lists the weather emergency preparation measures that are required. First, weather emergency preparation measures shall include providing training on weather emergency preparations and operations to relevant operational personnel. Adopted subsection (c)(2)(B) requires consideration of the risk to the health and safety of employees and protection of the environment. Adopted subsection (c)(2)(C) requires weatherization of the facility using methods a reasonably prudent operator would take given the type of facility, the age of the facility, the facility's critical components, the facility's location, and weather data for the facility's county or counties such as data developed for the Commission by the state climatologist. The Commission will periodically publish weatherization practices and may include weather data developed for the Commission by the state climatologist. The definition of "weatherization" is adopted with changes in subsection (b) as described in the summary of comments section.

Adopted subsection (d) requires a gas supply chain facility operator or gas pipeline facility operator to submit to the Commission a Weather Emergency Readiness Attestation by December 1st of each year. The attestation must be prepared by an authorized representative of the operator entity or under the authorized representative's supervision and direction and must attest that the operator implemented the weather emergency preparation measures described in subsection (c). The attestation must also include an attachment describing all activities the operator engaged in to implement the requirements of subsection (c), including a description of the weatherization methods utilized by the operator to weatherize each type of facility.

Additionally, subsection (d)(3) requires that for the first attestation due December 1, 2022, the attestation describe corrective actions taken to mitigate known weather-related forced stoppages that prevented sustained operation of the facility because of previous weather emergencies.

Adopted §3.66(e) states that the Commission will inspect facilities subject to §3.66 to ensure compliance with the section's requirements. The Commission notes that, generally, an inspection will stem from one of two places: (1) a regular inspection of the facility conducted in accordance with the Commission's inspection schedule; or (2) an inspection scheduled in response to a weather-related forced stoppage notification filed under subsection (f).

Adopted subsection (f) is adopted with changes described in the comment summary section. It contains requirements related to weather-related forced stoppages and forced stoppages due to a loss of electricity. Subsection (f)(1) requires the operator of a facility that experiences a weather-related forced stoppage or a forced stoppage due to a loss of electricity to notify the Commission of the stoppage if the stoppage is not resolved within 24 hours of discovery. The notification is only required if the forced stoppage occurs during a weather emergency. The notification shall be made to the Commission's Critical Infrastructure Division's notification portal. However, if the facility experiences a stoppage described in adopted subsection (f)(2), the operator shall, within one hour of discovery of the stoppage, contact the Commission through the Critical Infrastructure Division 24-hour emergency telephone number. As mentioned above, a notification through the portal or to the emergency number will result in an inspection to determine whether the stoppage was caused by the facility's failure to adhere to the requirements of adopted §3.66. If the weather-related forced stoppage was unrelated to the requirements of §3.66, the facility will not be issued a violation.

Subsection (f)(4) incorporates requirements added to Texas Natural Resources Code §86.044 and Texas Utilities Code §121.2015 by Senate Bill 3. If a gas supply chain facility or a gas pipeline facility experiences repeated weather-related forced stoppages or major weather-related forced stoppages it shall contract with a person with related experience to assess the facility's weather emergency preparation measures, plans, procedures, and operations. "Major weather-related forced stoppage" is defined in subsection (b)(4) and is adopted with changes due to comments as described above. "Repeated weather-related forced stoppage" is defined in subsection (b)(5) and is also adopted with a change such that "calendar year" is revised to "12-month period."

Adopted §3.66(g) relates to enforcement of violations of §3.66 and is adopted with changes as described in the comment summary above. Texas Natural Resources Code §§86.044 and 86.222-.224 stipulate the enforcement process and penalties for a violation of §3.66. Pursuant to these statutes, if the Commission determines that an operator has violated §3.66 and the violation is not remedied within a reasonable amount of time, the Commission is required to notify the Office of the Attorney General of Texas. Texas Natural Resources Code section 86.044 requires that the Attorney General initiate a suit to recover a penalty for the violation. Texas Natural Resources Code section 86.222 requires the Commission to establish a classification system to be used by a court for violations of §3.66. The classification system shall include a range of penalties that may be recovered for each class of violation based on factors such as the nature, circumstances, extent, and gravity of a prohibited act; the hazard or potential hazard created to the public's health, safety, or economic welfare; the history of previous violations; the amount necessary to deter future violations; and efforts to correct the violation. Section 86.222 further specifies that the classification system require only the highest class of violations to be eligible for a penalty exceeding $5,000. The maximum penalty allowed by section 86.222 is $1,000,000 for each offense.

The table in subsection (g)(1) contains the classification system required by section 86.222. It incorporates the factors required by section 86.222 and assigns a factor value to each factor. The values are then totaled to assign each violation a class based on point total, and the class determines the penalty range. A Class

A violation is the highest class of violations, making it eligible under section 86.222 for a penalty amount greater than $5,000 up to $1,000,000.

Adopted subsection (g)(2) incorporates the enforcement process and penalty requirements specified in Texas Utilities Code sections 121.2015 and 121.206. Section 121.2015 requires that the Commission assess an administrative penalty against an operator who violates §3.66 if the violation is not remedied within a reasonable amount of time. It also requires that the Commission report such violations to the Attorney General. However, unlike Texas Natural Resources Code section 86.044, the Attorney General is not required to file suit. Instead, the Commission is authorized to assess an administrative penalty. The Commission will use the table in subsection (g)(1) to assess penalties for a violation of §3.66.

The Commission notes that violations of §3.66 will be issued on a facility basis. The operator of a facility with an alleged violation will be issued a notice of the violation and given an opportunity for a hearing. A gas supply chain facility violation will be determined by the Commission and then referred to the Attorney General for penalty assessment as specified in subsection (g). For a gas pipeline facility violation, the Commission will determine whether there is a violation, and if so, will also assess the appropriate penalty.

The Commission adopts the new rule under section 86.044 of the Texas Natural Resources Code, which requires the Commission to adopt rules requiring certain gas supply chain facility operators to implement measures to prepare to operate during a weather emergency (i.e., "weatherize"); section 86.222 of the Texas Natural Resources Code, which requires the Commission to establish an enforcement process and penalties for violations of Commission rules adopted under section 86.044; section 121.2015 of the Texas Utilities Code, which requires the Commission to adopt rules requiring certain pipeline facility operators to implement measures to prepare to maintain service quality and reliability during extreme weather conditions; and section 121.206 of the Texas Utilities Code, which requires the Commission to establish an enforcement process and penalties for violations of Commission rules adopted under section 121.2015.

Statutory authority: Natural Resources Code §§86.044 and 86.222; Utilities Code §§121.2015 and 121.206.

Cross reference to statute: Natural Resources Code Chapter 86, Utilities Code Chapter 121.

§3.66. Weather Emergency Preparedness Standards.

(a) Applicability.

(1) In accordance with Texas Natural Resources Code §86.044, this section applies to a gas supply chain facility that is:

(A) included on the electricity supply chain map created under Texas Utilities Code §38.203; and

(B) designated as critical in §3.65 of this title, relating to Critical Designation of Natural Gas Infrastructure.

(2) In accordance with Texas Utilities Code §121.2015, this section applies to a gas pipeline facility that:

(A) directly serves a natural gas electric generation facility operating solely to provide power to the electric grid for the Electric Reliability Council of Texas (ERCOT) power region or for the ERCOT power region and an adjacent power region; and

(B) is included on the electricity supply chain map created under Texas Utilities Code §38.203.

(b) Definitions. In this section, the following definitions apply.

(1) Critical component--Any component, including components on equipment rented or leased from a third party, that is susceptible to weather-related interruptions, such as those caused by freezing temperatures, freezing precipitation, or extreme heat, the occurrence of which is likely to significantly hinder sustained operation of the gas pipeline or gas supply chain facility.

(2) Gas pipeline facility--A pipeline or pipeline facility regulated by the Commission under Texas Utilities Code Chapter 121.

(3) Gas supply chain facility--A facility that is:

(A) used for producing, treating, processing, pressurizing, storing, or transporting natural gas, as well as handling waste produced;

(B) not primarily used to support liquefied natural gas pretreatment, liquefaction, or regasification facilities in the business of exporting or importing liquefied natural gas to or from foreign countries;

(C) otherwise regulated by the Commission under Subtitle B of Title 3, Texas Natural Resources Code; and

(D) not regulated by the Commission under Texas Utilities Code Chapter 121.

(4) Major weather-related forced stoppage--A weather-related forced stoppage during a weather emergency that is the result of the deliberate disregard of this section or that results in:

(A) a loss of production exceeding 5,000 Mcf of natural gas per day per oil lease;

(B) a loss of production exceeding 5,000 Mcf of natural gas per day per gas well;

(C) a loss of gas processing capacity exceeding 200 MMcf per day;

(D) a loss of storage withdrawal capacity exceeding 200 MMcf per day; or

(E) a loss of transportation capacity exceeding 200 MMcf per day.

(5) Repeated weather-related forced stoppage--When a gas supply chain facility or a gas pipeline facility has more than one major weather-related forced stoppage or weather-related forced stoppage violation within a 12-month period.

(6) Sustained operation--Safe operation of a gas supply chain facility or a gas pipeline facility such that the facility does not experience a major weather-related forced stoppage or weather-related forced stoppage in production, treating, processing, storage, or transportation of natural gas.

(7) Weather emergency--Weather conditions such as freezing temperatures, freezing precipitation, or extreme heat in the facility's county or counties that result in an energy emergency as defined by §3.65 of this title. A weather emergency does not include weather conditions that cannot be reasonably mitigated such as tornadoes, floods, or hurricanes.

(8) Weatherization--The iterative cycle of preparedness for sustained operation during weather emergencies that includes:

(A) correcting critical component failures that occurred during previous weather emergencies;

(B) installing equipment to mitigate weather-related operational risks; and

(C) internal inspection, self-assessment, and implementation of processes to identify, test, and protect critical components.

(9) Weather-related forced stoppage--An unanticipated and/or unplanned outage in the production, treating, processing, storage, or transportation of natural gas that is caused by weather conditions such as freezing temperatures, freezing precipitation, or extreme heat and occurs during a weather emergency.

(c) Weather emergency preparedness standards for a gas supply chain facility or a gas pipeline facility.

(1) By December 1st of each year, a gas supply chain facility operator or a gas pipeline facility operator shall implement weather emergency preparation measures intended to:

(A) ensure the sustained operation of a gas supply chain facility or a gas pipeline facility during a weather emergency; and

(B) correct known major weather-related forced stoppages and weather-related forced stoppages that prevented sustained operation of a facility because of previous weather emergencies.

(2) Weather emergency preparation measures required by paragraph (1) of this subsection shall include:

(A) providing training on weather emergency preparations and operations to relevant operational personnel;

(B) consideration of the risk to the health and safety of employees and protection of the environment; and

(C) weatherization of the facility using methods a reasonably prudent operator would take given the type of facility, the age of the facility, the facility's critical components, the facility's location, and weather data for the facility's county or counties such as data developed for the Commission by the state climatologist. The Commission will periodically publish weatherization practices and may include weather data developed for the Commission by the state climatologist.

(d) Weather Emergency Readiness Attestation. By December 1 of each year, an operator of a gas supply chain facility or a gas pipeline facility shall submit to the Commission a Weather Emergency Readiness Attestation that:

(1) is signed by an authorized representative of the operator entity attesting, under penalties prescribed in Texas Natural Resources Code §91.143, that:

(A) the operator implemented the required weather emergency preparation measures described in subsection (c) of this section;

(B) the information and statements made in the Weather Emergency Readiness Attestation are true, correct, and complete to the best of the attestor's knowledge;

(C) the representative is authorized to sign the attestation on behalf of the operator entity; and

(D) the Weather Emergency Readiness Attestation was prepared by the authorized representative or under the authorized representative's supervision and direction;

(2) includes an attachment describing all activities engaged in by the operator to implement the requirements of subsection (c) of this section, including a description of the weatherization methods utilized by the operator to weatherize each type of facility; and

(3) for the Weather Emergency Readiness Attestation due December 1, 2022, also describes corrective actions taken to mitigate known major weather-related forced stoppages and weather-related forced stoppages that prevented sustained operation of a facility because of previous weather emergencies.

(e) Inspection of gas supply chain facilities and gas pipeline facilities. Beginning December 1, 2022, the Commission will inspect facilities to ensure compliance with this section and will prioritize inspections of oil leases and gas wells producing greater than 5,000 Mcf per day of natural gas and facilities storing, processing, or transporting greater than 200 MMcf per day of natural gas. The Commission will further prioritize inspections in descending order in accordance with a facility's production volume or storage, processing, or transportation capacity.

(f) Notifications and other requirements for gas supply chain facilities and gas pipeline facilities.

(1) An operator of a gas supply chain facility or a gas pipeline facility that experiences either of the following during a weather emergency shall notify the Commission immediately through the Critical Infrastructure Division's notification portal if the stoppage is not resolved within 24 hours of discovery of the stoppage:

(A) a weather-related forced stoppage; or

(B) a forced stoppage caused by a loss of electricity.

(2) An operator of a gas supply chain facility or gas pipeline facility that experiences either of the following during a weather emergency shall, within one hour of discovery of the stoppage, contact the Commission through the Critical Infrastructure Division's 24-hour emergency telephone number. Subsequent to the phone call, the operator shall submit a notification through the Critical Infrastructure Division's notification portal:

(A) a major weather-related forced stoppage; or

(B) a forced stoppage caused by a loss of electricity that results in the same volume of loss in natural gas production, withdrawal capacity, processing capacity, or transportation capacity as a major weather-related forced stoppage.

(3) The notification of the major weather-related forced stoppage or weather-related forced stoppage may include information such as any third-party issues that may have directly contributed to the stoppage, if applicable.

(4) A gas supply chain facility or a gas pipeline facility that is determined to have experienced repeated weather-related forced stoppages or major weather-related forced stoppages in sustained operation during a weather emergency shall comply with this paragraph. Upon notice from the Commission that the facility is required to comply with this paragraph, the facility's operator shall contract with a person with related experience to assess the facility's weather emergency preparation measures, plans, procedures, and operations. The person with related experience shall not be an employee of the facility or its affiliate and shall not have participated in any assessments of the facility for at least the previous five years, unless the facility's operator can document that no other persons with related experience are reasonably available for engagement. Within the timeframe provided by the Commission, the operator shall submit to the Commission a written assessment prepared by the person and the facility operator's corrective action plan in compliance with the terms in the Commission's notice that the facility is required to comply with this paragraph.

(g) Enforcement.

(1) Violation of this section by a gas supply chain facility operator. If a major weather-related forced stoppage or weather-related forced stoppage was caused by a gas supply chain facility's failure to adhere to the requirements of this section, the facility's operator will be subject to an enforcement action. A gas supply chain facility operator will be given notice and opportunity for a hearing for alleged violations of this section. The notice will be sent by certified mail and state the facts or conduct alleged to comprise the violation. The notice will give the operator 30 days from receipt to request a hearing. Pursuant to Texas Natural Resources Code §86.044 and §§86.222-.224, if after notice and opportunity for a hearing, the Commission determines that an operator has violated this section and the violation is not remedied in a reasonable amount of time, the Commission shall notify the Office of the Attorney General of Texas of the violation in accordance with Texas Natural Resources Code §86.222. The table in this paragraph contains a classification system to be used under Texas Natural Resources Code §86.222 for violations of this section. The penalty for each violation may be up to $1,000,000.
Figure: 16 TAC §3.66(g)(1)

(2) Violation of this section by a gas pipeline facility operator.

(A) If a major weather-related forced stoppage or weather-related forced stoppage was caused by a gas pipeline facility's failure to adhere to the requirements of this section, the facility's operator will be subject to an enforcement action. A gas pipeline facility operator will be given notice and opportunity for a hearing for alleged violations of this section. The notice will be sent by certified mail and state the facts or conduct alleged to comprise the violation. The notice will give the operator 30 days from receipt to request a hearing. Pursuant to Texas Utilities Code §121.2015, if after notice and opportunity for a hearing, the Commission determines that an operator has violated this section and the violation is not remedied in a reasonable amount of time, the Commission shall report the violation to the Office of the Attorney General of Texas. Pursuant to Texas Utilities Code §121.206, the Commission shall assess an administrative penalty for a violation of this section, which may be up to $1,000,000 for each offense. Each day a violation continues constitutes a separate offense.

(B) In accordance with Texas Utilities Code §121.206(d), the Commission will use the table in paragraph (1) of this subsection in assessing penalties for a violation of this section. The penalty amounts contained in the table in paragraph (1) of this subsection are provided solely as guidelines to be considered by the Commission in determining the amount of administrative penalties for violations of Texas Utilities Code, Chapter 121, Subchapter E, or a safety standard or other rule prescribed or adopted under that subchapter. The establishment of these penalty guidelines shall in no way limit the Commission's authority and discretion to cite violations and assess administrative penalties. The Commission retains full authority and discretion to cite violations of Texas Utilities Code, Chapter 121, Subchapter E, or a safety standard or other rule prescribed or adopted under that subchapter, and to assess administrative penalties in any amount up to the statutory maximum when warranted by the facts in any case, regardless of inclusion in or omission from this section. The penalty calculation worksheet shown in the table in paragraph (1) of this subsection lists the typical penalty amounts for certain violators, the circumstances justifying enhancements of a penalty, and the circumstances justifying a reduction in a penalty.

(h) Confidentiality. If a gas supply chain facility operator or a gas pipeline facility operator filing information required by this section contends certain information is confidential by law, the operator shall file a complete version of the required information and a version for public inspection in which the confidential information has been redacted. If the Commission receives a request under the Texas Public Information Act (PIA), Texas Government Code, Chapter 552, for materials that have been designated confidential, the Commission will notify the filer of the request in accordance with the provisions of the PIA so that the filer can take action with the Office of the Attorney General to oppose release of the materials.

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, 2022.

TRD-202203326
Haley Cochran
Rules Attorney, Office of General Counsel
Railroad Commission of Texas
Effective date: September 19, 2022
Proposal publication date: July 15, 2022
For further information, please call: (512) 475-1295

CHAPTER 5. CARBON DIOXIDE (CO2)

The Railroad Commission of Texas (the "Commission") adopts amendments to §5.101 and §5.102, relating to Purpose, and Definitions, in Subchapter A; amendments to §§5.201 - 5.207, relating to Applicability and Compliance; Permit Required; Application Requirements; Notice and Hearing; Fees, Financial Responsibility, and Financial Assurance; Permit Standards; and Reporting and Record-Keeping. Section 5.101 is adopted without changes and will not be republished. The remaining sections are adopted with changes to the proposed text as published in the May 20, 2022, issue of the *Texas Register* (47 TexReg 2944). These rules will be republished.

The Commission adopts the amendments to implement changes made during the 87th Texas Legislative Session (Regular Session, 2021) and to reflect additional federal requirements to allow the Commission to submit an application for enforcement primacy for the federal Class VI Underground Injection Control (UIC) program.

The U.S. Environmental Protection Agency (EPA) protects underground sources of drinking water (USDWs) by regulating the injection of fluids underground for storage or disposal. The Safe Drinking Water Act (SDWA) and the Underground Injection Control (UIC) program provide the primary regulatory framework. From the early 1980s until 2010, EPA regulated five classes of wells according to the type of fluid injected, the depth of injection, and the potential to endanger USDWs. Historically, most States have sought and been granted primacy over one or more classes of wells. For example, most states have primacy over Class II wells, in which fluids are injected for natural gas and oil production, hydrocarbons storage, and enhanced recovery of oil and gas.

In 2010, EPA promulgated rules creating a sixth well class (Class VI) specifically to regulate the injection of CO_2 into deep subsurface rock formations. EPA established minimum technical criteria for permitting, site characterization, area of review and corrective action, financial responsibility, well construction, operation, mechanical integrity testing, monitoring, well-plugging, post-injection site care, and site closure requirements.

Under the SDWA, EPA may delegate its authority to implement and enforce the UIC program to States upon application. If EPA approves a State's application, the State assumes primary enforcement authority (i.e., primacy) over a class or classes of wells. Until a State receives primacy, EPA directly implements the UIC program through its regional offices.

The State of Texas established a framework for projects involving the capture, injection, sequestration or geologic storage of anthropogenic carbon dioxide in Senate Bill 1387, 81st Texas Legislature, R.S., 2009. The statutes required the state to pursue primacy for the Class VI UIC program. In recent years, interest in carbon capture and storage has increased. In June 2021, Texas took an important step towards primacy by enacting House Bill 1284 (HB 1284, 87th Legislature, R.S., 2021), which gives the Railroad Commission of Texas sole jurisdiction over carbon sequestration wells (jurisdiction had previously been shared with the Texas Commission on Environmental Quality (TCEQ)). When Texas seeks primacy over Class VI wells, its primacy application should be greatly simplified by giving a single state agency jurisdiction over Class VI permitting.

HB 1284 also amended Texas Water Code, §27.041(a) and (c), to provide the Commission with jurisdiction over a well used for geologic storage of carbon dioxide regardless of whether the well was initially completed for that purpose or was initially completed for another purpose and is converted to the geologic storage of anthropogenic carbon dioxide.

HB 1284 also amended Texas Water Code, §27.043, to prohibit the Commission from issuing a permit for the conversion of a previously plugged and abandoned Class I injection well, including any associated waste plume, to a Class VI injection well.

HB 1284 amended Texas Water Code, Chapter 27, Subchapter C-1, by adding §27.0461, relating to letter of determination from Commission, which requires that a person making an application to the Commission for a Class VI permit must submit with the application a letter of determination from TCEQ concluding that drilling and operating an anthropogenic carbon dioxide injection well for geologic storage or constructing or operating a geologic storage facility will not impact or interfere with any previous or existing Class I injection well, including any associated waste plume, or any other injection well authorized or permitted by TCEQ.

HB 1284 amended Texas Water Code, §27.048(b), to require that the Commission seek primacy to administer and enforce the program for the geologic storage and associated injection of anthropogenic carbon dioxide in this state, including onshore and offshore geologic storage and associated injection.

The Commission's Class II program was approved under §1425 of the SDWA, which requires that the state's program be effective in preventing endangerment of USDWs. However, EPA must review the Commission's Class VI program for geologic sequestration of carbon dioxide under §1422 of the SDWA, which requires that a state's program meet the minimum federal requirements. The amendments ensure that the Commission's regulations meet the minimum federal requirements for Class VI UIC wells.

The Commission received 17 comments on the proposal, five from associations (the Greater Houston Partnership, NARO-Texas, the Permian Basin Petroleum Association (PBPA), The Texas Industry Project (TIP), and the Texas Oil and Gas Association (TXOGA)), ten from companies or organizations, and two from individuals. The Commission also received one comment submitted on behalf of 37 Texas-based organizations and individuals. The Commission appreciates these comments.

General Comments

The Port of Corpus Christi Authority, the Greater Houston Partnership, the Carbon Neutral Coalition, Calpine Corporation, the Energy Advance Center (EAC), PBPA, TXOGA, TIP, and Denbury Carbon Solutions, LLC (Denbury) expressed support for the Commission's Class VI primacy application to the EPA. The Environmental Defense Fund (EDF) commented that, in most respects the Commission's proposed rules are technically excellent and EDF is generally supportive of the Commission's approach. The Commission appreciates the support of these commenters.

Commission Shift and the Texas-based organizations and individuals commented that they do not support the Commission's pre-application for Class VI primacy. These commenters believe the Commission's oversight and response to emergencies and active contamination caused by modern and legacy wells is weak. In addition to changes recommended in Chapter 5, the Texas-based organizations and individuals recommended the Commission consider a thorough overhaul of its monitoring and enforcement programs for both the oil and gas division and the pipeline safety department. The Texas-based organizations and individuals oppose the current annual Oil and Gas Division Monitoring and Enforcement Strategic Plan required by House Bill 1818 because it has proven to be slow and insufficient in addressing the many serious structural problems with monitoring and enforcement at the Commission.

The Commission disagrees. The Commission is continually working to improve its ability to analyze and measure the effectiveness of its oil and gas monitoring and enforcement program. House Bill 1818 (85th Legislature, Regular Session, 2017) directed the Commission to develop an annual plan to assess the most effective use of its limited resources to protect public safety and minimize damage to the environment. The purpose of this plan is to define and communicate the Oil and Gas Division's strategic priorities for its monitoring and enforcement efforts. The plan confirms many of the division's current priorities as well as establishes direction for data collection, stakeholder input, and new priorities for future fiscal years. The draft program description and memorandum of agreement with EPA mirror the Commission's existing approach to compliance and enforcement for the UIC program. Enforcement and compliance records for UIC wells can be accessed through the Commission's online database. A listing of the information concerning compliance and enforcement with the Commission's Oil & Gas Division is available on the Commission's website at the following link: https://www.rrc.texas.gov/oil-and-gas/compliance-enforcement/.

Regarding the request to overhaul the Commission's enforcement program for pipeline safety, that comment is outside the scope of the rulemaking to amend Chapter 5. Further, the statutory changes made by House Bill 1818 regarding the Oil and Gas Division Monitoring and Enforcement Strategic Plan do not address pipeline safety issues.

The Texas-based organizations expressed opposition to any infrastructure approved by commissioners who have financial interests related to operators who appear on the Personal Financial Statements that the commissioners submit to the Texas Ethics Commission. The Texas-based organizations and

individuals requested that the Commissioners affirm that they will not make decisions about companies related to campaign donors from which the Commissioners have accepted more than $1,000. This comment is also outside the scope of this rulemaking.

Commission Shift and the Texas-based organizations commented that communities in the Gulf Coast and the Permian Basin who are likely to see the brunt of this development have expressed that they are already overburdened with the risks and health impacts of unchecked petrochemical development. The Texas-based organizations commented that many communities in the Texas Gulf Coast, the Eagle Ford Shale, and the Permian Basin regions are predominantly people of color, low income, and/or are already overburdened by heavy industrial activity and poor state oversight and that these communities will continue to be disproportionately affected by carbon capture and storage. The Texas-based organizations believe state agencies ignore the public's concerns and requests for information, and also believe private industry has unequal leverage over state agencies compared to the public. Nonetheless, the Texas-based organizations and individuals ask that the Commission participate in dialogue with the public in an effort to resolve potential conflicts posed by Class VI injection.

The Commission agrees that there are areas of Texas with a concentration of industrial activity that are also in the area of disadvantaged communities. The program requirements and rule amendments are designed to ensure that where geologic storage is deployed, projects are permitted, sited, constructed, operated, and closed in a manner that protects USDWs from endangerment. The regulations build on the long-standing framework of the UIC program, under which the injection of billions of gallons of liquids has been regulated for decades. The amendments enhance this existing framework with requirements that are tailored to the unique nature of large-scale geologic storage of carbon dioxide. These additional protective requirements include more extensive geologic testing, detailed computational modeling of the area of review (AOR) and periodic reevaluations, detailed requirements for monitoring and tracking the carbon dioxide plume and pressure front, and extended post-injection monitoring and site care. The intent of the emergency and remedial response requirements is that if the operator obtains any evidence that USDWs may be endangered, the operator must cease injection, take all steps reasonably necessary to identify and characterize any release, notify the director, and implement the approved emergency and remedial response plan.

The Port of Corpus Christi Authority commented that, when primacy is granted, the Commission should be allowed in the first five years to increase staff to review Class VI UIC applications.

The Commission will increase staffing to implement the Class VI UIC program. The duties and responsibilities for the Class VI UIC program will predominantly be handled by UIC staff. The Class VI UIC Manager will have a significant technical management role in the program, being responsible initially for conducting detailed aspects of the reservoir modeling and reservoir simulation technical review. Overall, management will also include supervising staff of geologists and engineers selected for the Class VI UIC team on the basis of their previous experience and expertise in reservoir modeling and simulation. With growth of the program in Texas, additional resources will be devoted to the program to continue to meet or exceed requirements for program performance.

The Texas-based organizations and Commission Shift commented that the sitting Commissioners' denial that climate change is human caused and their derision of federal efforts to curtail greenhouse gas emissions from the oil and gas supply chain give little confidence that the Commission will be prepared to improve its monitoring and enforcement function in a manner that prevents leaks and failures on carbon dioxide pipelines, Class VI wells, and Class II wells. The organizations requested that the Commission respond on whether it will consider passing a resolution to acknowledge the vast body of scientific evidence supporting that climate change is human caused, that significantly reducing emissions of carbon dioxide in the next decade is an essential mitigation tool to curb the worst effects of climate change, and that it is the Commission's duty to plan for and make every reasonable effort to prevent harm to communities from climate change and greenhouse gas mitigation infrastructure.

The Commission disagrees. The UIC program's authority under the SDWA focuses on ensuring that geologic storage projects are permitted, sited, constructed, operated, monitored, and closed in a manner that is protective of USDWs. Issues such carbon capture and pipeline transportation of carbon dioxide are important; however, these issues are outside of the UIC program's authority under the SDWA and beyond the scope of this rulemaking. Comments pertaining to climate and energy policy are not relevant to the substance of the Class VI primacy application or the proposed rule amendments.

Similarly, the Texas-based organizations recommended that the Commission support federal rulemakings to reduce methane emissions across the natural gas supply chain and significantly limit the reasons it allows for granting flaring and venting rule exceptions. This comment is also beyond the scope of this rulemaking.

The Texas-based organizations commented that the proposed rule changes will set the stage for the buildout of additional carbon capture and storage infrastructure, which the Intergovernmental Panel on Climate Change stated in its Working Group III report has "not been tested at a large scale," and entails many uncertainties and risks. The Texas-based organizations also commented that CO_2 capture costs present a key challenge. The capital cost of a coal or gas electricity generation facility with CCS is almost double one without CCS. Additionally, the energy penalty increases the fuel requirement for electricity generation by 13-44%, leading to further cost increases. The additional fuel requirement will mean additional carbon emissions. Therefore, installation of CCS infrastructure, which requires the use of Class VI wells, or Class II wells that may be converted to Class VI wells, will run counter to any effort to decarbonize the state of Texas.

The Commission disagrees. In its most recent Working Group III report *Climate Change 2022: Mitigation of Climate Change* report, the International Panel on Climate Change (IPCC) reaffirmed the central role that CCUS will play reducing carbon dioxide levels in the atmosphere. Carbon capture and storage technologies have been proven at commercial scale and there is an extensive network of global knowledge about carbon dioxide storage. Geologic storage of carbon dioxide for the purpose of reducing carbon dioxide emissions, began in 1996 with the Sleipner project in Norway. Today, there are 12 commercial scale facilities capturing and safely storing carbon dioxide in the United States. With respect to the cost of CCUS, the Commission agrees that the capture element of carbon capture, use, and storage (CCUS) is costly. However, in its Fifth Assessment

Report, the Intergovernmental Panel on Climate Change (IPCC) concluded that the costs for achieving atmospheric carbon dioxide levels consistent with holding average global temperatures to 2°C will be more than twice as expensive without CCUS. (IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)). IPCC, Geneva, Switzerland, 151 pp.)

The Texas-based organizations commented that the Commission has not fulfilled its duty to protect USDWs in Texas, its monitoring and enforcement program fails to adequately steward natural resources and the environment or protect personal and community safety, and it is clear that Commission leadership lacks the necessary care and understanding of the importance of preventing failures with carbon dioxide infrastructure and mitigating greenhouse gas emissions. The Texas-based organizations requested that the Commission undertake a thorough overhaul of its monitoring and enforcement programs for both the oil and gas division and the pipeline safety department. Under the current levels of oversight and enforcement from the Commission, the Texas-based organizations believe that EPA would have reason to rescind its delegation of authority to the Commission to implement and enforce the Underground Injection Control program under the Safe Drinking Water Act.

The Commission considers the comment regarding monitoring and enforcement programs for both the oil and gas division and the pipeline safety department beyond the scope of this rulemaking. With respect to the Commission's UIC program, EPA performs annual evaluations of the Commission's UIC program performance. These annual evaluations have been positive. EPA Region 6's 2021 annual evaluation acknowledged that the Commission's UIC program compliance surveillance and enforcement program for Class II and III injection wells regulated by the Commission appears to be effective. A large percentage of the authorized injection wells in Texas were inspected in FY 2020 and the Commission also collected and reviewed operator-submitted monitoring information from a large percentage of the Class II well inventory. Those numbers assure more than adequate inspection and monitoring surveillance actions. The 2021 annual evaluation specifically noted innovative measures taken by the Commission to address program challenges, such as induced seismicity and continued improvements of data reporting and recordkeeping.

The Texas-based organizations expressed concern with the Commission's ongoing practice of allowing facilities whose permits have been revoked to continue operating until a new final permit is reissued. Facilities that have acted so badly as to cause harm to their neighbors, groundwater, or air quality should not be allowed to continue operating under a revoked permit.

The UIC program is aware of no wells that have been allowed to continue to operate when the permit has been revoked. The Commission made no change in response to this comment.

TXOGA and TIP request that the Commission, in consultation with EPA, outline a process whereby any Class VI UIC well permit applications pending before EPA, at the time primacy is granted, would be transferred to the Commission for further processing. In that same spirit, we seek assurance that a permit pursued under the EPA application process would not have to start over when the Commission receives primacy.

The Commission and EPA have had ongoing discussions about transition upon granting of primacy. In addition, both EPA and the Commission are reviewing any applications received until primacy is granted in tandem to ensure that the permit processing and transition is as smooth as possible.

Rule-Specific Comments

§5.101

The Texas-based organizations commented that the stated purpose of the rules is protection of underground sources of drinking water, but the rules make no reference to public protection in the event of leakage. The organizations pointed to the carbon dioxide pipeline rupture near Satartia, Mississippi which revealed that carbon dioxide sinks when it is released and can cause asphyxiation.

The Commission makes no change in response to these comments. Although, as indicated, the purpose of the Class VI UIC regulations is the protection of USDWs, Texas Water Code §27.051 authorizes the Commission to issue a permit for the geologic storage of carbon dioxide if it finds, among other things, that the injection and geologic storage of anthropogenic carbon dioxide will not endanger or injure any oil, gas, or other mineral formation; that, with proper safeguards, both ground and surface fresh water can be adequately protected from carbon dioxide migration or displaced formation fluids; and that the injection of anthropogenic carbon dioxide will not endanger or injure human health and safety. Section 5.206(b)(3) of the rules states that the director may issue a permit if the applicant demonstrates, and the director finds, that injection of anthropogenic carbon dioxide will not endanger or injure human health and safety. The incident at Satartia, Mississippi, was the result of a pipeline rupture, which is beyond the scope of the geologic storage regulations. Establishment and enforcement of regulations relating to standards and monitoring of carbon dioxide pipelines are the jurisdiction of the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA). Regulation of pipelines is beyond the scope of this rulemaking.

§5.102

Texas 2036 commented that proposed §5.102(27) defines the types of underground storage facilities used for the geologic storage of CO_2. The only geologic feature described within the definition is "underground reservoir." While this term is broad, Texas 2036 recommended that it be amended to include the specific types of formations described within 26 USC §45Q(d)(2). This section of federal law describes those formations that may be used for secure geological storage for the purposes of the federal carbon dioxide sequestration tax credit. In particular, §45Q(d)(2) of the federal Internal Revenue Code lists "deep saline formations, oil and gas reservoirs, and unmineable coal seams" as geologic formations that shall qualify as secure geological storage. Texas 2036 recommended that these formations be included in the definition of "geologic storage facility" to ensure consistency between the adopted rule and the federal requirements for carbon dioxide sequestration tax credits.

The Commission agrees with this comment. EPA's Class VI regulations do not prohibit injection into any specific formation types (e.g., unmineable coal seams, basalts, and other formations). They afford all formations equal treatment and allow the regulatory flexibility to determine if injection at a particular site and depth is the appropriate approach. Title 40 CFR §144.3 defines "geologic sequestration" as "the long-term containment of

a gaseous, liquid, or supercritical CO_2 stream in subsurface geologic formations. This term does not apply to carbon dioxide capture or transport."

In the adoption preamble to the Class VI regulations, (75, FR 77231, Dec. 10, 2010), EPA noted that some research on CO_2 injection for geologic sequestration into various formations including shallow, volcanic rocks such as flood basalts (McGrail, *et al.,* 2006) and coal seam injection (Dooley, *et al.,* 2006; IPCC, 2005; MIT 2007; White *et al.,* 2005) illustrates the potential for geologic sequestration in these formations. However, EPA noted that some types of formations, such as coal seams and basalts, are typically shallow and above the lowermost USDW, which would require an injection depth waiver (§146.95) provided the operator can demonstrate that such injection can be performed in a manner that protects USDWs. Therefore, the Commission adopts §5.102(27), (28) and (45), as renumbered upon adoption, with changes to address this comment.

Texas 2036 commented that Chapter 5 includes multiple references to "fluids" and "injection fluids" without describing what these substances include. For example, §5.202(d)(2)(B)(i)(III) authorizes the termination of a permit if "fluids are escaping or likely to escape the injection zone." Further, the delineation of the area of review and corrective action required of a permit applicant in §5.203(d) must contemplate the relationship between injected fluids and USDWs. And, the permitting standards described within §5.206 prohibit the movement of "fluids" or "injection fluids" that endanger USDW. It is unclear in these and other examples precisely what type of fluid is subject to the applicable rule.

The terms "fluid" or "injection fluid" are not defined for the purposes of Chapter 5. While proposed §5.102(24) defines "formation fluid," the definitions section in §5.102 does not define the other fluids listed throughout the chapter. Defining "fluid or injection fluid" in §5.102 would clarify those specific substances - namely CO_2 - subject to the applicable regulations within the proposed rules. Towards that end, Texas 2036 recommended that the Commission amend the rule to define "fluid or injected fluid" that includes gaseous, liquid, or supercritical CO_2 to provide greater clarity to Chapter 5's requirements.

The Commission agrees that a definition for "fluid" would be helpful because with respect to the UIC program, the term "fluid" could mean formation fluids or injected fluids. The Commission has added a definition for "fluid" to §5.201.

The Texas-based organizations and an individual recommended the Commission clarify the definition of "permit" proposed in §5.102(36) and adopted in renumbered paragraph (40) by adding "this" before "chapter." The Commission agrees with this comment and has made the recommended change.

The Texas-based organizations recommended that the Commission modernize its methods of notice and include posts on social media, and not just newspapers. The organizations also recommended that the Commission consider setting up email lists that will enable the public to more easily opt into regional notices that may be relevant to them. The Texas-based organizations commented that it is not clear whether the applicants will be required to notify new individuals if the outermost boundary of the facility changes with a permit modification. Similarly, the comment notes there is incongruence in the rule with considering communities in the Area of Review versus the outermost boundary of the facility. The Texas-based organizations believe people who own land or reside in an area within a certain radius of the expected injection plume should be included in notice requirements. The organizations also recommended that notice be provided in Spanish without request, and instructions on how to obtain language accommodation should be provided in other languages. Finally, the organizations oppose placing the burden of proof on poorly-resourced individuals to prove that they "will" be impacted in order to qualify as an "interested person."

The Commission makes no change in response to this comment. Under Section 5.204, the Commission will provide both published and individual notice when a draft permit has been prepared and a hearing has been scheduled. Such notice would be mailed to each adjoining mineral interest owner in the outermost boundary of the proposed geologic storage facility; each leaseholder of minerals lying above or below the proposed storage reservoir; each adjoining leaseholder of minerals offsetting the outermost boundary of the proposed geologic storage facility; each owner or leaseholder of any portion of the surface overlying the proposed storage reservoir and the adjoining area of the outermost boundary of the proposed geologic storage facility; the clerk of the county or counties where the proposed storage facility is located; the city clerk or other appropriate city official where the proposed storage facility is located within city limits; any other unit of local government having jurisdiction over the area where the facility is or is proposed to be located; persons on the mailing list developed by the Commission, including those who request in writing to be on the list and by soliciting participants in public hearings in that area for their interest in being included on area mailing lists; and any other class of persons that the director determines should receive notice of the application. Notice must also be published. The Commission will develop a form for requesting to be on the list and include a link to the form on the Commission's webpage. The Commission will consider how to best use social media applications for important information and will encourage operators to use similar technologies to keep the public informed of geologic storage projects.

TXOGA and TIP request that "interested person", as defined in §5.202(d)(1), be included as a newly defined term in §5.102. This will provide greater consistency and clarity throughout the proposed rule, as the terms "interested person" and "affected person" are used throughout the proposed rule but have distinct meanings. The Texas-based organizations commented that the definition of interested persons and affected persons may be overly narrow, excluding people who may be impacted from these facilities from participating in hearings. The threshold for participation by the public in permit processes should be inclusive of all who may be potentially impacted.

The term "interested persons" is not defined in the federal regulations (or other state regulations) because the term encompasses any person who expresses an interest in an application, permit, or Class VI UIC well. However, the Commission agrees that clarification would be beneficial and adopts §5.102 with the requested change.

PBPA expressed concern that the definition of affected person in §5.102(1) could include parties claiming economic damage that is not linked to the facility. PBPA recommended that the damage be tied to permitted activity only.

The Commission agrees with this comment and adopts §5.102(1) with a change to state that an affected person is a person who, as a result of activity sought to be permitted has suffered or may suffer actual injury or economic damage other than as a member of the general public. This modified definition is consistent with the definition found in 16 TAC §3.81, relating

to Brine Mining Injection Wells. Brine mining wells are regulated under the UIC program as Class III injection wells. The Commission's Class III brine mining well program was approved by EPA under Section 1422 of the SDWA. Therefore, the revised definition of "affected person" should be acceptable.

NARO-Texas commented that, throughout the proposed amendments, reference is made to the "good faith claim to the necessary and sufficient property rights to operate the geologic storage facility." However, §5.102, relating to definitions, does not define the term "good faith." In the context of obtaining an oil and gas well drilling permit, an operator must demonstrate a good faith claim to the right to drill, or more thoroughly stated, a "factually supported claim based on a recognized legal theory to a continuing possessory right in a mineral estate, such as evidence of a currently valid oil and gas lease or a recorded deed conveying a fee interest in the mineral estate." *See Opiela v. Railroad Commission of Texas,* Cause No. D-1-GN-20-000099, pending in the 53rd District Court of Travis County, Texas. NARO--Texas recommended that the Commission define "good faith" to ensure that applicants properly demonstrate a continuing possessory right in a geologic storage facility based upon a factually supported and recognized legal theory.

The Commission agrees that a definition would be helpful and adopts §5.102 with a definition for "good faith claim" similar to that in 16 TAC §3.15(a)(5) of this title (relating to Surface Equipment Removal Requirements and Inactive Wells).

The Texas-based organizations commented that the definition of "Mechanical integrity" relies on whether "significant leaks" or "significant fluid movement" can be detected. They requested clarification as to how the Commission defines "significant" leaks or fluid movement. Part B of the "Mechanical integrity" definition explains that the Commission will consider test deviations that cannot be explained by the standard of error for the test. The Texas-based organizations inquired whether this be the only way of defining "significant" leaks, or whether the Commission also considers a leak to be "nonsignificant" despite test deviations that are not within the test's normal standard of error.

The Commission considers a successful mechanical integrity test to be one in which the applied test pressure stabilizes within 10% of the required test pressure and remains stabilized for a minimum of 30 minutes (60 minutes if testing with a gas-filled annulus). The applied test pressure may vary up to 10% prior to stabilizing but must not gain or lose any pressure for the 30/60 minute stabilization period. An "inconclusive" mechanical integrity test is one that does not stabilize but loses less than 10% of the test pressure within the 30-minute test period (60 minutes if testing with a gas-filled annulus). The test may also be ruled inconclusive for various procedural problems. A "failed" test is one in which the applied test pressure loses 10% or more within the 30-minute test period (60 minutes if testing with a gas-filled annulus). An inconclusive mechanical integrity test is one that fails to demonstrate the absence of tubing, packer or casing leaks but does not clearly indicate leaks. There will be minor variations in many data sets over time. Significance can be determined by a statistical analysis of the data. The Commission made no change in response to this comment.

The Texas-based organizations suggested that the Commission modify the definition of "plugging," which is defined as the act or process of stopping the flow of water, oil or gas into or out of a formation through a borehole or well penetrating that formation, to include supercritical carbon dioxide.

The Commission declines to make the requested change. The definition is consistent with the definition in 40 CFR §144.3.

The Texas-based organizations recommended that the Commission revise the definition of "operator" from "A person, acting for itself . . ." to "A person, acting for themselves . . ."

The Commission declines to make the requested change.

WSP USA (WSP) recommended adoption of EPA's full definition for the zone of confinement from 40 CFR §146.81(d).

The Commission agrees with this comment and adopts §5.102(13) with the recommended change such that confining zone is defined as: "A geologic formation, group of formations, or part of a formation stratigraphically overlying the injection zone(s) that acts as barrier to fluid movement. For Class VI wells operating under an injection depth waiver, confining zone means a geologic formation, group of formations, or part of a formation stratigraphically overlying and underlying the injection zone(s) that acts as a barrier to fluid movement."

With respect to proposed §5.102(26), relating to the definition of geologic storage, the Texas-based organizations requested clarification of the term "long-term" in this definition and recommended that the Commission consider defining "long-term" in the rule.

The Commission declines to make any changes. Section 120.001 of the Texas Natural Resources Code defines the term "sequester" as to inject carbon dioxide into a geological formation in a manner and under conditions that create a reasonable expectation that at least 99% of the carbon dioxide injected will remain sequestered from the atmosphere for at least 1,000 years." However, this definition is limited to Clean Energy Projects, which are defined as "a project to construct a coal-fueled, natural gas-fueled, or petroleum coke-fueled electric generating facility, including a facility in which the fuel is gasified before combustion, that will: (A) have a capacity of at least 200 megawatts; (B) meet the emissions profile for an advanced clean energy project under §382.003(1-a)(B), Texas Health and Safety Code; (C) capture at least 70% of the carbon dioxide resulting from or associated with the generation of electricity by the facility; (D) be capable of permanently sequestering in a geological formation the CO_2 captured; and (E) be capable of supplying the carbon dioxide captured for purposes of an EOR project." There is no statutory definition of the term "long-term" with respect to geologic storage of carbon dioxide.

§5.201

An individual commented on the amendments in §5.201(b), requesting that the Commission add a title to the subsection and include the factors that the Commission will consider when determining whether there is an increased risk to USDWs such that a Class VI permit is required. The individual commented that, while it is appropriate to incorporate these factors, it is also important to recognize that the Class VI regulations do not dictate exactly how the director should apply these factors when making the determination. More importantly, the factors themselves will play very different roles in affecting the assessment of risks.

PBPA expressed concern that the changes in §5.201(b)(2) could be construed to apply to Class II wells, for which the rule is not intended, and asked that the Commission clarify the provision to address circumstances where a Class II well has been converted to a Class VI well.

The Commission agrees and adopts §5.201(b) with a change clarifying that (b)(2) applies to a well that is permitted for the injection of CO_2 for the purpose of enhanced recovery.

TXOGA and TIP commented on the language in §5.201(c) that cross-references the factors listed in §5.201(b) for determining whether a Class II well used for the disposal of acid gas containing CO_2 should be converted to a Class VI well. Rather than cross-referencing the factors applicable to EOR wells, TXOGA and TIP recommended including the following specific factors applicable to acid gas disposal wells: the reservoir pressure within the injection zone; the quantity of acid gas being disposed of; distance between the injection zone and USDWs; suitability of the disposed waste AOR delineation; quality of abandoned well plugs within the AOR; the source and properties of injected acid gas; and any additional site-specific factors as determined by the Commission.

TXOGA and TIP further recommended that the Commission delete the words "from a single lease, unit, field, or gas processing facility" from the first sentence of proposed §5.201(c). TXOGA and TIP stated that the language in §5.201(c) appears to place new and unnecessary restrictions on the use of Class II wells for the injection of CO_2 and other acid gases generated from oil and gas activities. TXOGA and TIP are concerned that this language could be construed to require Class VI permits for any acid gas disposal well used to inject CO_2 or other acid gases that come from more than one lease, field, unit, or gas processing facility. TXOGA and TIP note that there is no requirement under federal law or in the Commission's current rules that places such a restriction on the use of Class II acid gas disposal wells. Under both the federal UIC rules and current Commission rules, CO_2 and other acid gases can be injected into a Class II well as long as they are generated from oil and gas activities, without regard to the number of sources or locations. Further, both the Treasury Department and EPA have acknowledged that Class II UIC wells may be used for the permanent sequestration of CO_2 generated from oil and gas activities if the operator has a Monitoring, Reporting, and Verification (MRV) plan that has been approved by EPA. EPA has approved MRV plans for significant carbon sequestration projects using Class II wells in New Mexico and Wyoming and there is no reason for operators in Texas to be put at a competitive disadvantage compared to operators in other states.

The Commission adopts §5.201(c) with a change to remove the reference to a single lease and to add the factors recommended by TXOGA and TIP as factors more applicable to acid gas disposal wells.

With respect to §5.201(f), relating to injection depth waiver, an individual recommended that injection depth waivers be available for existing wells through amendment of a permit to use an alternative injection interval.

The Commission agrees with this comment and adopts §5.201(f) with a change to incorporate the commenter's recommended language.

The Texas General Land Office (GLO) expressed concern that the rules allow waivers of the federal depth limitations for Class VI wells as such waivers could place USDW at risk and could result in CO_2 being stored at, or migrating to, depths shallower than required to maintain the fluid in its dense supercritical state. The GLO also expressed concerns because storage of CO_2 in the less dense vapor phase makes inefficient use of available pore space; flashing of dense supercritical CO_2 into the vapor phase is a safety concern: the lower density of the vapor phase increases buoyancy forces and, consequently, the risk of vertical migration; and there is evidence that vapor phase CO_2 can flow more easily through caprock seal pores than supercritical phase fluid, even at otherwise constant pressure differentials.

The Commission disagrees. The federal regulations at 40 CFR §146.96 allow an operator to seek a waiver of the Class VI injection depth requirements. In seeking a waiver of the requirement to inject below the lowermost USDW, the operator must submit a supplemental report concurrent with its permit application. The supplemental report must include: (1) a demonstration that the injection zone is laterally continuous, is not a USDW, and is not hydraulically connected to USDWs; does not outcrop; has adequate injectivity, volume, and sufficient porosity to safely contain the injected carbon dioxide and formation fluids; and has appropriate geochemistry; (2) a demonstration that the injection zone is bounded by laterally continuous, impermeable confining units above and below the injection zone adequate to prevent fluid movement and pressure buildup outside of the injection zone; and that the confining unit is free of transmissive faults and fractures and characterization of the regional fracture properties and contain a demonstration that such fractures will not interfere with injection, serve as conduits, or endanger USDWs; (3) a demonstration, using computational modeling, that USDWs above and below the injection zone will not be endangered as a result of fluid movement; (4) a demonstration that well design and construction, in conjunction with the waiver, will ensure isolation of the injectate in lieu of requirements at §146.86(a)(1) and will meet well construction requirements in §146.95(f); (5) a description of how the monitoring and testing and any additional plans will be tailored to the project to ensure protection of USDWs above and below the injection zone(s) if a waiver is granted; (6) information on the location of all the public water supplies affected, reasonably likely to be affected, or served by USDWs in the area of review; and (7) any other information requested by the director to inform the Regional Administrator's decision to issue a waiver.

To inform the Regional Administrator's decision on whether to grant a waiver of the injection depth requirements at §§144.6, 146.5(f), and 146.86(a)(1), the director must submit to the Regional Administrator, an evaluation of the following information as it relates to siting, construction, and operation of a geologic sequestration project with a waiver: the integrity of the upper and lower confining units; the suitability of the injection zone(s) (e.g., lateral continuity; lack of transmissive faults and fractures; knowledge of current or planned artificial penetrations into the injection zone(s) or formations below the injection zone); the potential capacity of the geologic formation(s) to sequester carbon dioxide, accounting for the availability of alternative injection sites; all other site characterization data, the proposed emergency and remedial response plan, and a demonstration of financial responsibility; community needs, demands, and supply from drinking water resources; planned needs, potential and/or future use of USDWs and non-USDWs in the area; planned or permitted water, hydrocarbon, or mineral resource exploitation potential of the proposed injection formation(s) and other formations both above and below the injection zone to determine if there are any plans to drill through the formation to access resources in or beneath the proposed injection zones/formations; the proposed plan for securing alternative resources or treating USDW formation waters in the event of contamination related to the Class VI injection activity; and, any other applicable considerations or information requested by the director.

Application for an injection depth waiver also requires consultation with the Public Water System Supervision Directors of all States and Tribes having jurisdiction over lands within the AOR of a well for which a waiver is sought and any written waiver-related information submitted by the Public Water System Supervision Director(s) to the UIC director.

The application further requires that the director give public notice that a waiver application has been submitted. The notice must clearly state:(1) the depth of the proposed injection zone(s); (2) the location of the injection well(s); (3) the name and depth of all USDWs within the area of review; (4) a map of the AOR; (5) the names of any public water supplies affected, reasonably likely to be affected, or served by USDWs in the area of review; and (6) the results of UIC-Public Water System Supervision consultation.

If the Regional Administrator determines that additional information is required to support a decision, the director shall provide the information. The Regional Administrator may require that public notice of the new information be initiated. In no case may a director of a State-approved program issue a waiver without receipt of written concurrence from the Regional Administrator. If a waiver of the requirement to inject below the lowermost USDW for geologic sequestration is granted, the operator of the Class VI well must comply with certain additional requirements to ensure protection of USDWs above and below the injection zone(s). The Commission made no change in response to this comment.

EDF and one individual recommended amending §5.201(g) to clarify that the subchapter does not apply to the injection of any CO_2 stream that meets the definition of a hazardous waste under 40 CFR part 261. Title 40 CFR §261.3 establishes the definition of hazardous waste. Carbon dioxide streams injected for geologic storage could potentially exhibit a hazardous characteristic (e.g., corrosivity) that would meet the definition of hazardous waste. However, EPA promulgated 40 CFR §261.4(h) to provide that certain carbon dioxide streams are not a hazardous waste, provided specified conditions are met. Thus, EDF recommended adding the reference to 40 CFR part 261 to ensure that §5.201(g) incorporates the applicability of 40 CFR §261.4(h).

The Commission agrees with EDF and the individual and adopts §5.201(g) with a change consistent with the definition of carbon dioxide (CO_2) stream in §5.102(7), which states that the term does not include any CO_2 stream that meets the definition of a hazardous waste under 40 CFR Part 261.

§5.202

An individual commented that the language in §5.202(a)(1) is too broad. To avoid confusion over the ability to construct a well, such as a stratigraphic test well, that will later be converted to a Class VI well, it would be better to use "Class VI well" in subsection (a)(1). In addition, the individual expressed concern that there is potential for precluding activities are essential steps but that are not within the purview of the UIC program because the definition of "geologic storage facility" is so broad and includes surface buildings and equipment, surface and subsurface rights and appurtenances, and any reasonable and necessary areal buffer and subsurface monitoring zones. The individual noted that because section 45Q of the IRS Code requires construction to start before specified deadlines, the Commission's regulation should not include language that might preclude an operator from constructing capture equipment (e.g., compressors) that might be located within a geologic storage facility. Thus, the individual recommended replacing the reference in §5.202(a)(1) to "an anthropogenic CO_2 injection well" with a reference to "a Class VI injection well." The individual also recommended striking language relating to construction.

The Commission partly agrees and adopts §5.202(a) with a change to clarify that the provision applies to an anthropogenic CO_2 injection well for geologic storage regulated under Subchapter B. The Commission declines to delete the reference to constructing a geologic storage facility because the language in 5.202(a) reflects Texas Natural Resources Code, §27.043, which states that a person may not begin drilling or operating an anthropogenic carbon dioxide injection well for geologic storage or constructing or operating a geologic storage facility regulated under this subchapter without first obtaining the necessary permits from the Railroad Commission.

The individual also recommended §5.202(e)(1)(C) be revised by adding "other than a denial" to differentiate a denial from an actual draft permit that would include permit conditions.

The Commission agrees with this comment and adopts a change in §5.202(e)(1)(C) to clarify the intent.

The GLO commented that injection rate increases should be allowed only after an approved permit amendment. The proposed rules state that "an operator must file an application to amend an existing geologic storage facility permit with the director . . . prior to increasing the permitted injection pressure." The GLO recommended that the Commission revise this language to also require an application to amend an existing permit for injection rate increases (as measured on a mass flow basis). The rate of injection can control reservoir sweep efficiency and, consequently, the degree to which residual phase trapping can act to sequester the carbon. Poor sweep efficiency can also result in a "pancake" of carbon rising to the top of the injection zone where it will migrate further in the lateral direction it otherwise would under more uniform reservoir contact conditions. Injection strategy - including rate management - can also affect ultimate storage efficiency.

The Commission agrees and adopts §5.202(b)(1)(B) with a change to address this issue.

The Texas-based organizations commented that §5.202(b) requires an operator to file an application to amend a permit prior to adding injection wells. The organizations requested clarification as to the number of injection wells anticipated for each geologic storage facility, whether there is a maximum number of wells the Commission anticipates would be located at any given facility, and whether operators will report on a per well or a per facility basis.

The Commission is unable to speculate on number of wells at any given future facility. However, recent proposed facilities have typically had less than ten injection wells at a facility. The Commission's rules do not limit the number of injection wells at a facility. Commission staff will assess compliance for each injection well at a facility. However, the Commission expects that a facility operator may submit reports for injection wells at the same facility together and that Commission staff may review compliance of injection wells together for efficiency. The Commission made no change in response to this comment.

With respect to §5.202(c)(1), the Texas-based organizations requested that the Commission advise as to remedies available to the Commission to allow for agency review of an applicant's notice of intended permit transfer in the case where the director has financial interest in the companies involved and review of such

notice would trigger U.S. Securities and Exchange Commission fiduciary and insider trading restrictions and/or rules.

The Texas Government Code, Chapter 572, prohibits, among other things, state officers and employees from having a direct or indirect interest, including financial and other interests, or engaging in a business transaction or professional activity, or incurring any obligation of any nature that is in substantial conflict with the proper discharge of the officer's or employee's duties in the public interest. The Commission's handbook incorporates the provisions of Chapter 572, including prohibiting Commission employees and officers from making personal investments that could reasonably be expected to create a substantial conflict between the employee's private interest and the public interest. The Commission made no change in response to this comment.

TXOGA and TIP recommended that the Commission revise the language in §5.202(d)(1)(C) describing "interested person" to instead refer to "any affected person."

The Commission notes that 40 CFR §124.5 states that permits may be modified, revoked and reissued, or terminated either request of any interested person (including the permittee) or upon the director's initiative. The term "interested person" is not defined in the federal regulations (or other state regulations). The term encompasses any person who expresses an interest in an application, permit, or Class VI UIC well. However, the language in §5.202(d)(1) seems to equate "interested person" with "affected person." The term "interested person" is broader than the term "affected person" and the federal regulations at 40 CFR §124.5 allow any interested person to request a review of a permit. Therefore, the Commission adopts §5.202(d)(1) with a change removing the examples of those who qualify as an interested person. The Commission notes, however, permits may only be modified, revoked and reissued, or terminated for the reasons specified in 40 CFR §144.39 or §144.40.

The Texas-based organizations requested clarification of §5.202(d). The organizations recommended that the Commission revise paragraph (1)(B) to be inclusive of any agencies that have jurisdiction over groundwater research or policies at the state or local level. They also recommended that the Commission revise paragraph (1)(C) to include any person who "may" suffer injury or economic damage. The threshold for participation by the public should be inclusive of all who may be potentially impacted, rather than overly narrow and restrictive. Requiring a burden of proof on poorly-resourced individuals to prove that they "will" be impacted in order to qualify as an "interested person" is unreasonable.

The Commission will establish a procedures to allow interested persons to sign up to be notified. If an interested person submits a comment or requests a hearing, the Commission will automatically add that person to the mailing list. The Commission made no change in response to this comment.

The Texas-based organizations noted that §5.202(d)(2)(A)(vii) states "During any revocation and reissuance proceeding the permittee shall comply with all conditions of the existing permit until a new final permit is reissued." This implies that when a facility permit is revoked, the facility may be allowed to continue operating while a new permit application is being processed. The Texas-based organizations ask: if a facility has operated in a manner that justifies revoking the permit and which causes risk of injury or actual injury to its neighbors or the surrounding community, in which cases would the Commission stop the facility from continuing to operate?

The Commission makes no change in response to this comment. The section to which the comment refers concerns instances in which the Commission has determined that the permit should be revoked and reissued, such as when there are material and substantial alterations or additions to the permitted facility or activity which occurred after permit issuance that justify the inclusion of permit conditions that are different from or absent in the existing permit; or the director has received information that was not available at the time of permit issuance and would have justified the inclusion of different permit conditions. Examples may include any increase greater than the permitted CO_2 storage volume, and/or changes in the chemical composition of the CO_2 stream; the standards or regulations on which the permit was based have been changed by promulgation of new or amended standards or regulations or by judicial decision after the permit was issued; or the director determines good cause exists for modification of a compliance schedule, such as an act of God, strike, flood, or materials shortage, or other events over which the permittee has little or no control and for which there is no reasonably available remedy. This provision is separate from termination of a permit.

TXOGA and TIP identified certain issues with §5.202(d), which generally addresses causes for permit modification, revocation, reissuance, or termination. First, TXOGA and TIP recommended that the Commission revise §5.202(d)(2)(A)(ii) to require that the threshold for permit modification or for revocation and reissuance be based on new information that must be material.

Second, TXOGA and TIP recommended that the Commission revise §5.202(d)(2)(A)(iii) to include language that a new regulation that may cause a modification or a revocation and reissuance of a permit should be based on a new, material change to applicable standards or regulations. This is generally consistent with the type of modification contemplated by the federal equivalent of this section, found in 40 CFR §144.39(a)(3).

The Commission agrees with these comments and adopts §5.202(d)(2)(A)(ii) and (iii) with the recommended changes.

TXOGA and TIP requested clarification on how the provisions on causes for modification, revocation and reissuance, or termination in §5.202(d)(2) will operate in practice given the Commission's incorporation by reference of EPA regulations in whole or in part in this proposal. TXOGA and TIP have concerns that any change in EPA regulations could potentially serve as an automatic basis for a permit modification, revocation and reissuance, or termination. One way to address this would be to state in the rules that the federal regulations would be incorporated as issued on a certain date, and any subsequent federal regulatory change would be subject to the Commission's rulemaking process to maintain appropriate opportunities for notice and comment to the rule changes.

The Commission made no change in response to this comment. One of the causes for modifications or for revocation and reissuance of a permit under §5.202(d)(2)(A)(iii) is that the "standards or regulations on which the permit was based have been changed by promulgation of new or amended standards or regulations or by judicial decision after the permit was issued." In §5.201(e), the Commission adopts by reference 40 CFR §144.7 and §146.4 relating to expansion of aquifer exemption, effective September 20, 2022, and in §5.201(f), the Commission adopts by reference 40 CFR §146.95, effective September 20, 2022. If the federal regulations are amended, the Commission will read-

opt those subsections in a rulemaking process consistent with the Administrative Procedures Act.

TXOGA and TIP requested that the Commission include a materiality standard for permit modification triggers that would allow minor modification changes to be made in a streamlined process, consistent with the federal equivalent in 40 CFR §144.39.

The Commission notes that §5.202(d)(2)(A)(viii) includes the list for permit modification triggers that would allow minor modifications on a streamlined basis consistent with 40 CFR 144.39. However, the Commission adopts the provision with a change to add "minor" before "changes" to clarify that the enumerated changes are considered minor.

The Texas-based organizations expressed concern that the director has the ability to modify a permit with only the permittee's consent and without following notice and public comment period requirements for many reasons that the public would ordinarily need to provide feedback on.

The Commission disagrees. The listed changes for which the permit can be modified with only the permittee's consent are minor modifications that are allowed under the federal regulations at 40 CFR §144.41.

EAC and Denbury recommended that to ensure regulatory certainty the Commission define what qualifies as a change in the chemical composition of the CO_2 stream as a cause for permit modification. These commenters stated that if the CO_2 stream is supplied by numerous captured emission sources, there is a potential for minor or insignificant fluctuations in CO_2 stream composition to occur as the volume delivered by the various emitters fluctuates and as new emitters are added to the system. While the commenters do not believe the Commission intended for such minor fluctuations to constitute a "change", they recommended that the Commission include a reasonable threshold of molar percentage change in chemical composition before the Commission would require consideration of a permit modification.

Similarly, TXOGA and TIP request that the Commission acknowledge that different emitters may alter the carbon dioxide composition in the pipeline and that pipeline criteria may also impact carbon dioxide composition. TXOGA and TIP requested clarification on what might qualify as a sufficient modification of the volume or chemical composition of the carbon dioxide stream.

The Commission understands that the types of impurities and their concentrations will vary by generator and pollutant removal and carbon capture technologies. In addition, the Commission understands that different entities may alter the carbon dioxide stream composition in the pipeline and that pipeline criteria may also impact carbon dioxide stream composition. Furthermore, it may be necessary to add substances to the carbon dioxide streams to improve injectivity, including substances to reduce viscosity, inhibit reactions with brine or formation rocks, or otherwise improve permeability. Any addition of substances to carbon dioxide streams to enable or improve the injection process would be occurring as part of the UIC Class VI permitted activity and thus ultimately implemented in a manner to prevent the endangerment of USDWs.

The rules require that the chemical composition and physical characteristics of the carbon dioxide streams be known as part of the initial permitting process, as well as during operation of the well, to ensure that these carbon dioxide streams can be injected in a manner that is protective of human health and the environment and USDWs. The rules address the quality and quantity of impurities by requiring operators to submit information on the source of the carbon dioxide and its physical and chemical properties. Specifically, the rules require the operator to submit data about the site, including an analysis of the chemical and physical characteristics of the carbon dioxide stream and information on the compatibility of the carbon dioxide stream with fluids in the injection zone and minerals in both the injection and the confining zones and the materials used to construct the well. This information can help the director determine the potential for geochemical reactions between the injectate (the carbon dioxide stream) and the host geologic formations, which could result in the plugging of pore spaces or the dissolution of formation minerals. Analysis of the carbon dioxide stream will provide information about any impurities that may be present and whether such impurities might alter the corrosivity of the injectate down-hole. Such information is necessary to inform well construction and the project-specific testing and monitoring plan and enable the operator to optimize well operating parameters while ensuring compliance with the Class VI permit. The analysis of the carbon dioxide stream must be conducted prior to commencing injection and throughout injection operations at an appropriate frequency based on the source of the carbon dioxide stream and the likelihood of variability in the injectate composition. The details of the sampling process and frequency must be described in the director-approved, site-specific testing and monitoring plan.

Neither the federal rules nor the Commission's rules set generic purity standards for carbon dioxide injectate streams (e.g., a percent carbon dioxide). The injection of carbon dioxide streams, including incidental associated substances derived from the source materials and the capture process, can be performed in a protective manner at a permitted UIC Class VI well. Regardless of the precise contaminants, and their concentrations, the UIC Class VI permitting requirements will take into account the physical and chemical characteristics of the carbon dioxide stream as part of establishing the appropriate conditions for the successful confinement of the carbon dioxide in a manner that is protective of USDWs.

However, the Commission agrees that some threshold for determining the need to modify the permit would be appropriate. Therefore, the Commission adopts a clarifying change in §5.202(d)(2)(A)(ii).

TXOGA and TIP understand that proposed §5.202(d)(2) and §5.204(b) are referencing an opportunity for a public hearing, if warranted, and that a public hearing is distinct from a contested case hearing that is otherwise provided for under Commission rules in 16 TAC Chapter 1. TXOGA and TIP suggest that for consistency, references to a "hearing" be revised to "public hearing" throughout the rule text, as appropriate, along with corresponding revisions to preamble references as well.

The Commission declines to make a change in response to the comment. The references to a hearing in §5.202(d) and §5.204(b) mean a contested case hearing.

Texas 2036 commented that proposed §5.202(e)(2) requires that the Oil and Gas Division director prepare a fact sheet for each draft permit that includes a description of the proposed facility and quantity of CO_2 planned for injection and storage. This fact sheet would be made available to the permit applicant and, upon request, to any other person. The fact sheet shall also be included as part of the public notice for each permit application. Texas 2036 recommended that the fact sheet also in-

clude a description of the proposed source, or sources, of CO_2 for a CCUS project. Examples of potential sources could include electric generation facilities, manufacturing facilities, hydrogen generation facilities, or even direct air capture. Given that the fact sheet is a public document for each permit application, and included as part of the public notice provided under §5.204(a), Texas 2036 believes it should include a disclosure regarding potential sources of CO_2. If a proposed facility is planned to capture CO_2 from a specific source, then that is a material disclosure that should be made available early in the permitting process. This disclosure would enhance the transparency for each permit application while helping advance the policy argument for each proposed CCUS facility. Amending the fact sheet disclosure requirements in §5.202(e)(2) to require the description of the proposed CO 2 source(s) would achieve this result. Texas 2036 notes that 26 USC §45Q provides a sequestration tax credit for the capture and disposal of "qualified carbon dioxide," which includes CO_2 captured from an industrial source. Just as permit applicants would need to identify the source of their "qualified carbon dioxide" in order to qualify for a §45Q sequestration credit, they should be able to identify that source in their permit application.

The Commission agrees and adopts §5.202(e)(2)(C)(ii) with a change to require the source of CO_2 to be included in the fact sheet.

Texas 2036 commented that the proposed rule states that the fact sheet shall be made available to any other person upon request. In the interest of enhancing the transparency of this critical Commission program, Texas 2036 recommended that the Commission make the fact sheets for proposed CCUS facilities publicly available on the Commission's website.

The Commission agrees and adopts §5.202(e)(2)(B) with a change to address this comment.

§5.203

An individual recommended that the Commission work with EPA to provide clearer guidance regarding exactly what data and information operators must submit to EPA through EPA's Geologic Sequestration Data Tool (GSDT). Once a state obtains primacy, it should not be necessary for a permit applicant to submit to EPA every response to the Commission's requests for additional information or revision of the permit application. It should be sufficient to submit the final complete permit application and associated data.

The Commission makes no change in response to this comment. The federal regulation in 40 CFR §146.91(e) states that regardless of whether a State has primary enforcement responsibility, owners or operators must submit all required reports, submittals, and notifications under subpart H of this part (relating to Criteria and Standards Applicable to Class VI Wells) to EPA in an electronic format approved by EPA. In addition, the EPA's GSDT will assist the Commission in organizing and retaining the large volume of material related to permit application reviews and subsequent project oversight activities. The EPA's GSDT facilitates compliance with the electronic reporting requirement in 40 CFR §146.91(e), providing reporting modules by which permit applicants/owners or operators can submit required information in an approved electronic format, and supports permitting authorities in tracking and managing submissions associated with Class VI reporting, including support for evaluation and oversight activities over the duration of a Class VI project.

PBPA recommended that §5.203 generally allow alternative methods that are approved by the director to provide greater flexibility in changing environments.

The Commission disagrees that greater flexibility is needed. States are required to apply for primacy for the Class VI UIC program under Section 1422 of the federal SDWA. Under that section, Texas must demonstrate that the State program meets EPA's minimum federal requirements. Those federal requirements, and the Commission's rules, include some flexibility, but a general authorization to allow alternative methods approved by the director would result in a program that does not meet the minimum federal requirements.

Section 5.203(a)(2)(D) requires that all applicants obtain letters of determination from TCEQ prior to being issued a permit by the Commission. Understanding that HB 1284 and Texas Water Code Section 27.0461 require this TCEQ determination, TXOGA and TIP requested greater detail and information on the framework for that two-step process and related timeframes for TCEQ and Commission coordination.

The Texas-based organizations also requested clarification regarding the kind of geospatial information applicants be required to provide the TCEQ so that the TCEQ can make its determination. Will the geographic coordinates of such data be required to be accurate within a certain measurement (for example, five feet)? The organizations commented that it is important to determine the accuracy of geospatial data that TCEQ will be using to determine the locations of both proposed Class VI wells and previous or existing Class I injection wells and their plumes.

The Commission notes that the TCEQ must have sufficient information to make the required determination. TCEQ staff has access to the information filed through EPA's GSDT online system. Using that information, TCEQ will perform the required evaluation and draft the required letter of determination. The TCEQ letter of determination is required before the Commission can issue authority to construct the injection well.

The Texas-based organizations recommended that the Commission require TCEQ's letter to verify that the Class VI well will not impact or interfere with wells "required to be authorized" by TCEQ, whether or not such wells are authorized.

The Commission does not understand this comment. Section 5.203(a)(2)(D) (D) requires a person applying for a permit under this subchapter to submit a letter of determination from TCEQ concluding that drilling and operating an anthropogenic CO_2 injection well for geologic storage or constructing or operating a geologic storage facility will not impact or interfere with any previous or existing Class I injection well, including any associated waste plume, or any other injection well authorized or permitted by TCEQ. TCEQ consideration of a well that is required to be authorized but is not authorized would imply that TCEQ has knowledge of such a well.

An individual expressed concern that the rules do not require a professional geoscientist or a professional engineer to review and approve the design of a sequestration facility. The proposed rules allow operators to self-certify their proposed design complies with the applicable regulations.

The Commission made no change in response to this comment but notes §5.203(a)(5) states that, if required under Texas Occupations Code, Chapter 1001, relating to Texas Engineering Practice Act, or Chapter 1002, relating to Texas Geoscience Practice Act, respectively, a licensed professional engineer or geo-

scientist must conduct the geologic and hydrologic evaluations required and must affix the appropriate seal on the resulting reports of such evaluations.

The GLO recommended that reservoir data requirements include both the injection zone and the confining zone consistent with Texas Class I regulations to manage and protect the integrity of the storage reservoir.

The Commission notes §5.203(c) requires an applicant for a carbon dioxide geologic storage injection well permit to submit geologic, geochemical, and hydrologic information on all relevant geologic formations, including the storage reservoir, the confining zone and formations overlying these zones. The Commission made no change in response to this comment from the GLO.

The Texas-based organizations commented that subsection (c)(2)(G) requires applicants to submit "baseline geochemical data" for subsurface formations. The organizations requested clarification as to whether such data will include baseline groundwater quality data. If so, which types of chemicals or analytes must be included in the baseline data? For example, should applicants submit test results for salts, radionuclides, metals, volatile organic compounds (VOCs), and Polycyclic Aromatic Hydrocarbons (PAHs)? Which constituents of each category should applicants test for? Other considerations include how often and how many tests should be taken in advance of well construction to establish baseline conditions. Similarly, the Texas-based organizations commented that it is advisable to take samples both upgradient and downgradient of the proposed injection well.

The Commission makes no change in response to this comment but notes the following. The rule requires baseline geochemical information on subsurface formations including all USDWs in the AOR. Geochemical information on both solids and fluids is also needed, in combination with the mineralogic data required, to determine whether the interaction of the formation fluids with the injectate and solids will cause changes in injectivity, changes in the properties of the confining zone, or the release of trace elements. Background information will also allow operators to distinguish possible effects of injection from naturally occurring variations over the life of the project.

The specific parameters to be analyzed will depend on the characteristics of the site, each formation being analyzed, and the composition of the planned CO_2 stream. Analyses should include basic parameters, such as pH; total dissolved solids (TDS); alkalinity; specific conductivity (SC); and major anions and cations (e.g., Ca2+, Mg2+, K+, Na+, Cl-, Br-, SO42-, and NO3-). Other constituents may differ by formation and be determined based on the mineralogy of the injection and confining formations. These may include: Sr2+, Fe2+, Fe3+, Al, SiO2, total organic carbon (TOC), and hydrogen sulfide and trace metals. Additionally, baseline gaseous carbon dioxide should be measured in subsurface formations including all USDWs within the AOR. Samples from proposed injection zones that are depleted hydrocarbon reservoirs may need to be analyzed for hydrocarbons.

In addition, common practices for groundwater monitoring would include monitoring of water both upgradient and downgradient of the injection well.

The Texas-based organizations recommended that the Commission revise the rules to require that the completion report required to be filed after the completion or conversion of an injection well subject to this subchapter also include the latitude and longitude coordinates of the wellbore within a specified accuracy.

The Commission notes the Completion Report (Form G-1 and W-2) requires the well latitude and longitude to a minimum five decimal places and the type. The Commission made no change in response to this comment.

PBPA recommended that the Commission revise §5.203(e)(1)(B)(ii) to allow operators to integrate standards that achieve equal results based on reservoir characteristics.

The Commission does not agree that §5.203(e)(1)(B)(ii) (relating to casing and cementing of anthropogenic carbon dioxide injection wells) needs to be revised to allow operators to integrate standards that achieve equal results based on reservoir characteristics. The last clause in §5.203(e)(1)(B)(ii) allows "comparable standards as approved by the director."

Regarding §5.203(e)(1)(B)(ii), TXOGA and TIP requested that chrome tubulars not be included as a requirement. Years of EOR experience in the Permian Basin demonstrates that other types of tubulars can be used successfully when paired with other mechanical means of corrosion inhibition. Further, chrome tubulars are not a requirement for CO_2 flooding, and §5.203(e)(1)(B)(vii) notes that the director may exempt existing wells from the requirements of this section.

The Commission made no change in response to this comment because the rules do not specifically require chrome tubulars.

The GLO recommended that the Commission revise the rules to require that cementing be verified by surface circulation. The proposed rules would allow operators to calculate or otherwise estimate the quantity of cement being used to protect USDW and the storage reservoir through alternative methods. Such methods ostensibly include purely volumetric calculations and the use of indirect log evidence. The GLO believes none of these alternative methods is consistent with Texas Class I regulation and they create unnecessary risk because lost circulation while drilling or other anomalies can result in insufficient cement coverage or bonding.

The Commission partly agrees with this comment. Section 5.203(e)(1)(B) requires that surface casing be cemented to the surface. The federal regulations at 40 CFR §146.86(b)(3) require that at least one long string casing, using a sufficient number of centralizers, be cemented by circulating cement to the surface in one or more stages. However, §5.203(e)(1)(B)(v) does not make it clear that the long string must be cemented to the surface as required by federal regulations. The Commission adopts §5.203(e)(1)(B)(v) with a change to ensure consistency with the federal regulation in 40 CFR §146.86(b)(3). Consistent with the federal regulations at 40 CFR §146.86(b)(4), §5.203(e)(1)(B)(iv) allows circulation of cement by staging and authorizes the director to approve an alternative method of cementing in cases where the cement cannot be circulated to the surface, provided the applicant can demonstrate by using logs that the cement does not allow fluid movement between the casing and the well bore. Section 5.203(e)(1)(B)(vi) requires the applicant to verify the integrity and location of the cement using technology capable of radial evaluation of cement quality and identification of the location of channels to ensure that USDWs will not be endangered.

EDF expressed doubts as to whether the Commission's exception process for transitioned wells in §5.203(e)(1)(B)(vii) is consistent with the requirements of 40 CFR at §146.86 for Class VI

wells. Any exceptions granted for well construction and operation must be granted in a way that is consistent with the EPA's Class VI requirements. Additionally, EDF suggested the Commission consider broadening this provision to apply to Class I, Class II and Class V wells that transition to Class VI.

An individual also commented on §5.203(e)(1)(B)(vii). The individual noted that the proposed provision allows the director to exempt existing wells that have been associated with injection of CO_2 for the purpose of enhanced recovery from provisions of these casing and cementing requirements if the applicant demonstrates that the well construction meets the general performance criteria in subparagraph (A) of this paragraph. The individual recommended that the Commission not limit this provision to conversion of Class II enhanced recovery wells, as other wells may also be converted to Class VI wells if the wells meet the requirements of subparagraph (A).

The Commission agrees in part. The Class VI rule allows for the repermitting of an existing well as a Class VI well, provided the operator can demonstrate to the director that the well under consideration was engineered and constructed to meet the requirements of 40 CFR §146.86(a) and ensure protection of USDWs, in lieu of requirements at 40 CFR §146.86(b) and §146.87(a). The language in §5.203(e)(1)(B)(vii) is consistent with that requirement. Texas statutes prohibit the Commission from permitting an existing Class I UIC well. The Commission agrees that the requirements could use additional clarification and adopts §5.203(e) with changes to ensure the language is not too limiting.

WSP recommended that the Commission revise the language to not be limited to a "mechanical packer." Modification of the language would give the operator the ability to use the correct packer for the situation, be it a hydraulic or mechanical packer.

The Commission agrees. The federal regulations at 40 CFR §146.86(c) only require a packer and do not specify that the packer be mechanical. The Commission adopts §5.203(e)(1)(C)(i) with a change to remove "mechanical."

The Texas-based organizations and an individual expressed concern that the rules make it too easy for operators to use a Class II well primarily for carbon dioxide storage, without the same level of scrutiny and standards for Class VI construction. The commenters believe this creates an incentive for operators to apply for Class II permits, then convert Class II EOR wells to Class VI wells. The organizations commented that it is important to keep careful watch over the possibility of unscrupulous operators in the case of carbon dioxide injection. Carbon dioxide is a colorless, odorless gas and has a tendency to sink into low-lying areas, causing risk of asphyxiation and death. The organizations requested that the Commission consider that some operators will apply for a Class II permit while intending to take part in Class VI operations.

Similarly, the GLO commented that the Class II UIC program is inadequate for managing carbon sequestration wells. The rules appear to provide several pathways intended to allow use of the Class II UIC program to regulate carbon sequestration wells under various conditions. Existing federal Class VI guidelines are most similar to Class I industrial waste injection well guidelines. Use of the Class II program as a substitute for geologic carbon sequestration also begs the question, why does the existing federal Class VI regulatory program not contemplate such "upgrades'? A new fit-for-purpose class of UIC regulation was designed because it is needed to ensure the safe and consistent operations of GS facilities. Thus, the GLO believes the delegation should implement the Class VI practices required under federal law, rather than attempting to circumvent them.

Further, the GLO noted that carbon sequestration activities conducted using sources of high-acid hydrocarbon gas will not necessarily be small operations. Two of the world's largest carbon sequestration projects (Sleipner in Norway and In Salah in Algeria) inject acid gas for geologic storage. The In Salah project has been shut down permanently due to the evolution of increasing carbon containment loss risks. Well integrity was a particular problem at In Salah, which highlights the need for high quality construction standards. Mechanical failures which limit maximum injection reservoir pressure will reduce its practical storage capacity, and less capacity means less revenue for the storage facility owner. This means that the PSF could lose significant revenue-generating opportunities even if actual containment of the injected fluid is not jeopardized, because permitted injection quantities will have to be curtailed.

The GLO commented that "long-term" in this context is at least 1000 years. Simulations of 1000 years of CO_2 injection into wells specifically designed for sequestration at the Ketzin pilot site in Germany showed that, if reservoir pressures remained elevated over the entire sequestration period, saturation of well cements with carbon dioxide and possible containment loss through the wellbores to the surface could occur. The study assumed that pressure would not quickly dissipate post-injection. The CO_2 saturation of the well cement caused its permeability to increase to a level enabling CO_2 migration. Significant corrosion of casing materials was also observed in the simulations. The GLO noted further studies have shown that the ability of the well cement to withstand carbonic acid attack is sensitive to the temperature and pressure of initial cement curing, the composition of the cement and any additives, and the pressure, temperature and pH of the carbon-rich brine environment to which cement is exposed. Older wells not originally designed for carbon sequestration service will not generally have been constructed from materials optimized for carbonic acid resistance.

The Commission agrees that the Class II UIC program is not appropriate for geologic storage of large volumes of carbon dioxide. The Commission disagrees that corrosion-resistant materials and cement do not exist. Experience over many decades in corrosive down-hole situations such as acid gas injection and production of natural gas with carbon dioxide and hydrogen sulfide shows that materials are available that can resist corrosive environments. Meyer (2007) lists several types of cements that have been used under such corrosive conditions. There are two studies of wells that were exposed to carbon dioxide for approximately 30 years by Carey et al. (2007) and Crow et al. (2008). Although these studies are limited in the number of well material samples and the number of wells examined, the casing and cement sampled indicate fairly good condition of well materials installed three decades ago. The director will carefully review information provided by the applicant to determine whether proposed casing and cementing materials will be adequately resistant to corrosion for each geologic storage project.

Both EPA and the Commission recognize that the Class II UIC program has managed acid gas disposal and injection of carbon dioxide for enhanced recovery for upstream oil and gas activities for decades. The Commission also recognizes that the injection and storage of larger volumes of carbon dioxide has the potential for increased risk to USDWs. The Commission has indicated in its rules that this potential for increased risk will be considered

when determining whether a Class II UIC well should be transitioned to a Class VI UIC well.

As the commenter stated, simulations of 1000 years of carbon dioxide injection into wells specifically designed for sequestration at the Ketzin pilot site in Germany showed that, if reservoir pressures remained elevated over the entire sequestration period, saturation of well cements with carbon dioxide and possible containment loss through the wellbores to the surface could occur. The study assumed that pressure would not quickly dissipate post-injection. The Commission finds that pressure dissipation is an important part of selecting an appropriate site and reservoir for the injection and storage of carbon dioxide. If modeling of a proposed project or monitoring of a permitted project reveals that pressure is not dissipating such that USDWs are threatened, the Commission will not approve a proposed project or will require cessation of injection in a permitted project.

In addition, §91.801 of the Texas Natural Resources Code requires the Commission to adopt rules that allow an operator of a well authorized by a permit issued by the Commission to convert the well from its authorized purpose to a new or additional purpose.

The Commission made no changes in response to these comments.

The Texas-based organizations requested clarification as to how the Commission will monitor Class II wells to verify that operators are not simply applying for Class II permits while they are primarily operating a geologic storage facility for anthropogenic carbon dioxide.

The Commission notes that §5.201(b)(2) lists the factors that the Commission will consider in determining if there is an increased risk to USDWs. These include an increase in reservoir pressure within the injection zone; an increase in carbon dioxide injection rates; a decrease in reservoir production rates; the distance between the injection zone and USDWs; suitability of the enhanced oil or gas recovery AOR delineation; the quality of abandoned well plugs within the AOR; the storage operator's plan for recovery of carbon dioxide at the cessation of injection; the source and properties of injected carbon dioxide; and any additional site-specific factors as determined by the Commission. The Commission is monitoring existing operations and carefully reviewing any applications for new Class II injection wells proposing to inject carbon dioxide using these factors. The Commission made no change in response to this comment.

The Texas-based organizations expressed concern that operators have falsified production reports to appear as though their wells meet the definition of active status and have continued to produce after receiving a seal and sever order. They recommended that the Commission collect real-time production and injection data from well operators to more accurately monitor Class II operations.

The Commission realizes the possibility that an operator could falsify production and injection data. The Commission's reporting and inspection requirements assist the Commission in determining whether data has been falsified. In addition, §85.387 of the Texas Natural Resources Code provides that a person shall be imprisoned in the Texas Department of Criminal Justice for not less than two nor more than five years if the person knowingly procures or causes an agent, officer, or employee of the Commission to approve or issue a permit or tender of the Commission relating to oil or gas or any product or by-product of oil or gas that includes a statement or representation that is false and that materially misrepresents the true facts respecting the oil or gas or any product or by-product of either. The Commission made no change in response to this comment.

Regarding §5.203(f)(1), TXOGA and TIP requested clarification as to whether alternative logs and derived curves would be acceptable if applicable or necessary. They also requested clarification with respect to the geologic logs which must be run in advance of long string casing installation, and whether the Commission is referring to formation imaging logs (fmi) or other log types.

Section 5.203(f) lists the general type of appropriate logs that must be run and provides examples of such logs. As stated, the logs must verify the depth, thickness, porosity, permeability, and lithology of, and the salinity of any formation fluids in, the formations that are to be used for monitoring, storage, and confinement to assure conformance with the injection well construction requirements set forth in subsection (e) of this section, and to establish accurate baseline data against which future measurements may be compared. With respect to geologic logs that must be run before long string casing is installed, the operator must run logs appropriate to the geology, such as resistivity, spontaneous potential, porosity, caliper, gamma ray, and fracture finder logs, to gather data necessary to verify the characterization of the geology and hydrology. Formation imaging logs are not specifically mentioned but may be useful to provide detailed information about the rocks in formations surrounding an open hole and about the pipe and casing condition in cased holes. The Commission made no change in response to this comment.

TXOGA and TIP request clarification that §5.203(f)(2)(B) assumes that a nearby well is accessible to perform a pressure fall-off test, and information on the minimum requirements for the coring and analysis required by §5.203(f)(3)(B).

The Commission made no change in response to this comment but clarifies as follows. Section §5.203(f) requires plans for logging, sampling, and testing of injection wells after permitting but before injection. Therefore, the assumption in this section is that the injection well has been drilled and completed. However, information on reservoir pressure response is required in the initial application possibly before the injection well has been drilled and is required to model the AOR. Therefore, the applicant may perform testing on nearby wells or a stratigraphic test well as long as the applicant can demonstrate that such data are representative of conditions at the proposed injection well.

The Texas-based organizations requested clarification of §5.203(f)(2)(C) as to whether 90% of fracture pressure is adequate to prevent initiation of new fractures or propagate existing fractures. They also requested clarification as to how this will be monitored. The Texas-based organizations asked for clarification as to why the rules allow the director to approve a plan "for controlled artificial fracturing" when this paragraph is trying to prevent fractures.

The Commission notes its regulations are consistent with the federal regulations, which only prohibit fracturing of the confining zone. The director may approve a plan for controlled artificial fracturing of the injection zone. The safety factor of 90% of fracture pressure is adequate to prevent initiation of new fractures or propagation of existing fractures in the confining zone. Therefore, except during approved stimulation activities, injection pressure may not be greater than 90 percent of the fracture pressure of the injection zone. However, the Commission adopts §5.203(f)(2)(C) with a change to clarify these requirements. The

Commission plans to be on-site during testing required to determine fracture pressure and during any planned stimulation activity.

TXOGA and TIP recommended that the Commission specifically allow the use of chemical tracers for the confirmation of the absence of significant fluid movement into a USDW required by §5.203(h)(1)(D).

The Commission declines to make the requested change. The federal Class VI regulations require annulus pressure tests and monitoring to verify internal mechanical integrity. However, if written approval is received from the EPA Administrator, the director may allow alternative mechanical integrity testing methods. *See* 40 CFR 146.89(e). Currently, the only available alternative internal MIT is the radioactive tracer survey, which is used under specific conditions (USEPA. 1987b. Underground Injection Control Program: Radioactive Tracer Survey Approval. Federal Register, Vol. 52, No. 237, p. 46837). The radioactive tracer survey may require long periods of investigation and cannot feasibly be conducted continuously during injection (and therefore cannot be used to comply with the continuous monitoring requirements). However, the radioactive tracer survey can provide supplementary information regarding internal fluid leakage and therefore may be conducted in addition to annular pressure monitoring. The radioactive tracer survey may be used to locate the depth of a leak within the well bore, unlike annulus pressure tests.

The Class VI rule in 40 CFR §146.89(c) requires that an oxygen-activation log or other approved tracer survey, a temperature log, or a noise log be conducted to comply with external mechanical integrity testing requirements. However, under 40 CFR §146.89(e), alternative methods beyond those listed may be allowed by the director if written approval is received from the EPA Administrator. Title 40 CFR §146.89(e) also states that a request to use methods other than those currently approved by EPA requires EPA approval and publication of the alternative method's approval in the *Federal Register.* Currently, there are no alternative methods that may feasibly be used for external mechanical integrity testing beyond those listed, except under very limited circumstances.

EPA's guidance on testing and monitoring indicates that radioactive tracer surveys have been used for assessing external mechanical integrity. Use of radioactive tracer surveys as the sole test for external mechanical integrity testing is limited to cases where there are no permeable formations between the injection zone and the lowermost USDW (USEPA. 1987b. Underground Injection Control Program: Radioactive Tracer Survey Approval. Federal Register, Vol. 52, No. 237, p. 46837). Essentially, a single confining layer would need to be present that separates the injection zone from the lowermost USDW. Given the depths of Class VI wells and the significant siting requirements, it is unlikely that this condition will be met for Class VI wells.

The Texas-based organizations commented on subsection (j) and requested clarification of internal processes the Commission will follow to verify that operators are conducting their plan for monitoring, sampling, and testing, as approved. The Texas-based organizations recommended that the Commission adopt a clear process of how permits will be monitored and enforced and a clear grievance process when the agency's monitoring and enforcement is in question.

Commission staff will not issue a permit that does not meet the requirements of Chapter 5, Subchapter B. Staff will review Class VI facilities for compliance at least annually. Compliance will be determined through review of records submitted by the facility operator, the facility permit, the permit application, and the rules. If staff finds that the operator has not submitted records to demonstrate compliance, the operator will be notified that they are in violation and must come into compliance or enforcement action will be pursued. Any report of a violation of a Commission permit will be evaluated, investigated, and enforced, if necessary. Lastly, any person may file a complaint under 16 TAC §1.23, which requires the respondent to answer the complaint or request a hearing within 20 days. The Commission made no change in response to this comment.

TXOGA and TIP request that the Commission consider adding language allowing for alternative methods to the pressure fall-off test to be used if approved by the director in §5.203(j)(2)(F).

The Commission declines to make the requested change because the federal rules require pressure falloff testing and provide for no alternative.

The GLO recommended that the Commission revise the rule language to require an annual pressure falloff test rather than requiring the test once every five years consistent with the Class I requirements. The GLO commented that the computational reservoir models used to monitor, verify, and quantify carbon storage are extremely sensitive to input data, including permeability, pressure, and the locations of reservoir boundaries, that are all routinely obtained or calibrated against falloff test interpretations. Moreover, falloff test results can signal increases in reservoir pressure that could lead to fracturing of the injection or confining zone, and to loss of containment. The tests can also help to detect the changing transmissivity or sealing potential of faults over time. The Miocene reservoirs are heavily faulted, and knowledge of the dynamic sealing potential of isolated reservoir compartments must inform decisions about the number, location, and size of carbon storage repositories offered for lease by the GLO.

The Commission made no change in response to this comment. The federal Class VI regulations require pressure falloff testing every five years. The Commission's rules allow the director to require more frequent testing and the Commission agrees that it would be helpful to know how the reservoir is performing at the beginning of injection. Therefore, the Commission may require more falloff testing at the initiation of injection and for a period after initiation of injection. In addition, in a reservoir that is heavily faulted, more frequent testing might be appropriate. However, testing at that frequency may not be necessary for the life of the project.

The Texas-based organizations expressed concerns regarding the accuracy of the AOR, considering that the latitude and longitude coordinates for many wells in the Commission's database are either not available or are inaccurate. One of the criteria the director may use to determine if a Class II well poses an increased risk to USDWs includes the "quality of abandoned well plugs within the AOR." Currently, the Commission's orphaned well list contains over 350 wells with no latitude or longitude coordinates and there are over 1,700 inactive unplugged wells with active operators and no latitude or longitude coordinates. Some landowners have reported undocumented wells on their properties that are unplugged and show evidence of having been drilled as oil and gas wells. The organizations requested clarification as to whether the Commission will consider better locating existing wells of all types so that AORs can be developed that fully account for potential risks.

The Commission notes that the rules require an applicant to identify all penetrations in the AOR that may penetrate the confining zones. The Commission agrees that a variety of types of abandoned wells may exist within the delineated AOR of a proposed project, including wells constructed prior to federal or state regulation (i.e., in the late 1800s or early 1900s), for which the Commission may have little or incorrect location information. However, several methods and sources of information are available to identify those artificial penetrations in a relatively efficient manner. The primary stages of an abandoned well investigation within the AOR include historical research, site reconnaissance, review of aerial and satellite imagery, and one or more geophysical surveys. Applicants will be required to conduct a records review as the first step in abandoned well identification within the AOR. Such records may include state databases or other files, county records, including survey maps, ownership records, and chain-of-title and property lease history, maintained by local tax assessors and county clerks, private data compilation service records. Such research may also include site reconnaissance, including interviewing local residents and property owners, oilfield workers, service company employees, and property and drilling-rights ownership brokers, as well as conducting a physical search for features indicative of abandoned wells. An applicant may also use historical aerial photographs to identify abandoned wells. Depending on the resolution of the image, satellite images may be used. Surface features may indicate abandoned wells including abandoned well derricks, access roads, brine pits, or vegetation stress. In addition, geophysical surveys, including magnetic, ground penetrating radar (GPR), and electromagnetic methods, can be used in the detection of abandoned wells in the AOR. The Commission made no change in response to this comment.

PBPA expressed concern that the post closure requirements in §5.203(m) would be completed during permitting, where it is more appropriate that the demonstrations be broadened to include post injection scenarios as well.

The Commission notes the requirements are consistent with the federal rules, which require that a post-injection storage facility care and closure plan be submitted with the application. The approved plan is a requirement of the Class VI permit. It is not unusual to include closure requirements in permits. In addition, the post-injection storage facility care and closure plan must be prepared in order to ensure that financial assurance will cover the estimated costs of post-injection care and closure, which is required to be submitted with the application.

Because operators at certain geologic storage sites will be able to demonstrate long-term containment and non-endangerment to USDWs before the end of the default 50-year monitoring period, TXOGA and TIP support the post-closure monitoring, which is reflected in the additional criteria language contained in §5.203(m). TXOGA and TIP additionally request clarification on whether, if the demonstration requirements are not met, the default 50-year monitoring period would be required or whether monitoring would continue until the demonstration is effectively made. Furthermore, TXOGA and TIP request that the Commission clarify that this demonstration can be made during permitting or post injection periods.

Monitoring must continue until the permittee can make the demonstration required before closure. The demonstration must be performed after injection ceases. The Commission made no change in response to these comments.

An individual recommended that the Commission not adopt a 50-year default period for PISC and use instead agreed criteria for demonstrating non-endangerment of USDWs. Experience shows that reductions in pressure and fluid movement within storage reservoirs are likely to occur much sooner than the 50-year period. In unusual cases where such demonstrations take longer, the current regulatory language already allows that even without specification of the default period. Estimates to support FA should be based on more realistic projections. The default 50-year PISC period is longer than it needs to be for well-chosen sites, and more flexibility should be included in Class VI permits so that shorter PISC timeframes can be specified with possibility of adjustment depending on actual site conditions.

The Commission appreciates this comment.

The Texas-based organizations recommended that the Commission not allow alternative timeframes for monitoring that are less than 50 years because carbon dioxide lasts tens of thousands of years in the atmosphere and wells get more dangerous as they age. The state should not prematurely take on responsibility for inactive assets that are likely to eventually fail.

The GLO recommended that the Commission's rules retain the federal 50-year default post-injection site care monitoring because regular monitoring data is essential for reducing the uncertainty of reservoir models used to provide early warnings of containment loss or plume migration post-injection and because well cement degradation may occur over a period of several decades. Reduction of the monitoring or PISC period could create financial incentives for operators to design wells and ancillary equipment that have a shorter service life. Long-term monitoring will also help to mitigate against the possibility that latent errors will cause future damage to the facility that are not easily traceable to specific operational actions.

TXOGA and TIP requested clarification on the Commission's proposed addition to §5.203(d)(1)(A)(i)(III), and the preamble description of the requirement that "the initial delineation of the area of review must be estimated from initiation of injection until the plume movement ceases, for a minimum of 10 years after the end of the injection period proposed by the applicant." TXOGA, TIP, Denbury, and the EAC recommended that the Commission change the language in §5.203(d)(1)(A)(i)(III) to "until the plume movement *stabilizes*." Denbury and the EAC commented that Wyoming takes this approach and defines plume stabilization as being "achieved when the carbon dioxide stream that has been injected subsurface essentially no longer expands vertically or horizontally and poses no threat to USDWs, human health, safety, or the environment, as demonstrated by a minimum of three consecutive years of monitoring data." TXOGA and TIP also requested that the Commission establish a time limit for this requirement to allow for greater modeling certainty.

The Commission notes the federal rules at 40 CFR §146.93, relating to post injection site care and site closure, require that the operator continue to conduct monitoring for at least 50 years following cessation of injection. However, the director may approve, in consultation with EPA, an alternative timeframe other than the 50-year default, if the operator can demonstrate during the permitting process that an alternative timeframe is appropriate and ensures non-endangerment of USDWs. The federal rules require that the demonstration be based on significant, site-specific data and information and contain substantial evidence that the geologic storage project will no longer pose a risk of endangerment to USDWs at the end of the alternative

post injection site care timeframe. Current Commission rules do not include a 50-year default post injection site care period. To meet the minimum federal requirements, the Commission proposed to amend §5.203(m) to include the data and information required to make a demonstration that an alternative timeframe is appropriate and ensures non-endangerment of USDWs. If the monitoring period is performance-based (i.e., no endangerment of Underground Sources of Drinking Water (USDWs)), a specific time frame is artificial.

The Commission considered the recommendation to replace the term "stabilization" as opposed to "cessation of movement" regarding plume movement. The final federal regulations do not include language regarding "plume stabilization." In fact, EPA removed a discussion of "plume stabilization" from one of its draft guidance documents as a result of comments it received. However, other states have included the concept of "plume stabilization." For example, Wyoming regulations require post injection site care monitoring for a period of not less than 10 years or as long thereafter as necessary to obtain a completion and release certificate certifying that plume stabilization has been achieved without the use of control equipment based on a minimum of three consecutive years of monitoring.

Because the goal of the Class VI UIC program is to prevent endangerment of USDWs, we agree that cessation of plume movement may not be the best measure. A plume can still be moving yet be considered non-endangering. Rather the plume and pressure front should not continue moving in a manner that increases the probability that it will encounter a leakage pathway. Complete stasis of the plume and pressure front within the injection interval as a requirement to end post injection site care monitoring could be unrealistic and unnecessary. The emphasis should be on documenting the effectiveness of the vertical separation and plume and pressure front confinement beneath adequate confining zones. If, to a high degree of certainty, the plume and formation fluids will remain deep in the subsurface below the confining zone, then any lateral migration may not result in endangerment of USDWs and it will be unnecessary for a plume or pressure front to be in complete stasis. The operator should be allowed to demonstrate that a plume and pressure front are not migrating vertically, with a trend toward pressure and chemical equilibrium.

Wyoming defines plume stabilization as being "achieved when the carbon dioxide stream that has been injected subsurface essentially no longer expands vertically or horizontally and poses no threat to USDWs, human health, safety, or the environment, as demonstrated by a minimum of three consecutive years of monitoring data." As such, Wyoming defines stabilization in terms of movement of the CO_2 stream. Therefore, it should not matter whether the Commission uses the term "stabilizes" or "ceases." However, Merriam Webster defines "cease" as "to come to an end or to bring an action or activity to an end," and defines "stabilize" as "to hold steady, such as to limit fluctuations of." The term "stabilize" appears to be more appropriate as it does not imply that the plume and associated pressure front must be in complete stasis. Due to these considerations, the Commission adopts §5.203 with changes in (d)(1)(A)(i)(III), (m)(5), and (m)(7)(iii).

EDF commented that it is important that the Commission's approach to the initial delineation of the AOR be consistent with what is needed in order to determine the length of PISC period and required period of monitoring, i.e. a determination of the point at which the plume has or is expected to be essentially stabilized. Accordingly, EDF recommended that the Commission delete the 10-year minimum from §5.203(d)(1)(A)(i)(III).

The Commission agrees with this comment. The Commission requested comment on whether the Commission should consider a minimum post injection site care monitoring period. Other states have included minimum PISC monitoring requirements. For example, Wyoming regulations require PISC monitoring for a period of not less than 10 years or as long thereafter as necessary to obtain a completion and release certificate certifying that plume stabilization has been achieved without the use of control equipment based on a minimum of three consecutive years of monitoring. Because the post injection monitoring period is to be based on individual projects and site-specific data, the Commission agrees with this comment and has made the recommended change in §5.203(d)(1)(A)(i)(III).

Regarding §5.203(e)(1)(B)(v)'s requirement for at least one long string casing to extend through the injection zone, TXOGA, TIP, EAC, and Denbury recommended changing the requirement from the long string "must extend through the injection zone" to the long string "must extend to the injection zone." This would allow for the potential use of a chrome liner to be run through the injection interval which could reduce cost and improve the quality of the cement job. The State of Wyoming uses similar language in its Class VI regulations.

The Commission agrees with these comments and adopts §5.203(e)(1)(B)(v) with the recommended change. The federal regulations at 40 CFR §146.86(b)(3) state that at least one long string casing, using a sufficient number of centralizers, must extend to the injection zone and must be cemented by circulating cement to the surface in one or more stages.

The Texas-based organizations requested clarification on the requirement in §5.203(o) that the applicant provide a letter from the Groundwater Advisory Unit (GAU) of the Oil and Gas Division. The Texas-based organizations asked whether the GAU letter must be applicable to the entire Area of Review and whether the Commission will allow an applicant to provide a GAU letter older than five years.

The GAU letter will be applicable to the AOR and must be prepared specifically for the geologic storage facility. The Commission made no change in response to this comment.

The GLO recommended that the Commission revise the rules to require that cement plugging for abandonment be from bottomhole to surface consistent with Texas Class I practice.

The Commission declines to make this change. Neither the federal Class VI regulations nor the TCEQ Class I regulations at 30 TAC §331.46 (relating to Closure Standards) require plugging with cement from bottomhole to the surface. TCEQ regulations at 30 TAC §331.46(e) state that a well shall be plugged in a manner which will not allow the movement of fluids through the well, out of the injection zone either into or between USDWs or to the land surface. The Commission's rules in Chapter 5 require an applicant to provide a plugging plan with the application, which will be reviewed by Commission staff for adequacy. Staff will consider factors similar to those considered by the TCEQ for Class I injection wells. These factors include, but are not limited to, the type and number of plugs to be used; the placement of each plug including the elevation of the top and bottom; the type, grade, and quantity of plugging material to be used; the method of placement of the plugs; and the procedure used to plug and abandon the well.

§5.204

PBPA supports transparency but requests that the Commission clarify how it would protect proprietary or confidential information while complying with the public hearing process that serves the public interest. TXOGA and TIP also request that the Commission explain how it will handle confidential business information, such as seismic licensing and internal knowledge, in a public hearing.

The Commission refers these commenters to §1.68 of this title (relating to Confidential Materials), which addresses confidential materials filed with the Commission. Section 1.68(a) states that all "records, data, and information filed with the Commission are subject to the Texas Public Information Act, Texas Government Code, Chapter 552. If the Commission receives a third-party request for materials that have been marked confidential pursuant to subsection (b) or (c) of this section, the Commission will notify the filing party of the request in accordance with the provisions of the Texas Public Information Act so that the party can take action with the Office of the Attorney General to oppose release of the materials."

Section 1.68(b) addresses filing confidential materials in a hearing before the Hearings Division and subsection (c) addresses filing confidential materials with the Commission other than in a hearing. All applications and other required reports and information must be submitted through EPA's Geologic Sequestration Data Tool (GSDT) system; however, EPA has established provisions for maintaining confidential information associated with the Class VI program.

PBPA recommended that notice be waived in the event that a well would threaten the public or imperil USDW or in a scenario that is otherwise approved by the director.

The Commission does not agree with this comment. The notice requirements in §5.204 correspond to the federal requirements. Section 5.202(d)(2)(A)(viii) includes the list for permit modification triggers that would allow minor modifications without notice consistent with 40 CFR §144.39. The application must include an emergency response and remediation plan, which should address the operator's plans for responding to the emergencies noted by the commenter. As part of the application, notice of this plan will be provided to the public in accordance with the notice requirement. Section 5.206(h)(3) requires that, if an operator obtains evidence that the injected carbon dioxide stream and associated pressure front may cause an endangerment to USDWs, the operator must: immediately cease injection; take all steps reasonably necessary to identify and characterize any release; notify the director as soon as practicable but within at least 24 hours; and implement the approved emergency and remedial response plan. In addition, §5.206(c)(3) states that in the case of an emergency repair, the operator must notify the director of such emergency repair as soon as reasonably practical. No such work may commence until approved by the director. The Commission will review the proposed emergency repair in an expeditious manner.

NARO-Texas commented that the rules should ensure proper and sufficient notice of a company's sequestration activities to affected mineral and royalty owners; owners both adjacent to and within proposed storage reservoirs. NARO-Texas further commented that, for the CCUS industry to thrive in Texas, buy-in from all stakeholders is necessary. NARO-Texas recommended that the Commission revise §5.204 to add "and mineral interest owners located within," following "each leaseholder of minerals" and before "lying above or below the proposed storage reservoir" to subsection (a)(3)(A)(V) to ensure proper notice to mineral owners within the proposed storage reservoir, not just adjacent mineral owners, surface owners within the proposed storage reservoir, and leaseholders as currently required by the remaining subsections.

The Commission agrees and adopts §5.204(a)(3)(A) with a change to add "interest owner" in §5.204(a)(3)(A)(v).

The Texas-based organizations recommended that the Commission revise §5.204(a) to require issuing web-based media posts and publishing the posts on the Commission's social media including hashtags for the appropriate counties and nearby population centers. In addition, the organizations recommended that the rule require that notice be provided in Spanish without request, and instructions on how to obtain language accommodation should be provided in other languages.

The Commission agrees that the use of new forms of information technology can improve public participation and understanding of geologic storage projects and the associated injection technologies involved. The Commission will use information technologies to inform the public. This information may include schedules for hearings, briefings, and other opportunities for involvement. The Commission also encourages operators to use the internet as well as other new and established tools to explain and post information on the latest developments. The Commission will consider how to best use social media applications for important information and will encourage operators to use similar technologies to keep the public informed of geologic storage projects. The Commission made no change in response to this comment.

Texas 2036 commented that §5.204(a)(2) requires that the Commission publish notice of a draft permit for a specified time in a newspaper of general circulation in each county where the storage facility will be located. As more Texans get their news and notices from on-line, rather than print, resources, we recommend that this publication requirement be expanded to include posting on the Commission's website. Further, and in the interest of improving outreach to the Environmental Justice and Limited English Proficiency communities described elsewhere in the proposed rules, notices published on the Commission's website should be in both English and Spanish.

The Commission agrees with the recommendation to post notice of a draft permit on the Commission's website and has revised §5.204(a)(2) accordingly. The Commission will publish the notice in Spanish and English if the proposed project is located in an Environmental Justice and/or Limited-English Speaking Household community.

Texas 2036 commented that the proposed rules require that individual notice be provided to certain persons and local governmental entities in the area of a proposed CCUS project. These persons and entities qualify for notice on the basis of their surface location in relation to the underlying proposed storage site. Section 5.204(a)(3)(A)(v), (viii), (ix), and (x) use different terms to describe that site, however. These terms include "storage reservoir," "storage facility," and "facility." In the interest of ensuring a uniform and consistent application of this notice requirement, Texas 2036 recommended that the Commission replace these terms with "geologic storage facility." This term is used for other individual notice requirements within §5.204(a)(3)(A) and is defined in §5.102(28).

The Commission agrees and adopts the provisions specified in the comment with the requested changes.

The Texas-based organizations requested clarification of §5.204(a)(3) as to whether a new notice would be issued if the permit is modified based on potential new outermost boundaries of the facility.

The Commission notes the rules require a permittee to file an application to amend a permit to expand the areal extent of the storage reservoir. If the director tentatively decides to modify or revoke and reissue a permit, the director must prepare a draft permit incorporating the proposed changes. The rules further require that the director give notice of a draft permit.

The Texas-based organizations commented on §5.204(a)(5), which requires that the applicant make "diligent efforts" to identify those that will require notice. This is based on county records. The organizations recommended that the Commission also require applicants to notify city councils, county commissioners courts, and groundwater conservation districts (if applicable) in the affected counties.

Section 5.204(a)(3)(A) requires notice to the clerk of the county or counties where the proposed storage facility is located; the city clerk or other appropriate city official where the proposed storage facility is located within city limits; any other unit of local government having jurisdiction over the area where the facility is or is proposed to be located, and each state agency having any authority under state law with respect to the construction or operation of the facility. The Commission made no change in response to this comment.

The Texas-based organizations recommended that the Commission revise §5.204(a)(3)(A)(viii) to read "where the proposed storage facility is or is proposed to be located for public announcement to county residents."

The Commission agrees and adopts §5.204(a)(3)(A)(viii) with the recommended change.

In addition, the Texas-based organizations recommended that the Commission revise (ix) "where the proposed storage facility is located within city limits," should read "is or is proposed to be located for public announcement to municipal or city residents."

Section 5.204(a)(3)(A)(ix) requires notification of the city clerk or other appropriate city official where the proposed storage facility is located within city limits. Section 5.204(a)(3)(A)(x) requires notification of any other unit of local government having jurisdiction over the area where the facility is or is proposed to be located. The Commission made no change in response to this comment.

The Texas-based organizations requested clarification as to whether the Commission will make a web-based form available for submitting a request to be on mailing list developed by the Commission, including those who request in writing to be on the list and by soliciting participants in public hearings in that area for their interest in being included on area mailing lists. They further commented that the Commission could make a link to the form available on its social media channels and in social media posts submitted to media outlets.

The Commission will develop a form for requesting to be on the list and include a link to the form on the Commission's webpage. The Commission made no change in response to this comment.

The Texas-based organizations requested clarification as to whether the AOR includes all parts of the outermost boundary of the proposed geologic storage facility and whether the outermost boundary of the proposed facility include all parts of the AOR.

The rule defines area of review as the subsurface three-dimensional extent of the CO_2 stream plume and the associated pressure front, as well as the overlying formations, any underground sources of drinking water overlying an injection zone along with any intervening formations, and the surface area above that delineated region. The Commission made no change in response to this comment.

An individual commented that the amendment in §5.204(o) to add new paragraph (2)(G) to require that the permittee of a geologic storage well coordinate with any operator planning to drill through the AOR to explore for oil and gas or geothermal resources is a very important and appropriate addition to the rule. Operators should be allowed to coordinate these operations, with the recognition that ultimate approval from the Commission will not be forthcoming if the operators fail to agree on operational procedures that will assure containment of the stored CO_2 and avoidance of endangering any USDWs.

The Commission appreciates this comment.

NARO-Texas recommended that the Commission revise §5.206 to add the following to the end of (o)(2)(G): "and take all reasonable steps necessary to minimize or correct any adverse impact on the operator's ability to drill for and produce oil and gas or geothermal resources from above or below the geologic storage reservoir". This addition to the condition that requires coordination with an exploration and production company establishes an affirmative duty--similar to the duty to mitigate contained in subsection (E) immediately above--to lessen the impact on the production of hydrocarbons which will benefit exploration and production companies and mineral and royalty owners alike.

The Commission agrees with this comment and adopts §5.206(o)(2)(G) to include language similar to that suggested by NARO-Texas.

EDF recommended that the Commission give further thought to the issue of environmental justice (EJ). CCS will only be an effective greenhouse gas mitigation tool if it is coupled with proactive efforts to address historic disproportionate impacts on communities as well as new impacts. Moreover, it is EDF's understanding that EPA expects to begin requiring states to address this issue as a condition of receiving primacy approvals. While it is not yet clear what EPA will require, EJ is a vital issue and EDF encouraged the Commission to begin thinking outside the box as to how it can meaningfully address community impacts and engage with affected communities. EDF provided an example suggesting the Commission discuss coordination on environmental justice issues with agencies (state or federal) that have roles to play in overseeing CO_2 capture and transportation.

PBPA recommended that the Commission clarify how the Commission would establish its environmental justice efforts to best serve the communities in the Permian Basin.

The Commission agrees with EDF that it is not clear what will be required by EPA regarding environmental justice. Commission staff is following the efforts of the various federal agencies, including EPA, as they develop guidelines. Until that guidance has been finalized, the Commission finds that enhanced public outreach and public engagement will assist the Commission and the applicant to clearly describe the proposed facility, potential impacts and safeguards against those impacts, and hear and

address the concerns of all communities, including environmental justice and other disadvantaged communities. The Commission acknowledges concerns that carbon dioxide capture, transportation, and geologic storage projects will add to burdens on disadvantaged communities. However, the Commission finds that CCS is beneficial to society at large for all, including disadvantaged communities.

Further, the scope of the Chapter 5 regulations is limited to Class VI injection and geologic storage of anthropogenic carbon dioxide. Potential impacts, including impacts to environmental justice communities, associated with carbon dioxide capture and transportation will be addressed during permitting associated with capture and transportation.

TXOGA and TIP also request that the Commission define "LEP," or alternatively, that the Commission use the term "limited English-speaking household" in §5.204(a)(6) in order to align with U.S. Census Bureau terminology.

The Commission agrees with this comment and adopts §5.204(a)(6) with a change to use the term limited English-speaking household. The U.S. Census Bureau defines a "limited English-speaking household" as one in which all members 14 years and older have at least some difficulty with English. The Commission adopts §5.102 with a definition for limited English-speaking household that matches the Bureau's definition.

Regarding §5.204(a), which requires applicants to identify whether the area of review encompasses environmental justice (EJ) or limited English-speaking household communities, TXOGA and TIP commented that the U.S. Census Bureau 2018 American Community Survey data is a recognized source that can serve to identify and consider environmental justice communities, but requested that the Commission provide additional guidelines on the criteria that may be used to identify those communities, and to direct enhanced engagement efforts in the permitting process, and to clarify the resources or tools that may be acceptable to establish that sufficient efforts were directed to engage those communities.

The Commission refers commenters to §5.204(a)(6), which requires that, if the AOR includes an EJ or limited English-speaking household community, the applicant conduct enhanced public outreach activities. Efforts must include: (1) published meeting notice in English and the identified language (e.g., Spanish); (2) comment forms posted on the applicant's webpage and available at public meeting in English and the alternate language; (3) interpretation services accommodated upon request; (4) English translation of any comments made during any comment period in the alternate language; and (5) to the extent possible, public meeting venues near public transportation.

To be transparent and open to input and influence, engagement processes must be understood by all stakeholders. A project proponent could begin with developing a public participation plan detailing the process that will be used to engage the public and how that process will encourage participation by diverse populations. The plan could include documentation of the public participation plan and analysis of its success and community opinion, in public reports. The plan should include procedures to provide clear, understandable information about the project, ways to work with community leaders to create common language with neutral terminology, free of jargon, and sensitive to race, ethnicity, culture, gender, disability status, and language. Documents and in-person discussions should be translated for individuals with limited English proficiency, and should provide alternative options or assistance for individuals who are physically, visually, and/or hearing-impaired. Agendas could be developed with the assistance of community representatives to better understand how the community would like information presented, questions they would like answered, and languages they speak.

Meeting times should be selected that do not conflict with work schedules and rush hours. Meeting locations should be local and accessible (e.g., reachable via public transit), of adequate size, ADA compliant, and represent neutral turf (e.g., not a government office, and not an office that requires official identification). The meetings and their proposed agendas should be advertised in a timely manner in popular print and electronic media sources, as well as radio, if appropriate. A contact with whom communities can communicate about upcoming meetings should be provided as well as a central point-of-contact to disseminate information and resolve problems. Tele- or video conferencing options could be offered to allow the public to join in-person meetings, using technology available to the public. Meetings should be designed to create an atmosphere of equal participation by avoiding a head table or panel, and providing multiple opportunities and channels for the public to voice questions and concerns. Questions and concerns should be clearly documented and information about next steps or follow-up should be communicated. Opportunities for continued participation and feedback after the project has been implemented should be created, and communication channels (e.g., via internet updates or email newsletters, by updating community leaders, etc.) established to inform the community about the status of the project.

In addition, opportunities for permitting agencies, including the Commission, should be provided to describe the permitting agency's role and contact information.

Additional guidance is available through several sources. One such source is EPA's Geologic Sequestration of Carbon Dioxide - UIC Quick Reference Guide: Additional Tools for UIC Program Directors Incorporating Environmental Justice Considerations into the Class VI Injection Well Permitting Process (https://www.epa.gov/uic/quick-reference-guides-class-vi-program-implementation). Another source is EPA's EJScreen (https://www.epa.gov/ejscreen). Applicants can also review EPA's *Guidance on Considering Environmental Justice During the Development of a Regulatory Action* (https://www.epa.gov/environmentaljustice/guidance-considering-environmental-justice-during-development-action). Although this guidance document was developed to assist EPA staff in evaluating environmental justice considerations at key points in the rulemaking process, it also contains information that could be helpful to applicants. Another potentially helpful document is EPA's Technical Guidance for Assessing Environmental Justice in Regulatory Actions (https://www.epa.gov/environmentaljustice/technical-guidance-assessing-environmental-justice-regulatory-analysis).

The National Petroleum Council's "Meeting the Dual Challenge: A Roadmap to At-Scale Deployment of Carbon Capture, Use, and Storage", includes a chapter (Chapter 4) on Building Stakeholder Confidence. This chapter includes references to several successful stakeholder engagement efforts. https://dualchallenge.npc.org/files/CCUS-Chap_4-030521.pdf.

The Texas-based organizations recommended that, in order to avoid frequently updating Chapter 5 rules and to ensure the most up to date information, the Commission revise the rule language to require use of the most recent U.S. Census Bureau 2018

American Community Survey (ACS) data to identify EJ and LEP areas data available at the time of the permit application.

The Commission agrees with this comment and adopts §5.204(a)(6) with an additional change to incorporate the recommended language.

The Texas-based organizations requested clarification as to whether "efforts to include EJ and LEP communities in public involvement activities" include public hearings described in subsection (b)(2).

The Commission notes that §5.204(b)(2) requires the director to notify the applicant that the director cannot administratively approve the application if the Commission receives a protest regarding an application for a new permit or for an amendment of an existing permit for a geologic storage facility from a person notified pursuant to subsection (a) of this section or from any other affected person within 30 days of the date of receipt of the application by the division, receipt of individual notice, or last publication of notice, whichever is later. Upon the written request of the applicant, the director will schedule a hearing on the application. In addition, §5.204(b)(2) states that the director must hold a public hearing whenever the director finds, on the basis of requests, a significant degree of public interest in a draft permit and the director may hold a public hearing at the director's discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision. The Commission made no change in response to this comment.

The Texas-based organizations requested clarification in §5.204(b)(1)(B) of "reasonable limits" for oral statements.

The rules allow for written comments and places no limit on such comments. Oral comments may be limited in time at a hearing depending on the number of persons wishing to give such statements. The Commission made no change in response to this comment.

The Texas-based organizations recommended that the rules specify that meetings and/or hearings should be conducted in English and the identified language (e.g. Spanish). Additionally, the rule should specify that a professional interpreter must be available to provide such services. They also recommended that the Commission consider contracting with a firm that can train hearings staff and public outreach staff on procedures for conducting and coordinating multi-lingual meetings in a manner that encourages participation from LEP groups.

The Commission declines to make a change in response to the comment. The rule requires that interpretation services be provided upon request. The Commission will consider contracting with professional interpreter services as necessary.

The Texas-based organizations recommended that the Commission allow at least 60 days (rather than 30 days) for protests to be received. Non-experts who may be impacted will likely need more time to understand the process and determine whether they may be impacted. Many individuals lack the economic means to hire lawyers and may not have immediate access to educational resources needed to understand notice letters.

The Commission declines to make the requested change. The rule states that public notice of a draft permit, including a notice of intent to deny a permit application, shall allow *at least* 30 days for public comment. The Commission may allow additional time for public comment depending on the location of the proposed geologic storage facility.

The Texas-based organizations recommend that the Commission revise the rules to include a robust environmental justice review, including evaluating the impacts of proposed Class VI wells on already overburdened environmental justice communities, not merely providing notice and language interpretation. The organizations commented that the omission of a substantive review of the environmental justice impacts of Class VI injection wells would constitute a failure of the Commission to carry out its legal obligation to ensure environmental justice through compliance with Title VI of the Civil Rights Act of 1964. Title VI prohibits the use of federal funds in a manner that is discriminatory on the basis of race, color or national origin. EPA requires state governmental entities, as recipients of federal financial assistance, to ensure environmental justice through compliance with civil rights law that prohibits discrimination. EPA's implementing regulations set forth general and specific prohibitions against discrimination that have direct application to regulatory activities under the Class VI UIC Program, such as siting.

The Commission understands that environmental justice is ensuring that all people have access to fair treatment and the opportunity for involvement in the development, implementation, and enforcement of environmental laws, regulations, and policies regardless of race, ethnicity, national origin, or income. Environmental justice is best achieved when there are equal degrees of protection from environmental and health hazards, and there is equal access to the environmental policy and decision-making process. (https://www.epa.gov/environmentaljustice).

The scope of the Chapter 5 regulations is limited to Class VI injection and geologic storage of anthropogenic carbon dioxide. Although the presence of industrial sources of carbon dioxide may factor in the selection of locations for geologic storage of carbon dioxide, the Commission has no role in permitting of many of those industrial sources (such as petrochemical plants). It is not clear what will be required by EPA regarding environmental justice. Commission staff is following the efforts of the various federal agencies, including EPA, as they develop guidelines. Until that guidance has been finalized, the Commission expects that enhanced public outreach and public engagement will assist the Commission and the applicant to clearly describe the proposed facility, potential impacts and safeguards against those impacts, and hear and address the concerns of all communities, including environmental justice and other disadvantaged communities.

§5.205

PBPA expressed concern that the annual fee, currently set at $50,000, could serve as a barrier to entry and may be more than necessary to fund the program, and incidents would likely already be covered through the financial assurance requirements.

WSP commented that the application fees are excessive, being 100 times greater than any other RRC injection permit and five to 50 times greater than the TCEQ fees imposed on similarly complex UIC permits. Having a fee structure so costly is contrary to efforts that incentivize emitters of carbon dioxide to find solutions to remove CO_2 from the atmosphere. WSP recommends establishing an application fee that is comparable with TCEQ's Class I hazardous waste injection well application fee.

TXOGA commented that §5.205(a)(3) requires applicants to pay an annual fee of $50,000 per year between the end of injection and site closure authorization. TXOGA seeks clarification on this annual fee, as it will add significant cost to a CO_2 storage project at a time when the project is not generating any revenue

from the injection and permanent storage of CO_2 as a service, which could hinder deployment of this technology. It would also stray from current requirements under EPA's UIC Class VI regulation, which imposes no such fee. Further, EPA's UIC Class VI regulation requires a CO_2 storage operator to demonstrate and maintain a financial responsibility instrument sufficient to cover the cost of corrective action, injection well plugging, emergency and remedial response, and post injection site care and site closure. In §5.205(c), the Commission includes a similar requirement for financial assurance through the end of the PISC period. Therefore, CO_2 storage operators will be responsible for any incident that may occur during the post injection through site closure phase of the project and have a financial instrument, which could be surety bonds, a letter of credit, insurance, or self-insurance, sufficient to cover the cost of remediation. The annual fee can therefore be viewed as redundant, providing no clear benefit to the permanence of stored CO_2.

TXOGA and TIP have additional concerns about the Commission's proposed elimination of the anthropogenic CO_2 storage trust fund cap of $5,000,000 in §5.205(a)(4). TXOGA and TIP would like clarification on why the trust fund cap is being eliminated and requests that the Commission make clear how the trust funds will be utilized in the future. Finally, TXOGA and TIP note that while geologic CO_2 storage is not without risk, these risks are well understood, can be mitigated, and decrease over time. For well-selected, designed, and managed geological storage sites, the CO_2 will gradually be immobilized by various trapping mechanisms and retained for up to millions of years, which raises the question of what issue these fees are trying to resolve.

The Texas-based organizations commented that the Commission should consider the actual cost to the state of monitoring Class VI wells over the active life, inactive life, post-injection care period, and after the post-injection care period, and whether the proposed fees are sufficient to cover the lifetime costs of state monitoring at a level that is protective of groundwater quality, human life, and natural resources. The organizations asked how much the Commission estimates spending on inspections for Class VI facilities during the active life of each facility, inactive life, post-injection care period, and after the post-injection care period, to plug and cleanup orphaned Class VI wells and whether Commission includes other activities, such as inspections, cementing contractors, in the estimates.

The Commission responds as follows. In 2009, Senate Bill 1387 (SB 1387) established the framework for geologic storage of anthropogenic carbon dioxide. SB 1387 provided the Commission with a method for funding this new program by establishing the Anthropogenic Carbon Dioxide Storage Trust Fund through Texas Natural Resources Code §120.003 and authorizing the Commission to impose fees under Texas Water Code §27.045 to cover the cost of permitting, monitoring, and inspecting Class VI injection wells and geologic storage facilities, and enforcing and implementing Subchapter C-1, relating to geologic storage and associated injection of anthropogenic carbon dioxide, and rules adopted by the Commission under that subchapter.

The rules in Chapter 5 adopted by the Commission effective December 20, 2010, included the current language regarding fees. Section 5.205 includes three non-refundable fees: a base fee for each application to cover the Commission's costs for processing the application; an annual fee based on the number of metric tons injected into the geologic storage facility; and an annual post-injection care fee until the director has authorized storage facility closure. The Commission did not propose to change the fee amounts. Regarding the comment regarding removing the trust fund cap of $5,000,000 in §5.205(a)(4), the Commission notes that Natural Resources Code §121.003 does not place a limit on the amount in the trust fund.

States are required to apply for primacy for the Class VI UIC program under Section 1422 of the federal SDWA. Under that section, Texas must demonstrate that the State program meets EPA's minimum federal requirements. That demonstration includes adequate funding for permitting, inspection, and monitoring. The fees will assist the Commission in providing adequate resources to administer the increased complexities of the Commission's carbon dioxide geologic injection and storage program and the additional oversight requirements.

The Commission's proposed fee structure is based on the estimated cost to the Commission of reviewing applications and monitoring geologic storage facilities. The fees are not out of line with the complexity of the program and the additional staff resources that will be needed to review the complex applications and monitoring data. The Commission has been covering the cost of preparation of the rule amendments and the primacy package, as well as computer programming to add a new UIC type code and a new Drilling Permit purpose of filing code to both the mainframe and open system applications.

The Commission notes that in 2008 the EPA estimated the cost of performing the necessary work for and preparing the application at approximately $1,481,775 per application. EPA also estimated that the recurring costs for a facility that has been permitted and is operating will be $1,705,294 a year; and the cost of post-injection monitoring and reporting at $216,092 a year. *See* "Information Collection Request for the Federal Requirements Under the Underground Injection Control Program for Carbon Dioxide Geologic Sequestration Wells--Proposed Rule," OMB Control No. 2040-NEW, EPA ICR No. 2309.01, July 2008. The fees included in the Commission's rules are reasonable compared to these other costs. The Commission made no change in response to these comments.

The Texas-based organizations commented on §5.205(c)(2)(C), which requires the director to approve the amount of financial assurance for a geologic storage facility, but specifically excludes plugging costs from being included in the estimate of costs of closure. The Texas-based organizations commented that subsection (c)(1) states that the operator must comply with the requirements of §3.78 of this title (relating to Fees and Financial Security Requirements) for all monitoring wells and injection wells. Section 3.78(g) only requires financial security in the amount of $2.00 per foot of well depth for individual wells, but allows blanket bonding that comes out to amounts of bonding at potentially $2,500 or less per well. The Commission spent an average of $8.48 per foot to plug wells across the state from FY 2015 - FY 2020. The Texas-based organizations also expressed concern that the financial security requirements in §3.78 are so low that thousands of orphaned wells and sites have been on the Commission's orphaned wells list for decades. The Texas-based organizations further expressed concern that operators would have the ability to request indefinite plugging extensions on inactive wells.

Because the Commission must ensure that there are no potential conduits for the escape of stored carbon dioxide, the Commission plans to require that all wells associated with a Class VI project are properly plugged before issuing a closure certificate. However, a close review of the federal regulations indicates that the closure costs must include the cost of plugging the wells.

Therefore, the Commission has revised the language to require that the estimated closure cost and financial assurance include the cost of well plugging.

The Texas-based organizations commented that §5.205(c)(2)(C)(i) indicates that a qualified professional engineer does not need to prepare a written estimate of the "highest likely dollar amount necessary to perform post-injection monitoring and closure of the facility," but instead that the engineer may supervise preparation of the estimate. The organizations recommend that the estimate should be directly prepared by a qualified professional engineer, and not merely supervised.

The Commission declines to make the requested change. Section 5.205(c)(2)(C)(i) requires that a qualified professional engineer licensed by the State of Texas, as required under Occupations Code, Chapter 1001, relating to Texas Engineering Practice Act, prepare or supervise the preparation of a written estimate of the highest likely amount necessary to close the geologic storage facility. The operator must submit to the director the written estimate under seal of a qualified licensed professional engineer, as required under Occupations Code, Chapter 1001, relating to Texas Engineering Practice Act. The Texas Engineering Practice Act requires that the professional engineer seal the estimate.

The Texas-based organizations noted that the director may consider allowing the phasing in of financial assurance for only corrective action based on project-specific factors and requested clarification as to the factors and corrective action.

The Commission notes the federal and state regulations allow operators to defer some identified corrective action needed within the AOR, but farther away from the injection well, until after injection has commenced, but prior to carbon dioxide plume and pressure front movement into that particular area. Such corrective action may include plugging of wells in the AOR. The Commission will consider factors specific to the particular geologic storage site. The Commission made no change in response to this comment.

The Texas-based organizations commented that the director may approve a reduction in the amount of financial assurance required for post-injection monitoring and/or corrective action based on project-specific monitoring results. The organizations recommended that the Commission not approve a reduction in the amount of financial assurance required to avoid liability to the Commission for post-injection monitoring after the monitoring period is over.

The Commission declines to make the recommended change. In the PISC and Site Closure Plan, an operator may propose reducing the frequency of monitoring during the post-injection phase if it can be demonstrated based on monitoring results that the potential for endangerment of USDWs has decreased over time. Specific, risk-based, quantitative criteria that will indicate that a reduced monitoring frequency is appropriate may include the reservoir pressure reaching a certain level relative to pre-injection conditions or steady or favorable trends in observed geochemical monitoring results over a pre-defined period. A prediction of the timeframe for pressure decline, based on the current and calibrated AOR delineation modeling, upon the cessation of injection must be included with the alternative PISC demonstration as required by 40 CFR §146.93(c)(1)(ii). The demonstration of pressure decline should include the full spatial extent of pressure front evolution at the project site.

A prediction of the rate of carbon dioxide plume migration, and the timeframe for the cessation of migration must be included in the demonstration for an alternative PISC timeframe. This assessment should include the full spatial extent of plume evolution at the project site, including both the lateral and vertical extent. The operator should use plots and cross sections of plume extent at various time intervals during post-injection monitoring until its mobility ceases or it reaches a potential receptor. When the plume is migrating at a rate such that this timeframe becomes exceedingly long (e.g., thousands of years), the plume migration rate may be considered sufficiently minor as to not pose an endangerment to USDWs. The plume migration assessment can also be supported by saturation profiles at specific locations, such as monitoring wells. Site-specific plume monitoring results may also be used to support these predicted assessments.

The operator must also identify specific processes leading to carbon dioxide trapping and trapping rates, including physical entrapment and immobilization at the injection zone/confining zone interface, and capillary trapping.

The Texas-based organizations commented that §5.205(d)(1) requires notice of adverse financial conditions be submitted by certified mail and recommended that the Commission allow notice also to be submitted by electronic mail.

The Commission disagrees. Section 146.85(d) of the federal Class VI regulations requires that the operator give notice of adverse financial conditions by certified mail.

The Texas-based organizations recommended that §5.205(d)(3) be revised to reduce the amount of time to replace the bond from 90 days to 30 days.

The Commission agrees the time period should be decreased. Title 40 CFR §146.85(d)(3) requires the operator to establish other financial assurance within 60 days. Therefore, the Commission adopts §5.205(d)(3) with a change to incorporate a 60-day timeline.

The Texas-based organizations commented on §5.205(n)(2), which requires the director to rely on the applicant's most recent audited annual report and quarterly report filed with the U.S. Securities and Exchange Commission or the person's most recent audited financial statement and "the date of the audit must be not more than one year before the date of submission of the application." The organizations requested clarification as to whether the director will have the authority to request updated an audit report if the application approval process takes longer than one year.

Section 5.205(c)(2)(E) requires the operator of a geologic storage facility to provide to the director annual written updates of the cost estimate to increase or decrease the cost estimate to account for any changes to the AOR and corrective action plan, the emergency response and remedial action plan, the injection well plugging plan, and the post-injection storage facility care and closure plan. The operator must provide to the director upon request an adjustment of the cost estimate if the director has reason to believe that the original demonstration is no longer adequate to cover the cost of injection well plugging and post-injection storage facility care and closure. The Commission made no change in response to this comment.

The Texas-based organizations requested clarification as to the source of funding to allow the Commission to pay for future well plugging and cleanup of orphaned Class VI wells that exhibit casing failures after 20 years. The organizations also requested

clarification regarding the speed with which the Commission will conduct plugging and cleanup of orphaned Class VI wells.

The Commission cannot issue a closure certification for a facility until all wells have been properly plugged. Until a certification has been issued, the permittee must maintain financial assurance for the geologic storage facility and pay the annual fee in §5.205. In addition, Texas Natural Resources Code §121.003 establishes the Anthropogenic Carbon Dioxide Storage Trust Fund and Texas Water Code §27.045 authorizes the Commission to impose fees to cover the cost of permitting, monitoring, and inspecting Class VI injection wells and geologic storage facilities, and enforcing and implementing Subchapter C-1, relating to Geologic storage and associated injection of anthropogenic carbon dioxide, and rules adopted by the Commission under that subchapter. The trust fund consists of fees imposed under §5.205, penalties imposed for violations of Subchapter C-1 or rules adopted under that subchapter, funds received by the Commission from financial responsibility mechanisms; and penalties imposed for violations of Commission rules adopted under §382.502, Health and Safety Code.

Section 121.003 of the Texas Natural Resources Code authorizes the Commission to use the trust fund for permitting, inspecting, monitoring, investigating, recording, and reporting on geologic storage facilities and associated anthropogenic carbon dioxide injection wells; long-term monitoring of geologic storage facilities and associated anthropogenic carbon dioxide injection wells; remediation of mechanical problems associated with geologic storage facilities and associated anthropogenic carbon dioxide injection wells; repairing mechanical leaks at geologic storage facilities; plugging abandoned anthropogenic carbon dioxide injection wells used for geologic storage; training and technology transfer related to anthropogenic carbon dioxide injection and geologic storage; and compliance and enforcement activities related to geologic storage and associated anthropogenic carbon dioxide injection wells.

The Commission made no change in response to this comment.

§5.206

Denbury recommended that the Commission clarify the word "injure" found in §5.206(b)(1). Denbury recommended that "injure" be more clearly defined to reduce the scope of potential interpretations.

The EAC commented that the amendments properly focus on protecting existing or prospective subterranean resources or wasting of such resources due to the injection of carbon dioxide; however, it urged the Commission to reflect on the excessive breadth of the term "injure" used in the proposed language. EAC commented that the language warrants greater precision of definition and reduction in the potential scope of its interpretation to obviate future disputes concerning the intent of the provision on protecting other resources.

The Commission disagrees with these comments. The language in §5.206(b)(1) is consistent with the language in §27.051(b-1)(1) of the Texas Water Code, which states that the Commission may issue a permit if it finds that "the injection and geologic storage of anthropogenic carbon dioxide will not endanger or injure any oil, gas, or other mineral formation." The statutes do not define the term "injure." However, the Commission notes that the same "endanger or injure" language appears in Texas Water Code §27.051(b)(1), regarding other types of injection wells under the jurisdiction of the Commission. Therefore, the phrase "endanger or injure" with respect to Chapter 5 has the same scope as the Commission has historically used for issuing injection well permits. The Commission made no change in response to this comment.

The Texas-based organizations and individuals commented on §5.206(b)(9) regarding the applicant's signed statement that the applicant has a good faith claim to the necessary and sufficient property rights for construction and operation of the geologic storage facility for at least the first five years after initiation of injection in accordance with §5.203(d)(1)(A) of this title. The Texas-based organizations ask why the Commission only requires a good faith claim to operate in the first five years after initiation of injection when the facility's storage is required to be permanent.

The Commission notes that §5.207(a)(2)(D)(iv) requires that the operator submit an annual report detailing the updated area for which the operator has a good faith claim to the necessary and sufficient property rights to operate the geologic storage facility. The Commission made no change in response to this comment.

TXOGA and TIP expressed concern with the modification of the notice requirement in §5.206(c) to require notice to the Commission 30 days prior to conducting any "well workover that involves running tubing and setting packers, beginning any workover or remedial operation, or conducting any required pressure tests or surveys." The rules currently require no more than 48 hours' notice. This change will cause significant difficulty, as operators are often not aware of the need for such work 30 days in advance of commencing workover or remedial operations. TXOGA and TIP recommend that the Commission consider including language allowing notice to be waived when the well endangers the public or USDW, such as when casing or cement failures may contaminate USDW, or when otherwise approved by director.

The EAC agrees that providing the Commission with sufficient notice to witness planned well workovers and other stimulation activities is appropriate. However, EAC views the amount of time for such notice reflected in the proposal to be excessive, raising the risk that unnecessary downtime and operating delays will result. Noting that previous notice requirement was 48 hours, the EAC recommends that the 30-day notice period be reduced to seven days rather than the 30 days proposed.

The Commission declines to change the proposed language. Section 5.206(c)(3) states that, except in the case of an emergency repair, the operator of a geologic storage facility must notify the director in writing at least 30 days prior to conducting any well workover that involves running tubing and setting packers, beginning any workover or remedial operation, or conducting any required pressure tests or surveys. In the case of an emergency repair, the operator must notify the director of such emergency repair as soon as reasonably practical. No such work may commence until approved by the director. The operator must notify the Commission as soon as possible in the case of an emergency and obtain approval from the director.

WSP and an individual commented that the proposed wording in §5.206(c)(3) creates confusion about whether the prohibition on commencing work also applies to "emergency repairs", which does not appear to be the intent. The individual recommended that the Commission relocate the final sentence to follow the sentence that excludes emergency repairs as follows.

The Commission agrees with these comments and adopts §5.206(c)(3) with a change to relocate the last sentence as suggested.

The Texas-based organizations recommended that the Commission revise §5.206(e) to detail the type and frequency of monitoring considered to be "sufficient" (e.g., monthly, quarterly, or annually).

The frequency of testing and monitoring will depend on the rule requirements and on site-specific conditions. The Commission will use the EPA's Geologic Sequestration of Carbon Dioxide Underground Injection Control (UIC) Program Class VI Well Testing and Monitoring Guidance (EPA 815-R-13-001, March, 2013) as guidance. For example, the guidance document states that project-specific frequency may be determined (e.g., based on variability in ground water chemistry) and approved by the UIC Program Director. Sampling frequency may be reduced based on project-specific benchmarks, such as generally stable conditions observed in several successive sampling rounds. Likewise, sample frequency may need to be increased if the results of monitoring indicate possible fluid leakage or endangerment of USDWs at a particular location. Certain constituents may be monitored near-continuously using dedicated downhole sensors, such as pH and specific conductivity. The Commission made no change in response to this comment.

TXOGA and TIP commented that there is an inconsistency between §5.206(d)(2)(C) and §5.203(f)(2)(C). Section 5.206(d)(2)(C) limits the injection pressure to 90% of the fracture pressure of the injection zone, whereas §5.203(f)(2)(C) is not clear on whether the 90% limit of the fracture pressure applies to the injection zone or the confining zone. TXOGA and TIP recommended that the limit of the fracture pressure be applied only to the confining zone, which is consistent with EPA's implementation manual. Accordingly, TXOGA and TIP recommended that the Commission revise §§5.206(d)(2)(C) and 5.203(f)(2)(C) to resolve the inconsistency and to clarify that the 90% limit should be applied only to the confining zone.

The Commission agrees that clarification is needed but declines to make the requested change. The federal regulations at 40 CFR §146.88(a) state that "Except during stimulation, the owner or operator must ensure that injection pressure does not exceed 90 percent of the fracture pressure of the injection zone(s) so as to ensure that the injection does not initiate new fractures or propagate existing fractures in the injection zone(s). In no case may injection pressure initiate fractures in the confining zone(s) or cause the movement of injection or formation fluids that endangers a USDW. Pursuant to requirements at 40 CFR §146.82(a)(9), all stimulation programs must be approved by the Director as part of the permit application and incorporated into the permit."

In addition, EPA's UIC Program Class VI Implementation Manual for UIC Program Directors recommends that program directors "Review the proposed maximum injection pressure to confirm that it is no more than 90 percent of the fracture pressure of the injection zone. . . .If the proposed maximum fracture pressure is greater than 90 percent of the fracture pressure of the injection zone, require a change in the injection pressure to ensure compliance with 40 CFR 146.88(a)."

Therefore, except during approved stimulation activities, injection pressure may not be greater than 90% of the fracture pressure of the injection zone. The Commission adopts §5.203(f)(2)(C) with a change to clarify these requirements.

The GLO recommended that the Commission revise the rules to prohibit initiation or propagation of fractures in the injection zones through stimulation, consistent with the Texas Class I regulations. The GLO commented that the rules allow approved stimulation of the injection zone, which could impact the storage seal and lead to a reduction of the maximum allowable storage pressure, and, consequently reduce storage capacity and the associated revenue available to the PSF as the facility owner. Fractures, once created, require relatively less stress to propagate - all other things equal. The GLO particularly expressed concern with fracturing Miocene age sediments comprising the best offshore Texas storage reservoirs because of the region's highly faulted and compartmentalization.

The Commission understands this concern but makes no change in response. If well stimulation is proposed, the Commission will review the proposed procedures to ensure that well integrity will be maintained and that the confining zone will not be fractured. The Commission will compare proposed stimulation pressures to well material strength and formation fracture pressures and compare the composition of any stimulation chemicals proposed to the chemical resistance of the well materials. If it appears that any proposed stimulation procedures might harm the well or fracture the confining layer, the Commission will require that the stimulation plan be revised or will not allow stimulation. If it is not clear whether stimulation procedures might damage the well or confining layer, the Commission will consider requesting modeling of the stimulation activity and resultant fracture patterns or increased monitoring of pressure and other variables with appropriate safeguards during stimulation. If approved well stimulation is performed, the Commission will review post-stimulation documentation.

The GLO also recommended that fracture stress be calculated using rock data from cores that comprise all the relevant lithologies in the injection and confining zones when considering maximum allowable surface injection pressure. Fracture stress will be the minimum strength among these lithologies--not an average value, as the rock will fracture as its weakest point first. The GLO believes safety factors should then be applied to the minimum value of fracture stress.

The Commission will evaluate geomechanical and petrophysical information to verify that the applicant has submitted sufficient information to characterize all required parameters throughout the project area. This includes porosity, permeability, capillary pressure, and information on fractures, stress, ductility, rock strength, and in situ fluid pressures. The Commission will verify that the applicant provides information on and the variability in measurements for the various types of geomechanical and petrophysical data. The Commission will review information on the mineralogy, petrology, and lithologies of the injection and confining zones and verify that the cores on which this information is based were collected from representative locations and that they include the injection and confining zones--or that cores will be taken as part of the pre-operational formation testing program. If there is evidence of heterogeneity, the Commission may request that additional cores be taken and analyzed to characterize the site geology as thoroughly as possible. The Commission will verify that measurements of ductility and rock strength are based on appropriate laboratory tests that are suitable for simulating downhole stress conditions. In addition, the Commission will verify that information on in situ stress incorporates measurements of vertical stress, maximum horizontal stress, and minimum horizontal stress and that the applicant used appropriate methods to measure stresses. The Commission made no change in response to this comment.

Regarding §5.206(d)(2)(D), which requires that the operator maintain on the annulus a pressure that exceeds the operating injection pressure, TXOGA and TIP support adding pressure to the annulus to improve monitoring efforts but cautions that this pressure should not exceed the safe working pressure for the well. Specifically, anything greater than the equivalent bottom hole injection pressure would be excessive. The EAC observed that due to the gradient differential between water and CO_2 there exists the prospect that a higher annulus pressure at the well surface can produce a very significant pressure differential "downhole" in the well. Denbury and the EAC recommended that the Commission change the clause "maintain on the annulus a pressure that exceeds the operating injection pressure" to "maintain on the annulus a bottom hole pressure that exceeds the operating injection pressure."

The Commission notes that the federal rule in 40 CFR §146.88(c) requires that the operator fill the annulus with an approved non-corrosive fluid and maintain pressure on the annulus that exceeds the operating injection pressure. Maintaining an annulus pressure that is higher than the injection pressure, will ensure that if there are leaks in the tubing, the annulus fluid will move into the tubing, rather than the injectate moving out of the tubing and potentially along the outside of the well. This requirement is appropriate for Class VI wells given the potential high volumes and supercritical nature of the CO_2 injectate, potential geomechanical stresses in the wellbore, and the potential for movement of the CO_2 in the event of a mechanical integrity loss.

The Commission agrees that, in some circumstances, maintaining an annulus pressure greater than the injection pressure could result in a greater chance for damage to the well or the formation. As a result, the rules provide the director with discretion to adjust this requirement if maintaining an annulus pressure higher than the injection pressure may cause damage to the well or the formation. Section 5.206(d)(2(D) states that: "The operator must fill the annulus between the tubing and the long string casing with a corrosion inhibiting fluid approved by the director. The owner or operator must maintain on the annulus a pressure that exceeds the operating injection pressure, *unless the director determines that such requirement might harm the integrity of the well or endanger USDWs"* (emphasis added). The Commission made no change in response to this comment.

The Texas-based organizations recommended that the Commission revise §5.206(h)(2)(C) to require the information to be submitted with every annual report.

The Commission agrees and adopts §5.206(h)(2)(C) with the requested change.

WSP commented that §5.206(h)(4)(i) references notifying the Commission prior to performing work on an injection well; however, there is a discrepancy in the language regarding the form of notification and when work shall commence. WSP recommended revising the language to require that a proposed schedule of activities be submitted in writing to the Commission.

The Commission does not agree with the recommended revision of §5.206(h)(4)(i) because the language as proposed is consistent with the federal regulations. The Commission made no change in response to this comment.

Regarding §5.206(i), Denbury recommended that the requirement of a 30-day notice to the Commission prior to any planned testing or logging be reduced to a 7-day notice. The rules currently require no more than 48 hours' notice. Seven days would allow scheduling flexibility and limit downtime while still providing RRC with an opportunity to witness the activity.

The Commission declines to change the proposed language. Title 40 CFR §146.87(f) of the federal rules requires the operator to submit a schedule of all logging and testing to the director 30 days prior to conducting the first test and submit any changes to the schedule 30 days prior to the next scheduled test.

The GLO commented that injection of CO_2 should be required to be under supercritical conditions, because injection of liquid CO_2 in the reservoir could create undesirable thermal stresses and either initiate or propagate fractures in the injection zone.

The Commission disagrees. The federal and state regulations do not require that carbon dioxide be injected in the supercritical state. An applicant would be required to consider the phase and characteristics of carbon dioxide to be injected. To transport captured CO_2 for geologic storage, operators typically compress carbon dioxide to convert it from a gaseous state to a supercritical state (IEA, 2008). The Commission believes that many operators will inject CO_2 in a supercritical state to depths greater than 800 meters (2,645 feet) to maximize storage capacity.

The Texas-based organizations requested clarification as to whether the requirement in §5.206(k)(6)(A) for a survey plat submitted with the storage facility closure report that indicates the location of the injection well relative to permanently surveyed benchmarks include latitude and longitudes coordinates of the well. The Texas-based organizations recommended that the Commission include language in subsection (b) that specifies the geographic coordinate system the map should use. The organizations also recommended that the rule language specify how accurate the location data should be, within a specified margin of error for coordinates depicted compared to actual (e.g. number of feet).

The Commission agrees and adopts subsection (k)(6)(A) with a change to address this concern.

The Texas-based organizations commented that §5.206(o)(2)(C) should be revised to include mitigation resulting from actions that are considered to be compliant.

The Commission declines to make the requested change. The language in §5.206(o)(2)(C) is standard language required by the federal regulations. The rules include requirements and procedures for correcting adverse impacts on the environment that are discovered even if the operator is in compliance with the permit and regulations.

The Texas-based organizations also commented on §5.206(o)(2)(G). The Texas-based organizations expressed concern that drilling through the AOR would be allowed. They also requested that the Commission clarify the term "coordinate" and requested that the Commission explain the level of scrutiny with which the Commission will examine drilling permits for wells that are within the AOR and clarify whether the public will receive notice and have an opportunity to comment.

The Commission does not have the authority to prohibit the drilling of wells for the exploration of oil or gas or geothermal resources through the AOR. However, the Commission does have the authority to require both the operator drilling the oil or gas well and the operator of the geologic storage facility to coordinate in a manner consistent with the Commission's authority in Texas Natural Resources Code Chapters 85 and 91, as well as Water Code Chapter 27. Texas Natural Resource Code §91.015 states that "Operators and drillers that drill for

oil or gas shall use every possible precaution in accordance with the most approved methods to stop and prevent waste of oil, gas, or both oil and gas in drilling operations and shall not wastefully use oil or gas or allow oil or gas to leak or escape from natural reservoirs." Texas Water Code §27.051 authorizes the Commission to issue a permit for the geologic storage of carbon dioxide if it finds, among other things, that the injection and geologic storage of anthropogenic carbon dioxide will not endanger or injure any oil, gas, or other mineral formation, that, with proper safeguards, both ground and surface fresh water can be adequately protected from carbon dioxide migration or displaced formation fluids, and that the injection of anthropogenic carbon dioxide will not endanger or injure human health and safety.

As stated in the proposal preamble, the Commission plans to designate the AOR of geologic storage projects on the GIS maps used by the Drilling Permits Section to alert the section of a drilling permit application for a well within the AOR. A condition will be included in the drilling permit requiring the drilling permittee to notify and coordinate with the permittee of the geologic storage project of its plans to drill. The Commission made no change in response to this comment.

§5.207

The Texas-based organizations recommended that the Commission revise §5.207(a)(1) to require operators to apply "best practices" not only "generally accepted" methods and standards for test evaluation.

The Commission declines to make the requested change. The language is consistent with the language in 40 CFR §146.89(f).

Texas 2036 commented that §5.207(a)(2)(D) requires that an operator submit an annual report to the Commission detailing the tons of CO_2 injected, among other items. Texas 2036 recommended that the Commission amend this section to include the source(s) of the injected CO_2. In addition, the annual report should disclose if the current sources of CO_2 have changed from those sources described in the permit application's fact sheet. These data will be important to the Commission's monitoring and tracking of its CCUS permitting program. Moreover, these data will provide the public with a clear understanding of the types of industries engaging in CCUS programs. This level of reporting and transparency would work to enhance the policy argument for continued and expanded CCUS in Texas.

The Commission notes that §5.203(i)(1)(C) and (D) require the applicant to submit an operating plan that includes the sources of the CO_2 stream and the volume of CO_2 from each source; and an analysis of the chemical and physical characteristics of the CO_2 stream prior to injection. Section 5.206(d)(1) requires that the operator maintain and comply with the approved operating plan. Section 5.207(a)(2)(C)(ii) requires the operator to submit a semi-annual report that includes changes to the physical, chemical, and other relevant characteristics of the CO_2 stream from the proposed operating data. Section 5.207(a)(2)(D) requires the operator to submit an annual report that includes a statement confirming that the operator has reviewed the operational data that are relevant to a decision on whether to update an approved plan required by §5.203 or §5.206 and determined whether any updates were warranted by material change in the operational data or in the evaluation of the operational data by the operator. Operators must submit either the updated plan or a summary of the modifications for each plan for which an update the operator determined to be warranted. The director may require submission of copies of any updated plans and/or additional information regarding whether or not updates of any particular plans are warranted. However, the Commission agrees that clarification would be helpful and has revised §5.207(a)(2) to require reports if there are changes to the source of the CO_2 stream.

The GLO has jurisdiction over the leasing of most State-owned uplands and submerged lands for the purpose of energy resource development, including, but not limited to, offshore carbon sequestration activities under Texas Clean Air Act H&SC §382.501. Revenue from energy leases accrues to the Texas Permanent School Fund (PSF). The maximum bond guarantee amount allowed under current federal law is $117 billion, which makes aggressive growth of the PSF vital to the long-term financing of Texas public education. The GLO has a fiduciary duty to protect the physical and financial integrity of its assets- including offshore carbon storage reservoirs. The GLO recommended that every reference to "volume" in the proposed rules be changed to "mass" and that all continuous monitoring and measurement plans and requirements should include either both volume and density or else a direct mass measurement. GLO further commented that the rules should also require that temperature be measured and monitored in all instances where pressure measurement and monitoring is required. The GLO commented that CO_2 is a compressible fluid and must be measured and monitored accordingly. Although the measurement in terms of volume is common practice in the natural gas industry, the highly compressible behavior of caron dioxide near the critical point makes it even more important to measure mass, rather than volume. Moreover, all custody transfer measurements of CO_2 for tax credit or offset credit computation purposes are made in terms of mass -specifically metric tons (1 metric ton = 1000 kg).

The GLO noted that errors in measurement due to volume discrepancies at different temperatures and pressures measured at different locations can result in large mass balance calculations, particularly as the density of carbon dioxide can change as much as 70% over a temperature change of less than 5° C near critical pressure. Thermodynamic equations of state exist for conversion of volume, temperature, and pressure measurements to mass; however, the need to control and measure each of those quantities independently creates additional uncertainty in the derived mass quantity. Fiscal carbon measurements will be more accurate if all the allowable uncertainty is either applied to a single mass measurement or aggregated from combined measurements of density and volume; otherwise, density changes could result in payment errors.

The GLO's comment pointed to a review of flowmeters for use in the CCS projects conducted by researchers at Heriot Watt University. The review emphasizes the need for accurate mass measurement in carbon custody transfer or other fiscal applications as follows: "Examples exist for large scale CCS projects. For example, the Sleipner project uses ultrasonic meters, while both the In Salah project ad Vattenfall projects employ orifice plates. The Yates project uses orifice plates supplemented by Coriolis meters and Sheep Mountain project operates both turbine meters and densitometers. It may appear that the task of choosing mass flowmeters suitable for CCS has already been accomplished; however, there is one major difference between the projects listed above and those of the future: the matter of accuracy. In these earlier projects the operators were not compelled to record the mass flowrate of CO_2 within the bounds determined by EU ETS."

The GLO further commented that the Texas Clean Air Act requires the GLO to publish annual reports on the "total volume of carbon dioxide stored", "the total volume of carbon dioxide received for storage during the year", and "the volume of carbon dioxide received from each producer of carbon dioxide. The determination of "stored" volumes demands an analysis of the various physical carbon dioxide trapping mechanisms (structural, capillary, dissolution and mineralization) that is conducted through the interrogation of models and data submitted by the Class VI permittees. Reconciliation of the mass balance among the received, injected, and stored CO_2 quantities affects the periodic auditing of rental payments made to the State and the verification of tax credits. Inconsistencies among the quantities will need to be reconciled.

The Texas-based organizations also requested the measurement of CO_2 by mass in addition to volume.

The Commission agrees with this comment and adopts the following provisions with changes to address these comments: §5.203(d)(1)(A), §5.203(e)(2)(D), §5.203(h)(1)(C), §5.203(i)(1), §5.203(j)(2), §5.206(d)(2), §5.206(k)(6)(C), §5.206(l)(5), and §5.207(a)(2)(C). Operators of geologic storage facilities will be collecting data on the mass of carbon dioxide injected under Section 45Q of the federal Internal Revenue Code.

The GLO expressed support for the Commission's decision to rely on the EPA's GSDT for submission and retention of all permitting data and documentation. However, the GLO recommended that all interested parties have access to the electronic archive and that all notices, draft permits, monitoring reports and permit correspondence be included in the archive.

The Commission will archive information regarding notices, draft permits, monitoring reports, and permit correspondence. Some of this information will be available electronically. The Commission made no change in response to this comment.

The Texas-based organizations commented on §5.207(e), which requires operators to retain all wellhead pressure records, metering records, and integrity test results for at least 10 years. The Texas-based organizations recommended that the Commission require records to be retained for the entire life of the well and the post-injection site care period.

Similarly, the Texas-based organizations recommended the Commission revise §5.206(m) to require record retention for the entire life of the facility including the PISC period and to require consideration of the costs of maintaining these records in perpetuity in the financial security requirements.

The GLO recommended that the Commission modify the requirement to retain "records, including modeling inputs and data to support area of review calculations and integrity test results, for at least 10 years" to mandate permanent archive in the EPA Geologic Data Storage Tool with access granted to the public for purposes of independent computational modeling and validation in support of safety and royalty payment auditing.

The Commission will archive information regarding notices, draft permits, monitoring reports, and permit correspondence. Some of this information will be available electronically. The Commission made no change in response to this comment.

The GLO commented that compliance with applicable international standards should be mandatory. The proposed rules state that "the director must apply methods and standards generally accepted in the industry." This should be revised to also mandate compliance with international standards applicable to geologic carbon sequestration, particularly ISO Standard 27914 "Carbon dioxide capture, transportation and geologic storage - Geological storage." This standard was authored in part by researchers at the Bureau of Economic Geology (BEG) at the University of Texas at Austin and will serve as a consistent and uniform set of requirements for monitoring, reporting, and verification (MRV). Not only will adoption of this standard ease the Commission's regulatory burden by streamlining the requirements for MRV, but it will eliminate discordance among MRV plans among operators which could complicate leasing, measurement, or auditing of carbon storage.

The Commission notes that the ISO Standard 27914 is a "standard generally accepted in the industry" and declines to make a change in response to the comment.

Texas 2036 commented that CCUS will be an integral component to Texas' continued energy expansion. If the EPA approves the agency's request for enforcement primacy of the Class VI underground injection well program, then the Commission's new jurisdiction will play a critical role in statewide CCUS deployment. In light of the critical nature of this program, and its important work to remove anthropogenic carbon dioxide from Texas' air, Texas 2036 recommended that the Commission develop public-facing metrics to inform Texans of the permitting program's success. Examples include: the number of CCUS facilities permitted; tons of CO_2 sequestered per year; and volumes of sequestered CO_2 emissions by source type. The Commission has already developed exceptionally informative data visualization maps highlighting state oil and gas production and permitting. Texas 2036 encouraged the Commission to consider developing similar maps for CCUS data once it becomes available.

The Commission will develop information regarding geologic storage of carbon dioxide for public consumption. The Commission made no changes in response to this comment.

Other Topics of Concern

Earthquakes

The Texas-based organizations expressed concern with blowouts and induced seismicity events across Texas that are likely related to Class II injection. EDF believes it is important for Texas to adopt measures that make sure CO_2 injection projects do not cause earthquakes that would alarm the public and risk causing damage to life and property, even though doing so is not strictly necessary in order to obtain primacy. The commenters note the seismicity provisions of EPA's Class VI rule are limited to preventing earthquakes that are so large that they would jeopardize containment and thereby jeopardize USDWs. Smaller earthquakes can alarm the public and do damage even if they don't threaten containment. The Commission, fortunately, has broad powers to guard the public welfare and is not limited the way EPA is.

The GLO commented that consolidation of injection-induced fractures near lateral fault boundaries may - under the right combination of initial fracture trajectory and geomechanical stress state - create conditions that may result in lower fault surface cohesion. Lower fault surface cohesion could lead to fault slippage, higher fault transmissivity and new carbon leakage pathways, or more favorable conditions for induced seismicity. Numerical modeling studies of geologic carbon injection have also shown that there is the potential for injection zone fractures to intersect the confining zone and create localized higher permeability channels through which CO_2 could migrate.

EDF recommended that the Commission add provisions to require permittees to appropriately monitor for induced seismicity and to perform a risk analysis based on the resulting data that would indicate whether there is a significantly increased risk of felt earthquakes. If there is a significantly elevated risk, mitigation should be required. With some adjustments, EDF believes that section 4.3.2.3 (Seismicity Monitoring) of the CCS protocol adopted by the California Air Resources Board for projects seeking to qualify for the state's large Low Carbon Fuel Standard credit could serve as a useful model. In the alternative, EDF recommended that the Commission include conditions in individual permits to achieve this same end. If the Commission prefers that approach, it might still be a good idea to add language to the proposed rule to serve as a basis for the permit conditions.

The Commission is aware that seismicity induced by fluid injection is a widely observed phenomenon and that the rates and maximum magnitudes of induced earthquakes generally increase with rising reservoir pressures, total fluid volumes and injection rates. However, mitigation and monitoring measures can reduce risk.

Section 5.203(c)(2)(D) requires an applicant to submit information on the seismic history, including the presence and depth of seismic sources, and a determination that the seismicity would not compromise containment. This information should include a summary of the applicant's evaluation of seismic risk, including the site-specific information reviewed. If there is uncertainty about the geologic characterization of the site or concerns about induced seismicity, the Commission may require additional information, which may include seismic monitoring at the site. If site characterization and modeling suggest that induced seismicity is a concern, the applicant will be required to address it in the Emergency and Remedial Response Plan. The Commission may also consider including permit conditions designed to minimize risks associated with potential seismic events, such as seismic monitoring. However, the Commission agrees that the rules are not clear that such measures and actions may be required and adopts §5.203(l) and §5.206(e) with changes to address this concern.

Well Plugging and Financial Assurance

The Texas-based organizations commented that the Commission appears to be holding Class VI wells to the same plugging and financial assurance standards that oil, gas, and injection wells are held to in Texas. These standards have allowed the state to accumulate approximately 140,000 inactive unplugged wells and nearly 8,000 orphaned wells. The Commission does not collect sufficient amounts of financial assurance to be able to plug all of the orphaned wells the agency takes on in a reasonable timeframe, and these delays have resulted in leaks and blowouts. Holding Class VI wells to the same standards will be unacceptable and will eventually result in hazardous leaks that can cause fatal asphyxiation or brain damage. The rule needs to address hazards posed by CO_2 leakage, considering severe impacts after a pipeline rupture in Satartia, Mississippi.

The Commission declines to make any changes. The goal of financial responsibility is to ensure that financial resources are available to prevent endangerment of USDWs from improper plugging, remediation, and management of wells in the event that the operator experiences financial difficulties. As such, operators must demonstrate financial responsibility for, among other things, any needed emergency and remedial response actions that are necessary to mitigate endangerment or potential endangerment of USDWs.

The Texas-based organizations requested clarification of operator liability upon transfer of facilities, whether asset retirement obligations can be transferred in whole or in part, and whether the Commission will be reviewing whether facility transfers are being made to financially solvent operators.

The Commission notes §5.202(c) requires an operator to notify the Commission of an intended permit transfer and provide information enumerated in subsection (c)(1)(A). Subsection (c)(2) requires that the operator acquiring the permit provide the director with evidence of financial responsibility satisfactory to the director in accordance with §5.205. An operator remains responsible for the geologic storage facility until the director approves in writing the sale, assignment, transfer, lease, conveyance, exchange, or other disposition and the person acquiring the storage facility complies with all applicable requirements. Section 5.205(c)(1)(B) prohibits the Commission from approving the transfer of the facility permit until the new operator provides the financial assurance required by this subchapter. A new operator shall not assume operation of the geologic storage facility without a valid permit. The Commission made no change in response to this comment.

The Texas-based organizations expressed concern with the incentive that would lower financial assurance based on post-injection monitoring and/or corrective action. An incentive that lowers financial assurance requirements is misguided and prematurely shifts the cost burden of state monitoring to the public. Costs of facility care and monitoring will likely increase over the life of the well, not decrease -even after the post-injection care period.

The Commission notes §5.205(c) states that the director may consider allowing the phasing in of financial assurance for only corrective action based on project-specific factors and that the director may approve a reduction in the amount of financial assurance required for post-injection monitoring and/or corrective action based on project-specific monitoring results.

While geologic CO_2 storage is not without risk, these risks are well understood, can be mitigated, and decrease over time. For well-selected, designed, and managed geological storage sites, the CO_2 will gradually be immobilized by various trapping mechanisms and retained for decades. For a well-sited, characterized, operated and managed site, the risks accumulate during the operational phase, but decline as injection ceases and the site moves from post-injection site care to closure to eventual long-term care.

The International Energy Agency (IEA) has stated that carbon dioxide can be stored in deep geological formations in a process that mimics how oil and gas have been trapped underground for millions of years. Captured carbon dioxide is compressed and injected into a reservoir of porous rock located under an impermeable layer of rock (the cap rock). The carbon dioxide is prevented from migrating to the surface by the cap rock as well as other trapping mechanisms related to how the carbon dioxide behaves in the subsurface (https://www.iea.org/commentaries/the-world-has-vast-capacity-to-store-co2-net-zero-means-we-ll-need-it).

There are several trapping mechanisms. Once carbon dioxide is injected into a reservoir, it slowly moves upward through the reservoir until it meets this layer of impermeable rock, which acts like a lid the carbon dioxide cannot pass through. This is what's referred to as "structural storage" and is the same mechanism that has kept oil and gas locked underground for millions of years. Over time, the carbon dioxide trapped in reservoirs will

often begin to chemically react with the minerals of the surrounding rock, essentially locking the carbon dioxide into the rock in a process called "mineral storage." In the case of saline aquifers, as well as structural and mineral storage, the carbon dioxide can dissolve into the salty water in a process called "dissolution storage." In any given reservoir, each (or all) of these processes work to store carbon dioxide indefinitely.

While there remains some possibility of carbon dioxide leakage from a site, research suggests it will be minimal. One study, published in the journal Nature, suggests more than 98% of injected carbon dioxide will remain stored for over 10,000 years (Estimating geological CO_2 storage security to deliver on climate mitigation, Nature Communications, June 12, 2018, Alcalde, et al., https://www.nature.com/articles/s41467-018-04423-1). Another study of natural-occurring 100,000 year-old carbon dioxide reservoirs showed no significant corroding of cap rock, suggesting the greenhouse gas has not leaked back out. The carbon dioxide must remain buried for at least 10,000 years to avoid the impacts on climate. By studying a natural reservoir in Utah, USA, where carbon dioxide released from deeper formations has been trapped for around 100,000 years, a Cambridge-led research team showed that carbon dioxide can be securely stored underground for far longer than the 10,000 years needed to avoid climatic impacts. Their new study shows that the critical component in geological carbon storage, the relatively impermeable layer of "cap rock" that retains the carbon dioxide, can resist corrosion from carbon dioxide-saturated water for at least 100,000 years. (N. Kampman, et al. "Observational evidence confirms modelling of the long-term integrity of CO_2-reservoir caprocks" *Nature Communications* 28 July 2016.)

However, the Class VI regulations are designed to ensure that the carbon dioxide is contained in the permitted injection interval and monitoring of the site is required until the injected carbon dioxide no longer endangers underground sources of drinking water. The Commission made no change in response to this comment.

Permit Standards

The Texas-based organizations recommended that the Commission consider requiring operators to share real-time data with the Commission from the required continuous recording devices that will monitor injection pressure, rate, volume, and temperature of the CO_2 stream.

The Commission currently does not have the ability to receive such voluminous amounts of data. The Commission made no change in response to this comment.

The Texas-based organizations commented that, in the event of an emergency, the Commission should require operators to educate neighbors on appropriate safety procedures in response to an emergency and should explicitly require operators to notify neighbors. The Texas-based organizations recommended that the Commission revise §5.203(h)(3) to include notifying the facility's neighbors and individuals in the AOR and to require that the operator identify types of potential endangerment or emergencies and educate facility neighbors about appropriate responses to such events on an annual basis so that affected persons are prepared.

The Commission agrees with this comment and adopts §5.203(l)(3) with a change to require the safety plan to include instructions and procedures for alerting the general public and public safety personnel of the existence of an emergency, procedures for requesting assistance and for follow-up action to remove the public from an area of exposure, and provisions for advance briefing of the public within the AOR on subjects such as the hazards and characteristics of CO_2, the manner in which the public will be notified of an emergency, and steps to be taken in case of an emergency.

The Texas-based organizations commented that operators of Class VI wells should be required to have a certification or license with the state of Texas.

The Commission is unsure what type of certification or license would be required. Any geologic storage facility operator in Texas will be required to have a valid Organization Report (Form P-5) with adequate financial security and a permit for the facility prior to operation. In addition, §5.203(a)(5) states that, if required under Texas Occupations Code, Chapter 1001, relating to Texas Engineering Practice Act, or Chapter 1002, relating to Texas Geoscience Practice Act, respectively, a licensed professional engineer or geoscientist must conduct the geologic and hydrologic evaluations required under this subchapter and must affix the appropriate seal on the resulting reports of such evaluations. The Commission made no change in response to this comment.

The Commission adopts amendments in §5.101 to remove language that references the Commission having jurisdiction over only a portion of the program.

The Commission amends §5.102 to add terms defined in HB 1284 and to add other terms included in the federal Class VI UIC regulations. The Commission adds a definition for "offshore" to reflect the definition included in HB 1284. The Commission adds definitions for "casing," "cementing," "Class VI well," "draft permit," "exempted aquifer," "flow rate," "formation," "injection well," "lithology," "packer," "permit," "plugging," "stratum," "surface casing," and "well injection" for consistency with the federal Class VI UIC regulations.

In §5.201, the Commission amends subsection (a) to reflect the change in jurisdiction under HB 1284 and to clarify that the Commission has jurisdiction over all geologic storage of anthropogenic carbon dioxide and the injection of anthropogenic carbon dioxide in the state, both onshore and offshore.

The Commission adopts amendments in §5.201(b) to add a title to the subsection and to include the factors that the Commission will consider when determining whether there is an increased risk to underground sources of drinking water such that a Class VI permit is required. As previously discussed in the preamble, the Commission adopts subsection (b)(2) with changes from the proposed text.

The Commission adopts new §5.201(c) to clarify that Subchapter B of Chapter 5 does not apply to the disposal of acid gas waste generated from oil and gas activities from a single lease, unit, field, or gas processing facility. Injection of acid gas that contains carbon dioxide and was generated as part of oil and gas processing may continue to be appropriately permitted as Class II injection. The potential need to transition from Class II to Class VI will be based on the increased risk to underground sources of drinking water related to significant storage of carbon dioxide in the reservoir, where the regulatory tools of the Class II program cannot successfully manage the risk. The Commission will consider similar factors enumerated in §5.201(b) when determining whether there is such an increased risk. As previously discussed in the preamble, the Commission adopts subsection (c) with changes from the proposal.

The Commission amends §5.201(d), currently subsection (c), to add language from HB 1284 to clarify that this subchapter applies regardless of whether the well was initially completed for the purpose of injection and geologic storage of anthropogenic carbon dioxide or was initially completed for another purpose and is converted to the purpose of injection and geologic storage of anthropogenic carbon dioxide except that the Commission may not issue a permit under this subchapter for the conversion of a previously plugged and abandoned Class I injection well, including any associated waste plume, to a Class VI injection well.

The Commission adopts new §5.201(e) to allow for the expansion of the areal extent of an aquifer exemption for a Class II enhanced recovery well for the exclusive purpose of Class VI injection for geologic storage in accordance with 40 Code of Federal Regulations (CFR) §146.4, relating to criteria for exempted aquifers. The Commission also adopts 40 CFR §144.7, relating to identification of underground sources of drinking water and exempted aquifers, and §146.4 by reference. Title 40 CFR §144.7 requires protection of aquifers and parts of aquifers that meet the definition of "underground source of drinking water" in 40 CFR §144.3. The section also provides for the designation of certain aquifers as exempt aquifers. Title 40 CFR §146.4 outlines the criteria an aquifer must meet for it to be designated exempt. The aquifer must not currently serve as a source of drinking water and must show it will not in the future serve as a source of drinking water because of one or more reasons listed in §146.4(b). The Commission adopts an effective date of September 20, 2022, as the date for which the federal regulations will be adopted by reference.

The Commission adopts new §5.201(f) to provide for a waiver from the Class VI injection depth requirements for geologic storage to allow injection into non-USDW formations while ensuring that USDWs above and below the injection zone are protected from endangerment. The Commission also adopts 40 CFR §146.95, relating to Class VI injection depth waiver requirements, by reference. Title 40 CFR §146.95 requires that an operator seeking a waiver submit a supplemental report with its permit application. The section also specifies the required elements of the supplemental report. As with subsection (e), the effective date is adopted as July 1, 2022. As previously discussed in the preamble, the Commission adopts subsection (f) with changes from the proposal.

The Commission adopts new §5.201(g) to state that the regulations do not apply to the injection of any CO_2 stream that meets the definition of a hazardous waste. As previously discussed in the preamble, the Commission adopts subsection (g) with changes from the proposal.

Finally, in §5.201, the Commission redesignates existing subsections (d) and (e) as new subsection (h) and (i), with no other changes.

In §5.202(a), the Commission adopts wording to require a storage operator to obtain a permit before engaging in certain activities and proposes new paragraph (2) regarding when injection may begin. As previously discussed in the preamble, the Commission adopts subsection (a)(1), as well as subsection (b)(1)(B), with changes from the proposal.

The Commission amends §5.202(d) to include language in the federal regulations at 40 CFR §124.5, relating to modification, revocation and reissuance, or termination of permits, and §144.39(a), relating to modification or revocation and reissuance of permits. New subsection (d)(1) states that permits issued pursuant to this subsection are subject to review by the Commission and allows any interested person to request that the Commission review a permit for one or more of several reasons. The request must be in writing and must contain facts to support the request. The Commission may review the permit if it determines that the request may have merit or at the Commission's initiative. As previously discussed in the preamble, the Commission adopts subsection (d)(1) with changes from the proposal.

The Commission adopts new subsection (d)(2), redesignated from current subsection (d)(1), to incorporate requirements of 40 CFR §144.39(a), relating to causes for modification or for revocation and reissuance. These causes include material and substantial alterations or additions to the permitted facility or activity, new information, new regulations, and modification of compliance schedules. The Commission adopts new language to state that if the director of the Oil and Gas Division or the director's delegate (hereinafter "director") tentatively decides to modify or revoke and reissue a permit, the director shall prepare a draft permit incorporating the proposed changes, and to clarify that the director may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of revoked and reissued permits, the director shall require the submission of a new application. As previously discussed in the preamble, the Commission adopts subsection (d)(2)(A)(ii) and (iii) with changes from the proposal.

The Commission also adds language in subsection (d)(2)(A)(vii) to state that in a permit modification, only those conditions to be modified shall be reopened when a new draft permit is prepared and all other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued under this section, the entire permit is reopened and subject to revision just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding, the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

The Commission adopts new subsection (d)(2)(A)(viii) to clarify that, upon the consent of the permittee, the director may modify a permit to make the corrections or allowances for changes in the permit, without following the procedures of §5.202(e) and §5.204, to correct typographical errors; require more frequent monitoring or reporting by the permittee; change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement; allow for a change in ownership or operational control of a facility where the director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the director; change quantities or types of fluids injected which are within the capacity of the facility as permitted and, in the judgment of the director, would not interfere with the operation of the facility or its ability to meet the permit conditions; change construction requirements approved by the director pursuant to §5.206, provided that any such alteration shall comply with the requirements of this subchapter; amend a plugging and abandonment plan which has been updated under §5.203(k); or amend an injection well testing and monitoring plan, plugging plan, post-injection site care and site closure plan, or emergency and remedial response plan where the modifications merely clarify or correct the plan, as determined by the director.

The Commission adopts new §5.202(d)(2)(B) to make it consistent with the requirements in 40 CFR §144.40, relating to termination of permits, and includes the causes that could lead to termination of a permit during its term or to deny renewal of a permit consistent with 40 CFR §144.40. The new subparagraph also requires the director to issue an intent to terminate a permit, draft permit and fact sheet and provide for public comment in terminating any permit.

The Commission deletes existing subsection (d)(1)(A) - (E) because the reasons for modifying or revoking and reissuing a permit are enumerated in new subsection (d)(2).

The Commission adds new §5.202(d)(3) to state that the suitability of a facility location will not be considered at the time of permit modification or revocation and reissuance unless new information or standards indicate that a threat to human health or the environment exists which was unknown at the time of permit issuance.

The Commission renumbers current §5.202(d)(2) as new subsection (d)(4).

The Commission amends the title of §5.202 based on new subsection (e), which is proposed to comply with 40 CFR §124.6, relating to draft permits, and 40 CFR §124.8, relating to fact sheet. As previously discussed in the preamble, the Commission adopts subsection (e)(1)(C), (e)(2)(B), and (e)(2)(C)(ii) with changes from the proposal.

In §5.203, the Commission amends §5.203(a) to add requirements under 40 CFR §146.91(e), relating to reporting requirements, that operators of Class VI wells must submit geologic sequestration project information directly to EPA in an electronic format approved by EPA, regardless of whether a state has primacy for the Class VI program. Such data includes the permit application and associated data, as well as all required reports, submittals, and notifications. As of the time of this adoption, EPA is requiring the use of its Geologic Sequestration Data Tool (GSDT), which is a centralized, web-based system that receives, stores, and manages Class VI data, and satisfies the Class VI electronic reporting requirement. Whether or not the State has primacy for the Class VI UIC program, an applicant is required to submit to EPA all application and reporting information through the GSDT. The Commission plans to access Class VI information through the GSDT; the Commission will not develop or require the use of a separate online system.

The Commission adopts new wording in subsection (a)(1)(B) consistent with federal regulations at 40 CFR §144.32(a), relating to requirements for signatories to permit applications, and proposes new wording in subsection (a)(1)(C) consistent with federal regulations at 40 CFR §144.32(d), relating to certification of an application or report.

The Commission adopts new §5.203(a)(2)(B) to clarify that when a geologic storage facility is owned by one person but is operated by another person, it is the operator's duty to file an application for a permit. The federal regulation at 40 CFR §144.31 relating to application for permit; authorization by permit, references "owner or operator;" however, the Commission holds the operator of the well, as identified by the Commission's Form P-4 (Certificate of Compliance and Transportation Authority), responsible.

The Commission adopts new §5.203(a)(2)(C) to add language consistent with 40 CFR §144.31(e)(6), relating to application for permit; authorization by permit, to require that an application include a listing of all relevant permits or construction approvals for the facility received or applied for under federal or state environmental programs.

The Commission adopts new §5.203(a)(2)(D) to reflect changes made by HB 1284 to Texas Water Code, §27.0461, to require that an applicant under this subchapter submit a letter of determination from TCEQ concluding that drilling and operating a Class VI injection well or constructing or operating a geologic storage facility will not impact or interfere with any previous or existing Class I injection well, including any associated waste plume, or any other injection well authorized or permitted by TCEQ.

The Commission adopts new §5.203(a)(5) regarding the requirement that, if required under Occupations Code, Chapter 1001, relating to Texas Engineering Practice Act, or Chapter 1002, relating to Texas Geoscience Practice Act, respectively, a licensed professional engineer or geoscientist must conduct the geologic and hydrologic evaluations required under this subchapter and must affix the appropriate seal on the resulting reports of such evaluations.

The Commission amends §5.203(d)(1)(A)(i)(III) to clarify that the initial delineation of the area of review must be estimated from initiation of injection until the plume movement ceases, for a minimum of 10 years after the end of the injection period proposed by the applicant. As previously discussed in the preamble, the Commission adopts subsection (d)(1)(A)(i), (d)(1)(A)(i)(III), and (d)(1)(A)(ii)(II) with changes from the proposal.

The Commission amends §5.203(e)(1)(B)(i) to clarify that the operator must ensure that injection wells are cased and the casing is cemented in compliance with §3.13 of this title (relating to Casing, Cementing, Drilling, and Completion Requirements), in addition to the requirements of this section. As previously discussed in the preamble, the Commission adopts subsection (e)(1)(B)(v) and (vii), (e)(1)(C), and (e)(2)(D), as well as subsection (f)(2)(C) with changes from the proposal.

The Commission amends §5.203(h)(1)(B) to clarify that internal mechanical integrity must be demonstrated by pressure testing of the tubing casing annulus. As previously discussed in the preamble, the Commission adopts subsection (h)(1)(C) with changes from the proposal.

The Commission amends §5.203(h)(1)(D) to reflect the federal standard in 40 CFR §146.89, relating to mechanical integrity, and §146.90(e), relating to testing and monitoring requirements, that, at least once per year until the injection well is plugged, amended from the current text which says five years, the operator must confirm external mechanical integrity using an approved method.

The Commission amends §5.203(h)(1)(E) to clarify the requirement to test injection wells after any workover that disturbs the seal between the tubing, packer, and casing to verify the internal mechanical integrity of the tubing and long string casing.

The Commission amends §5.203(h)(2) to delete language regarding test frequency of five years to make the language consistent with the federal requirements in 40 CFR §146.89 and §146.90 for internal and external mechanical integrity testing.

The Commission amends §5.203(h)(2)(E) to clarify that some alternative test methods may need to be approved by the Administrator of EPA consistent with 40 CFR §146.89(e).

As previously discussed in the preamble, the Commission adopts §5.203(i)(1)(A) and (C) and (j)(2)(B) with changes from the proposal.

The Commission adds new §5.203(j)(2)(F) to require that a plan for monitoring, sampling, and testing after initiation of operation must include a pressure fall-off test at least once every five years unless more frequent testing is required by the director based on site-specific information consistent with federal requirements at 40 CFR §146.90(f), relating to injection well plugging.

The Commission amends §5.203(k)(1) to add the specific information required under 40 CFR §146.92(b), relating to injection well plugging, to be included in a well plugging plan.

As previously discussed in the preamble, the Commission adopts subsection (l)(3) with changes from the proposal.

The Commission amends §5.203(m) to add language to conform with the federal regulations. Following cessation of injection, the federal rules at 40 CFR §146.93, relating to post injection site care and site closure, require that the operator continue to conduct monitoring for at least 50 years. However, the director may approve, in consultation with EPA, an alternative timeframe other than the 50-year default, if the operator can demonstrate during the permitting process that an alternative timeframe is appropriate and ensures non-endangerment of USDWs. The federal rules require that the demonstration be based on significant, site-specific data and information and contain substantial evidence that the geologic storage project will no longer pose a risk of endangerment to USDWs at the end of the alternative post injection site care timeframe. Current Commission rules do not include a 50-year default post injection site care period. To meet the minimum federal requirements, the Commission amends §5.203(m) to include the data and information required to make a demonstration that an alternative timeframe is appropriate and ensures non-endangerment of USDWs. The amendment would require additional effort for each Class VI permit application, but would provide a more appropriate, site-specific post injection site care timeframe. As previously discussed in the preamble, the Commission adopts subsection (m)(5) and (7)(C) with changes from the proposal.

In §5.204, the Commission amends the title from Notice and Hearing to Notice of Permit Actions and Public Comment Period; other amendments comply with the federal requirements at 40 CFR 124.10, public notice of permit actions and public comment period. The federal regulations require that the Commission provide notice of a draft permit. Therefore, the Commission deletes language regarding operator notice of an application under this subsection. The Commission also includes language stating that notice must include information satisfying the requirements of 40 CFR §124.10(d)(1). As previously discussed in the preamble, the Commission adopts subsection (a)(2), (a)(3)(A)(v), (vii), and (xi) through (x) with changes from the proposal.

The Commission also adopts new §5.204(a)(5) to require that the applicant identify whether any portions of the area of review encompass an environmental justice (EJ) or Limited English-Speaking Household community using U.S. Census Bureau 2018 American Community Survey data. If the area of review incudes an EJ or Limited English-Speaking Household community, the proposed new wording includes the actions that the applicant shall conduct. As previously discussed in the preamble, the Commission adopts subsection (a)(6) with changes from the proposal.

The Commission amends current §5.204(c) to redesignate it as subsection (b), to rename the subsection, and to make the requirements consistent with federal regulations at 40 CFR §124.12, relating to public hearings. New subsection (b)(1) clarifies that during the public comment period, an interested person may submit written comments on the draft permit and may request a hearing if one has not already been scheduled, that reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required; and that the public comment period shall automatically be extended to the close of any public hearing under this section. The hearing examiner may also extend the comment period by so stating at the hearing. The Commission adopts new wording in subsection (b)(2) to state that the director must hold a public hearing whenever the director finds, on the basis of requests, a significant degree of public interest in a draft permit; and may also hold a public hearing at the director's discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision.

In §5.205, the Commission removes the $5 million cap in subsection (a)(4) and adopts other nonsubstantive changes. As previously discussed in the preamble, the Commission adopts subsection (c)(2)(C)(i) and subsection (d)(3) with changes from the proposal.

In §5.206, the Commission adopts amendments to make the section consistent with the federal requirements. The Commission adopts new subsection (a) consistent with 40 CFR §146.92(b) to require that all conditions applicable to all permits be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations must be given in the permit. The requirements are directly enforceable regardless of whether the requirement is a condition of the permit.

The Commission amends current §5.206(a), redesignated as subsection (b), to reorganize the subsection and to add new paragraph (8) requiring that an applicant provide a letter of determination from TCEQ concluding that drilling and operating an anthropogenic carbon dioxide injection well for geologic storage or constructing or operating a geologic storage facility will not impact or interfere with any previous or existing Class I injection well, including any associated waste plume, or any other injection well authorized or permitted by TCEQ, consistent with HB 1284.

The Commission amends current subsection §5.206(b), redesignated as subsection (c), to require written notice to the director 30 days, rather than 48 hours, prior to conducting any well workover that involves running tubing and setting packers, beginning any workover or remedial operation, or conducting any required pressure tests or surveys, and to clarify that no such work may commence until approved by the director.

The Commission amends current §5.206(c)(2)(C), redesignated as subsection (d)(2)(C), to clarify that the Commission will include in any permit it might issue a limit of 90 percent of the fracture pressure to ensure that the injection pressure does not initiate new fractures or propagate existing fractures in the injection zone(s). In no case may injection pressure initiate fractures in the confining zone(s) or cause the movement of injection or formation fluids that endangers a USDW. As previously discussed in the preamble, the Commission adopts subsection (c)(3) with changes from the proposal.

The Commission amends §5.206(d)(2)(D) to include a requirement that the operator maintain on the annulus a pressure that exceeds the operating injection pressure, unless the director determines that such requirement might harm the integrity of the well or endanger USDWs. As previously discussed in the pream-

ble, the Commission adopts subsection (d)(1)(B) with changes from the proposal.

The Commission amends current subsection §5.206(d), redesignated as subsection (e), to reorganize the subsection and to add a new paragraph (2) requiring that all permits specify requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods; required monitoring including type, intervals, and frequency sufficient to yield data that are representative of the monitored activity including when required, continuous monitoring; and applicable reporting requirements. Reporting shall be no less frequent than specified in this subchapter.

The Commission amends current §5.206(e)(4), redesignated as subsection (f), to add the term "significant" consistent with the language in federal regulations at 40 CFR §146.89(g). As previously discussed in the preamble, the Commission adopts subsection (e)(4) with changes from the proposal.

The Commission amends current subsection §5.206(h), redesignated as subsection (i), consistent with the federal requirements at 40 CFR §146.91(d) to require that operators notify the director in writing 30 days in advance of any planned workover, any planned stimulation activities, other than stimulation for formation testing conducted; and any other planned test of the injection well conducted by the permittee. As previously discussed in the preamble, the Commission adopts subsection (h)(2)(C) with changes from the proposal.

The Commission amends current subsection §5.206(j), redesignated as subsection (k), to add wording in paragraph (1)(B) to require that any amendments to the post-injection site care and site closure plan must be approved by the director, be incorporated into the permit, and are subject to the permit modification requirements at §5.202 of this subchapter, as appropriate. The Commission adds this language consistent with federal regulations at 40 CFR §146.93(a)(3), relating to post-injection site care and site closure. The Commission also amends paragraph (4) to clarify that notice by the operator to the director before closure must be in writing consistent with federal regulations at 40 CFR §146.93(d).

As previously discussed in the preamble, the Commission adopts subsection (k)(3)(C) and (k)(6)(A) and (C) with changes from the proposal.

The Commission amends current subsection §5.206(l), redesignated as subsection (m), to clarify that the operator must retain records collected during the post-injection storage facility care period for 10 years rather than five years following storage facility closure consistent with federal requirements at 40 CFR §146.93(h). As previously discussed in the preamble, the Commission adopts subsection (l)(5) with changes from the proposal.

The Commission amends current subsection §5.206(n), redesignated as subsection (o), to reorganize the subsection and to replace the term "suspended" with "terminated." The Commission also adopts new paragraph (2) consistent with federal regulations at 40 CFR Part 144, Subpart E, relating to permit conditions. Federal regulations require that permits for Class VI injection wells include conditions relating to the duty to comply, the need to halt or reduce activity not a defense in an enforcement action, the need take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance, the need to properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit; the need for proper operation and maintenance, including effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures; the issuance of a permit does not convey any property rights of any sort, or any exclusive privilege; the issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations; the duty to provide information; the need to allow the Commission to enter and inspect any Class VI facility or where records are kept, have access to and copy, during reasonable working hours, any records required to be kept under the conditions of the permit; sample or monitor any substance or parameter for the purpose of assuring compliance with the permit or as otherwise authorized by the Texas Water Code, §27.071, or the Texas Natural Resources Code, §91.1012; and the inclusion of a schedule of compliance, when appropriate.

The Commission also amends subsection §5.206(o) to add new paragraph (2)(G) to state that the permittee of a geologic storage well will be required to coordinate with any operator planning to drill through the area of review (AOR) to explore for oil and gas or geothermal resources. The Commission plans to designate the AOR of geologic storage projects on the GIS maps used by the Drilling Permits Section to alert the section of a drilling permit application for a well within the AOR. A condition will be included in the drilling permit requiring the drilling permittee to notify and coordinate with the permittee of the geologic storage project of its plans to drill.

The adopted amendments to §5.206(o)(2)(G) are made pursuant to the Commission's authority in Texas Natural Resources Code Chapters 85 and 91, as well as Water Code Chapter 27. As previously discussed in the preamble, the Commission adopts subsection (o)(2)(G) with changes from the proposal.

Texas Natural Resource Code, §85.042(b) requires the Commission to make and enforce rules either general in their nature or applicable to particular fields where necessary for the prevention of actual waste of oil or operations in the field dangerous to life or property. Section 85.046 defines "waste" to mean, "among other things, specifically includes: ... underground waste or loss, however caused and whether or not the cause of the underground waste or loss is defined in this section." Section 85.202 requires the Commission to include rules and orders to prevent waste of oil and gas in drilling and producing operations, to require wells to be drilled and operated in a manner that will prevent injury to adjoining property; and to prevent oil and gas and water from escaping from the strata in which they are found into other strata. Section 91.015 states that "Operators and drillers that drill for oil or gas shall use every possible precaution in accordance with the most approved methods to stop and prevent waste of oil, gas, or both oil and gas in drilling operations and shall not wastefully use oil or gas or allow oil or gas to leak or escape from natural reservoirs." Section 91.101 requires the Commission to adopt and enforce rules and orders and may issue permits relating to the drilling of exploratory wells and oil and gas wells to prevent pollution of surface water or subsurface water,

Texas Water Code, §27.051 authorizes the Commission to issue a permit for the geologic storage of carbon dioxide if it finds, among other things, that the injection and geologic storage of anthropogenic carbon dioxide will not endanger or injure any oil, gas, or other mineral formation, that, with proper safeguards, both ground and surface fresh water can be adequately pro-

tected from carbon dioxide migration or displaced formation fluids, and that the injection of anthropogenic carbon dioxide will not endanger or injure human health and safety.

In §5.207, the Commission amends subsection (a)(2)(C)(iii) and (iv) to add mass and monthly annulus fluid volume to the items that the operator must include on the semi-annual report consistent with federal regulations at 40 CFR §146.91. As previously discussed in the preamble, the Commission adopts subsection (a)(2)(C)(ii) and (iii) with changes from the proposal.

The Commission amends §5.207(a)(2)(D) to move the language in subsection (a)(2)(D)(vi)(III) to new subsection (a)(3) and to clarify that the director will require such revisions after significant changes to the facility.

The Commission amends §5.207(b) to clarify that the results of internal mechanical integrity tests are to be reported on Form H-5, and to require that operators submit all required reports, submittals, and notifications under this subchapter to the director and to EPA in an electronic format approved by the EPA administrator.

The Commission adopts new subsection (c) to reflect federal regulations for signatories to reports at 40 CFR §144.32(b).

The Commission adopts new subsection (d) to require that all reports and other information be certified consistent with federal regulations at 40 CFR §144.32(d).

The Commission amends current subsection (c), redesignated as subsection (e), to clarify that the operator must retain records, including modeling inputs and data to support area of review calculations and integrity test results, for at least 10 years, rather than five years, consistent with federal regulations at 40 CFR §146.84(g), relating to area of review and corrective action.

The Commission adopts the amendments pursuant to House Bill 1284 (HB 1284, 87th Legislature, R.S., 2021), which gives the Railroad Commission of Texas sole jurisdiction over carbon sequestration wells; Texas Natural Resources Code, §§81.051 and 81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, Chapter 91, Subchapter R, as enacted by SB 1387 (81st Texas Legislature, R.S., 2009), relating to authorization for multiple or alternative uses of wells; Texas Water Code, Chapter 27, Subchapter C-1, as enacted by SB 1387 (81st Texas Legislature, R.S., 2009), which gives the Commission jurisdiction over the geologic storage of carbon dioxide in, and the injection of carbon dioxide into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir; and Texas Water Code, Chapter 120, as enacted by SB 1387 (81st Texas Legislature, R.S., 2009), which establishes the Anthropogenic Carbon Dioxide Storage Trust Fund, a special interest-bearing fund in the state treasury, to consist of fees collected by the Commission and penalties imposed under Texas Water Code, Chapter 27, Subchapter C-1, and to be used by the Commission for only certain specified activities associated with geologic storage facilities and associated anthropogenic carbon dioxide injection wells.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §5.101, §5.102

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120.

Cross reference to statute: Texas Natural Resources Code, Chapters 81 and 91, and Texas Water Code, Chapters 27 and 120.

§5.102. Definitions.

The following terms, when used in Subchapter B of this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affected person--A person who, as a result of activity sought to be permitted has suffered or may suffer actual injury or economic damage other than as a member of the general public.

(2) Anthropogenic carbon dioxide (CO_2)--

(A) CO_2 that would otherwise have been released into the atmosphere that has been:

(i) separated from any other fluid stream; or

(ii) captured from an emissions source, including:

(I) an advanced clean energy project as defined by Health and Safety Code, §382.003, or another type of electric generation facility; or

(II) an industrial source of emissions; and

(iii) any incidental associated substance derived from the source material for, or from the process of capturing, CO_2 described by clause (i) of this subparagraph; and

(iv) any substance added to CO_2 described by clause (i) of this subparagraph to enable or improve the process of injecting the CO_2; and

(B) does not include naturally occurring CO_2 that is produced, acquired, recaptured, recycled, and reinjected as part of enhanced recovery operations.

(3) Anthropogenic CO_2 injection well--An injection well used to inject or transmit anthropogenic CO_2 into a reservoir.

(4) Aquifer--A geologic formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

(5) Area of review (AOR)--The subsurface three-dimensional extent of the CO_2 stream plume and the associated pressure front, as well as the overlying formations, any underground sources of drinking water overlying an injection zone along with any intervening formations, and the surface area above that delineated region.

(6) Carbon dioxide (CO_2) plume--The underground extent, in three dimensions, of an injected CO_2 stream.

(7) Carbon dioxide (CO_2) stream--CO_2 that has been captured from an emission source, incidental associated substances derived from the source materials and the capture process, and any substances added to the stream to enable or improve the injection process. The term does not include any CO_2 stream that meets the definition of a hazardous waste under 40 CFR Part 261.

(8) Casing--A pipe or tubing of appropriate material, of varying diameter and weight, lowered into a borehole during or after drilling in order to support the sides of the hole and thus prevent the walls from caving, to prevent loss of drilling mud into porous ground, or to prevent water, gas, or other fluid from entering or leaving the hole.

(9) Cementing--The operation whereby a cement slurry is pumped into a drilled hole and/or forced behind the casing.

(10) Class VI well--Any well used to inject anthropogenic CO_2 specifically for the purpose of the long-term containment of a gaseous, liquid, or supercritical CO_2 in subsurface geologic formations.

(11) Code of Federal Regulations (CFR)--The codification of the general and permanent rules published in the Federal Register by the executive departments and agencies of the federal government.

(12) Commission--A quorum of the members of the Railroad Commission of Texas convening as a body in open meeting.

(13) Confining zone--A geologic formation, group of formations, or part of a formation stratigraphically overlying the injection zone or zones that acts as barrier to fluid movement. For Class VI wells operating under an injection depth waiver, confining zone means a geologic formation, group of formations, or part of a formation stratigraphically overlying and underlying the injection zone or zones that acts as a barrier to fluid movement.

(14) Corrective action--Methods to assure that wells within the area of review do not serve as conduits for the movement of fluids into or between underground sources of drinking water, including the use of corrosion resistant materials, where appropriate.

(15) Delegate--The person authorized by the director to take action on behalf of the Railroad Commission of Texas under this chapter.

(16) Director--The director of the Oil and Gas Division of the Railroad Commission of Texas or the director's delegate.

(17) Division--The Oil and Gas Division of the Railroad Commission of Texas.

(18) Draft permit--A document prepared indicating the director's tentative decision to issue or deny, modify, revoke and reissue, terminate, or reissue a permit. A notice of intent to terminate a permit, and a notice of intent to deny a permit are types of "draft permits." A denial of a request for modification, revocation and reissuance, or termination is not a draft permit.

(19) Enhanced recovery operation--Using any process to displace hydrocarbons from a reservoir other than by primary recovery, including using any physical, chemical, thermal, or biological process and any co-production project. This term does not include pressure maintenance or disposal projects.

(20) Exempted aquifer--An aquifer or its portion that meets the criteria in the definition of underground source of drinking water but which has been exempted according to the procedures in 40 CFR §144.7.

(21) Facility closure--The point at which the operator of a geologic storage facility is released from post-injection storage facility care responsibilities.

(22) Flow rate--The volume per time unit given to the flow of gases or other fluid substance which emerges from an orifice, pump, turbine or passes along a conduit or channel.

(23) Fluid--Any material or substance which flows or moves whether in a semisolid, liquid, sludge, gas, or any other form or state.

(24) Formation--A body of consolidated or unconsolidated rock characterized by a degree of lithologic homogeneity which is prevailingly, but not necessarily, tabular and is mappable on the earth's surface or traceable in the subsurface.

(25) Formation fluid--Fluid present in a formation under natural conditions.

(26) Fracture pressure--The pressure that, if applied to a subsurface formation, would cause that formation to physically fracture.

(27) Geologic storage--The long-term containment of anthropogenic CO_2 in subsurface geologic formations.

(28) Geologic storage facility or storage facility--The underground geologic formation, underground equipment, injection wells, and surface buildings and equipment used or to be used for the geologic storage of anthropogenic CO_2 and all surface and subsurface rights and appurtenances necessary to the operation of a facility for the geologic storage of anthropogenic CO_2. The term includes the subsurface three-dimensional extent of the CO_2 plume, associated area of elevated pressure, and displaced fluids, as well as the surface area above that delineated region, and any reasonable and necessary areal buffer and subsurface monitoring zones. The term does not include a pipeline used to transport CO_2 from the facility at which the CO_2 is captured to the geologic storage facility. The storage of CO_2 incidental to or as part of enhanced recovery operations does not in itself automatically render a facility a geologic storage facility.

(29) Good faith claim--A factually supported claim based on a recognized legal theory to a continuing possessory right in pore space, such as evidence of a currently valid lease or a recorded deed conveying a fee interest in the pore space.

(30) Injection zone--A geologic formation, group of formations, or part of a formation that is of sufficient areal extent, thickness, porosity, and permeability to receive CO_2 through a well or wells associated with a geologic storage facility.

(31) Injection well--A well into which fluids are injected.

(32) Interested person--Any person who expresses an interest in an application, permit, or Class VI UIC well.

(33) Limited English-speaking household--A household in which all members 14 years and older have at least some difficulty with English.

(34) Lithology--The description of rocks on the basis of their physical and chemical characteristics.

(35) Mechanical integrity--

(A) An anthropogenic CO_2 injection well has mechanical integrity if:

(i) there is no significant leak in the casing, tubing, or packer; and

(ii) there is no significant fluid movement into a stratum containing an underground source of drinking water through channels adjacent to the injection well bore as a result of operation of the injection well.

(B) The Commission will consider any deviations during testing that cannot be explained by the margin of error for the test used to determine mechanical integrity, or other factors, such as temperature fluctuations, to be an indication of the possibility of a significant leak and/or the possibility of significant fluid movement into a stratum containing an underground source of drinking water through channels adjacent to the injection wellbore.

(36) Monitoring well--A well either completed or re-completed to observe subsurface phenomena, including the presence of anthropogenic CO_2, pressure fluctuations, fluid levels and flow, temperature, and/or in situ water chemistry.

(37) Offshore--The area in the Gulf of Mexico seaward of the coast that is within three marine leagues of the coast.

(38) Operator--A person, acting for itself or as an agent for others, designated to the Railroad Commission of Texas as the person with responsibility for complying with the rules and regulations regarding the permitting, physical operation, closure, and post-closure care of a geologic storage facility, or such person's authorized representative.

(39) Packer--A device lowered into a well to produce a fluid-tight seal.

(40) Permit--An authorization, license, or equivalent control document issued by the Commission to implement the requirements of this chapter.

(41) Person--A natural person, corporation, organization, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity.

(42) Plugging--The act or process of stopping the flow of water, oil or gas into or out of a formation through a borehole or well penetrating that formation.

(43) Post-injection facility care--Monitoring and other actions (including corrective action) needed following cessation of injection to assure that underground sources of drinking water are not endangered and that the anthropogenic CO_2 remains confined to the permitted injection interval.

(44) Pressure front--The zone of elevated pressure that is created by the injection of the CO_2 stream into the subsurface where there is a pressure differential sufficient to cause movement of the CO_2 stream or formation fluids from the injection zone into an underground source of drinking water.

(45) Reservoir--A natural or artificially created subsurface stratum, formation, aquifer, cavity, void, or coal seam.

(46) Stratum (or strata)--A single sedimentary bed or layer, regardless of thickness, that consists of generally the same kind of rock material.

(47) Surface casing--The first string of well casing to be installed in the well.

(48) Transmissive fault or fracture--A fault or fracture that has sufficient permeability and vertical extent to allow fluids to move beyond the confining zone.

(49) Underground source of drinking water (USDW)--An aquifer or its portion which is not an exempt aquifer as defined in 40 CFR §146.4 and which:

(A) supplies any public water system; or

(B) contains a sufficient quantity of ground water to supply a public water system; and

(i) currently supplies drinking water for human consumption; or

(ii) contains fewer than 10,000 mg/l total dissolved solids.

(50) Well injection--The subsurface emplacement of fluids through a well.

(51) Well stimulation--Any of several processes used to clean the well bore, enlarge channels, and increase pore space in the interval to be injected thus making it possible for fluid to move more readily into the formation including, but not limited to, surging, jetting, blasting, acidizing, and hydraulic fracturing.

(52) Workover--An operation in which a down-hole component of a well is repaired or the engineering design of the well is changed. Workovers include operations such as sidetracking, the addition of perforations within the permitted injection interval, and the addition of liners or patches. For the purposes of this chapter, workovers do not include well stimulation operations.

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, 2022.

TRD-202203327
Haley Cochran
Rules Attorney, Office of General Counsel
Railroad Commission of Texas
Effective date: September 19, 2022
Proposal publication date: May 20, 2022
For further information, please call: (512) 475-1295

SUBCHAPTER B. GEOLOGIC STORAGE AND ASSOCIATED INJECTION OF ANTHROPOGENIC CARBON DIOXIDE (CO2)

16 TAC §§5.201 - 5.207

The Commission adopts the amendments pursuant to House Bill 1284 (HB 1284, 87th Legislature, R.S., 2021), which gives the Railroad Commission of Texas sole jurisdiction over carbon sequestration wells; Texas Natural Resources Code, §§81.051 and 81.052, which give the Commission jurisdiction over all persons owning or engaged in drilling or operating oil or gas wells in Texas and the authority to adopt all necessary rules for governing and regulating persons and their operations under the jurisdiction of the Commission; Texas Natural Resources Code, Chapter 91, Subchapter R, as enacted by SB 1387 (81st Texas Legislature, R.S., 2009), relating to authorization for multiple or alternative uses of wells; Texas Water Code, Chapter 27, Subchapter C-1, as enacted by SB 1387 (81st Texas Legislature, R.S., 2009), which gives the Commission jurisdiction over the geologic storage of carbon dioxide in, and the injection of carbon dioxide into, a reservoir that is initially or may be productive of oil, gas, or geothermal resources or a saline formation directly above or below that reservoir; and Texas Water Code, Chapter 120, as enacted by SB 1387 (81st Texas Legislature, R.S., 2009), which establishes the Anthropogenic Carbon Dioxide Storage Trust Fund, a special interest-bearing fund in the state treasury, to consist of fees collected by the Commission and penalties imposed under Texas Water Code, Chapter 27, Subchapter C-1, and to be used by the Commission for only certain specified activities associated with geologic storage facilities and associated anthropogenic carbon dioxide injection wells.

Statutory authority: Texas Natural Resources Code, §§81.051, 81.052; Texas Natural Resources Code, Chapter 91, Subchapter R; and Texas Water Code, Chapters 27 and 120.

Cross reference to statute: Texas Natural Resources Code, Chapters 81 and 91, and Texas Water Code, Chapters 27 and 120.

§5.201. Applicability and Compliance.

(a) Scope of jurisdiction. This subchapter applies to the geologic storage and associated injection of anthropogenic CO_2 in this state, both onshore and offshore.

(b) Injection of CO_2 for enhanced recovery.

(1) This subchapter does not apply to the injection of fluid through the use of an injection well regulated under §3.46 of this title (relating to Fluid Injection into Productive Reservoirs) for the primary purpose of enhanced recovery operations from which there is reasonable expectation of more than insignificant future production volumes of oil, gas, or geothermal energy and operating pressures are no higher than reasonably necessary to produce such volumes or rates. However, the operator of an enhanced recovery project may propose to also permit the enhanced recovery project as a CO_2 geologic storage facility simultaneously.

(2) If the director determines that an injection well that is permitted for the injection of CO_2 for the purpose of enhanced recovery regulated under §3.46 of this title should be regulated under this subchapter because the injection well is no longer being used for the primary purpose of enhanced recovery operations or there is an increased risk to USDWs, the director must notify the operator of such determination and allow the operator at least 30 days to respond to the determination and to file an application under this subchapter or cease operation of the well. In determining if there is an increased risk to USDWs, the director shall consider the following factors:

(A) increase in reservoir pressure within the injection zone;

(B) increase in CO_2 injection rates;

(C) decrease in reservoir production rates;

(D) distance between the injection zone and USDWs;

(E) suitability of the enhanced oil or gas recovery AOR delineation;

(F) quality of abandoned well plugs within the AOR;

(G) the storage operator's plan for recovery of CO_2 at the cessation of injection;

(H) the source and properties of injected CO_2; and

(I) any additional site-specific factors as determined by the director.

(3) This subchapter does not preclude an enhanced oil recovery project operator from opting into a regulatory program that provides carbon credit for anthropogenic CO_2 sequestered through the enhanced recovery project.

(c) Injection of acid gas. This subchapter does not apply to the disposal of acid gas generated from oil and gas activities from leases, units, fields, or a gas processing facility. Injection of acid gas that contains CO_2 and that was generated as part of oil and gas processing may continue to be permitted as a Class II injection well. The potential need to transition a well from Class II to Class VI shall be based on the increased risk to USDWs related to significant storage of CO_2 in the reservoir, where the regulatory tools of the Class II program cannot successfully manage the risk. In determining if there is an increased risk to USDWs, the director shall consider the following factors:

(1) the reservoir pressure within the injection zone;

(2) the quantity of acid gas being disposed of;

(3) the distance between the injection zone and USDWs;

(4) the suitability of the disposed waste AOR delineation;

(5) the quality of abandoned well plugs within the AOR;

(6) the source and properties of injected acid gas; and

(7) any additional site-specific factors as determined by the director.

(d) This subchapter applies to a well that is authorized as or converted to an anthropogenic CO_2 injection well for geologic storage (a Class VI injection well). This subchapter applies regardless of whether the well was initially completed for the purpose of injection and geologic storage of anthropogenic CO_2 or was initially completed for another purpose and is converted to the purpose of injection and geologic storage of anthropogenic CO_2, except that the Commission may not issue a permit under this subchapter for the conversion of a previously plugged and abandoned Class I injection well, including any associated waste plume, to a Class VI injection well.

(e) Expansion of aquifer exemption. The areal extent of an aquifer exemption for a Class II enhanced recovery well may be expanded for the exclusive purpose of Class VI injection for geologic storage if the aquifer does not currently serve as a source of drinking water; and the total dissolved solids content is more than 3,000 milligrams per liter (mg/l) and less than 10,000 mg/l; and it is not reasonably expected to supply a public water system in accordance with 40 CFR §146.4. An operator seeking such an expansion shall submit, concurrent with the permit application, a supplemental report that complies with 40 CFR §144.7(d). The Commission adopts 40 CFR §144.7 and §146.4 by reference, effective September 20, 2022.

(f) Injection depth waiver. An operator may seek a waiver from the Class VI injection depth requirements for geologic storage to allow injection into non-USDW formations while ensuring that USDWs above and below the injection zone are protected from endangerment. An operator seeking a waiver of the requirement to inject below the lowermost USDW shall submit, concurrent with the permit application or a permit amendment application, a supplemental report that complies with 40 CFR §146.95. The Commission adopts 40 CFR §146.95 by reference, effective September 20, 2022.

(g) This subchapter does not apply to the injection of any CO_2 stream that meets the definition of a hazardous waste under 40 CFR Part 261.

(h) If a provision of this subchapter conflicts with any provision or term of a Commission order or permit, the provision of such order or permit controls.

(i) The operator of a geologic storage facility must comply with the requirements of this subchapter as well as with all other applicable Commission rules and orders, including the requirements of Chapter 8 of this title (relating to Pipeline Safety Regulations) for pipelines and associated facilities.

§5.202. Permit Required, and Draft Permit and Fact Sheet.

(a) Permit required.

(1) A person shall not begin drilling or operating an anthropogenic CO_2 injection well for geologic storage regulated under this subchapter or constructing or operating a geologic storage facility regulated under this subchapter without first obtaining the necessary permits from the Commission. Following receipt of a geologic storage facility permit issued under this subchapter, the storage operator shall obtain a permit to drill, deepen, or convert a well for storage purposes in accordance with §3.5 of this title (relating to Application to Drill, Deepen, Reenter, or Plug Back).

(2) A person may not begin injection until:

(A) construction of the well is complete;

(B) the operator has submitted to the director notice of completion of construction;

(C) the Commission has inspected or otherwise reviewed the injection well and finds it is in compliance with the conditions of the permit; and

(D) the director has issued a permit to operate the injection well.

(b) Permit amendment.

(1) An operator must file an application to amend an existing geologic storage facility permit with the director:

(A) prior to expanding the areal extent of the storage reservoir;

(B) prior to increasing the permitted injection pressure or injection rate;

(C) prior to adding injection wells; or

(D) at any time that conditions at the geologic storage facility materially deviate from the conditions specified in the permit or permit application.

(2) Compliance with plan amendments required by this subchapter does not necessarily constitute a material deviation in conditions requiring an amendment of the permit.

(c) Permit transfer. An operator may transfer its geologic storage facility permit to another operator if the requirements of this subsection are met. A new operator shall not assume operation of the geologic storage facility without a valid permit.

(1) Notice. An applicant must submit written notice of an intended permit transfer to the director at least 45 days prior to the date the transfer of operations is proposed to take place, unless such action could trigger U. S. Securities and Exchange Commission fiduciary and insider trading restrictions and/or rules.

(A) The applicant's notice to the director must contain:

(i) the name and address of the person to whom the geologic storage facility will be sold, assigned, transferred, leased, conveyed, exchanged, or otherwise disposed;

(ii) the name and location of the geologic storage facility and a legal description of the land upon which the storage facility is situated;

(iii) the date that the sale, assignment, transfer, lease conveyance, exchange, or other disposition is proposed to become final; and

(iv) the date that the transferring operator will relinquish possession as a result of the sale, assignment, transfer, lease conveyance, exchange, or other disposition.

(B) The person acquiring a geologic storage facility, whether by purchase, transfer, assignment, lease, conveyance, exchange, or other disposition, must notify the director in writing of the acquisition as soon as it is reasonably possible but not later than five business days after the date that the acquisition of the geologic storage facility becomes final. The director shall not approve the transfer of a geologic storage facility permit until the new operator provides all of the following:

(i) the name and address of the operator from which the geologic storage facility was acquired;

(ii) the name and location of the geologic storage facility and a description of the land upon which the geologic storage facility is situated;

(iii) the date that the acquisition became or will become final;

(iv) the date that possession was or will be acquired; and

(v) the financial assurance required by this subchapter.

(2) Evidence of financial responsibility. The operator acquiring the permit must provide the director with evidence of financial responsibility satisfactory to the director in accordance with §5.205 of this title (relating to Fees, Financial Responsibility, and Financial Assurance).

(3) Transfer of responsibility. An operator remains responsible for the geologic storage facility until the director approves in writing the sale, assignment, transfer, lease, conveyance, exchange, or other disposition and the person acquiring the storage facility complies with all applicable requirements.

(d) Modification, revocation and reissuance, or termination of a geologic storage facility permit.

(1) Permit review. Permits are subject to review by the Commission. Any interested person may request that the Commission review a permit issued under this subchapter for one of the reasons set forth in paragraph (2) of this subsection. All requests must be in writing and must contain facts or reasons supporting the request. If the Commission determines that the request may have merit or at the Commission's initiative for one or more of the reasons set forth in paragraph (2) of this subsection, the Commission may review the permit.

(2) Action by the Commission. The director may modify, revoke and reissue, or terminate a geologic storage facility permit after notice and opportunity for hearing under any of the following circumstances.

(A) Causes for modification or for revocation and reissuance. The following may be causes for revocation and reissuance as well as modification:

(i) Alterations. There are material and substantial alterations or additions to the permitted facility or activity which occurred after permit issuance that justify the inclusion of permit conditions that are different from or absent in the existing permit.

(ii) New information. The director has received new material information that was not available at the time of permit issuance and would have justified the inclusion of different permit conditions at the time of issuance. This may include any increase greater than the permitted CO_2 storage volume, and/or changes in the chemical composition of the CO_2 stream that in the judgment of the director, would interfere with the operation of the facility or its ability to meet the permit conditions.

(iii) New regulations. The standards or regulations on which the permit was based have been materially changed by promulgation of new or amended standards or regulations or by judicial decision after the permit was issued.

(iv) Compliance schedules. The director determines good cause exists for modification of a compliance schedule, such as an act of God, strike, flood, or materials shortage, or other events over which the permittee has little or no control and for which there is no reasonably available remedy.

(v) Basis for permit modification. The director shall modify the permit whenever the director determines that permit changes are necessary based on:

(I) a re-evaluation under §5.203(d) of this title (relating to Application Requirements);

(II) any amendments to the testing and monitoring plan under §5.203(j) of this subchapter;

(III) any amendments to the injection well plugging plan under §5.203(k) of this title;

(IV) any amendments to the post-injection site care and site closure plan under §5.203(m) of this title;

(V) any amendments to the emergency and remedial response plan under §5.203(l) of this title;

(VI) a review of monitoring and/or testing results conducted in accordance with permit requirements;

(VII) cause exists for termination under subparagraph (B) of this paragraph, and the director determines that modification or revocation and reissuance is appropriate;

(VIII) the director has received notification of a proposed transfer of the permit; or

(IX) a determination that the fluid being injected is a hazardous waste as defined in 40 CFR §261.3 either because the definition has been revised, or because a previous determination has been changed.

(vi) If the director tentatively decides to modify or revoke and reissue a permit, the director shall prepare a draft permit incorporating the proposed changes. The director may request additional information and, in the case of a modified permit, may require the submission of an updated application. In the case of revoked and reissued permits, the director shall require the submission of a new application.

(vii) In a permit modification, only those conditions to be modified shall be reopened when a new draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the existing permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding, the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

(viii) Upon the consent of the permittee, the director may modify a permit to make the corrections or allowances for minor changes in the permit, without following the procedures of subsection (e) of this section, and §5.204 of this title (relating to Notice of Permit Actions and Public Comment Period), to:

(I) correct typographical errors;

(II) require more frequent monitoring or reporting by the permittee;

(III) change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement;

(IV) allow for a change in ownership or operational control of a facility where the director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the director;

(V) change quantities or types of fluids injected which are within the capacity of the facility as permitted and, in the judgment of the director, would not interfere with the operation of the facility or its ability to meet the permit conditions;

(VI) change construction requirements approved by the director pursuant to §5.206 of this title (relating to Permit Standards), provided that any such alteration shall comply with the requirements of this subchapter;

(VII) amend a plugging and abandonment plan which has been updated under §5.203(k) of this title; or

(VIII) amend an injection well testing and monitoring plan, plugging plan, post-injection site care and site closure plan, or emergency and remedial response plan where the modifications merely clarify or correct the plan, as determined by the director.

(B) Termination of permits.

(i) The following may be causes to terminate a permit during its term, or deny a permit renewal application:

(I) the permittee's failure to comply with any condition of the permit or applicable Commission orders or regulations;

(II) the permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time;

(III) fluids are escaping or are likely to escape from the injection zone;

(IV) USDWs are likely to be endangered as a result of the continued operation of the geologic storage facility; or

(V) a determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or termination.

(ii) The director shall follow the applicable procedures in subsection (e) of this section, and §5.204 of this title, in terminating any permit under this section.

(iii) If the director tentatively decides to terminate a permit under this subchapter, where the permittee objects, the director shall issue a notice of intent to terminate. A notice of intent to terminate is a type of draft permit.

(3) Facility siting. Suitability of the facility location shall not be considered at the time of permit modification or revocation and reissuance unless new information or standards indicate that a threat to human health or the environment exists which was unknown at the time of permit issuance.

(4) Emergency shutdown. Notwithstanding the provisions of paragraph (2) of this subsection, in the event of an emergency that threatens endangerment to USDWs or to life or property, or an imminent threat of uncontrolled release of CO_2, the director may immediately order suspension of the operation of the geologic storage facility until a final order is issued pursuant to a hearing, if any.

(e) Draft permit and fact sheet.

(1) Draft permit; notice of intent to deny.

(A) Once a geologic storage facility permit application is complete, the director shall decide whether to prepare a draft permit or to deny the application.

(B) If the director tentatively decides to deny the permit application, the director shall issue a notice of intent to deny. A notice of intent to deny the permit application is a type of draft permit which follows the same procedures as any draft permit prepared under this section. If the director's final decision is that the tentative decision to deny the permit application was incorrect, the director shall withdraw the notice of intent to deny and proceed to prepare a draft permit.

(C) If the director decides to prepare a draft permit, the draft permit shall contain the permit conditions required under §5.206 of this title (relating to Permit Standards). If the director is issuing a denial, the permit conditions are not required.

(2) Fact sheet.

(A) The director shall prepare a fact sheet for every draft permit. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit.

(B) The director shall send this fact sheet to the applicant and, on request, to any other person. The director shall post the fact sheet on the Commission's website.

(C) The fact sheet shall include, when applicable:

(i) a brief description of the type of facility or activity which is the subject of the draft permit;

(ii) the source and quantity of CO_2 proposed to be injected and stored;

(iii) the reasons why any requested variances or alternatives to required standards do or do not appear justified;

(iv) a description of the procedures for reaching a final decision on the draft permit including:

(I) the beginning and ending dates of the comment period;

(II) the address where comments will be received;

(III) The date, time, and location of the storage facility permit hearing, if a hearing has been scheduled; and

(IV) any other procedures by which the public may participate in the final decision; and

(v) the name and telephone number of a person to contact for additional information.

§5.203. Application Requirements.

(a) General.

(1) Form and filing; signatories; certification.

(A) Form and filing. Each applicant for a permit to construct and operate a geologic storage facility must file an application with the division in Austin on a form prescribed by the Commission. The applicant must file the application and all attachments with the division and with EPA Region 6 in an electronic format approved by EPA. On the same date, the applicant must file one copy with each appropriate district office and one copy with the Executive Director of the Texas Commission on Environmental Quality.

(B) Signatories to permit applications. An applicant must ensure that the application is executed by a party having knowledge of the facts entered on the form and included in the required attachments. All permit applications shall be signed as specified in this subparagraph:

(i) For a corporation, the permit application shall be signed by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means a president, secretary, treasurer, or vice president of the corporation in charge of a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation, or the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

(ii) For a partnership or sole proprietorship, the permit application shall be signed by a general partner or the proprietor, respectively.

(iii) For a municipality, State, Federal, or other public agency, the permit application shall be signed by either a principal executive officer or ranking elected official.

(C) Certification. Any person signing a permit application or permit amendment application shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(2) General information.

(A) On the application, the applicant must include the name, mailing address, and location of the facility for which the application is being submitted and the operator's name, address, telephone number, Commission Organization Report number, and ownership of the facility.

(B) When a geologic storage facility is owned by one person but is operated by another person, it is the operator's duty to file an application for a permit.

(C) The application must include a listing of all relevant permits or construction approvals for the facility received or applied for under federal or state environmental programs;

(D) A person making an application to the director for a permit under this subchapter must submit a copy of the application to the Texas Commission on Environmental Quality (TCEQ) and must submit to the director a letter of determination from TCEQ concluding that drilling and operating an anthropogenic CO_2 injection well for geologic storage or constructing or operating a geologic storage facility will not impact or interfere with any previous or existing Class I injection well, including any associated waste plume, or any other injection well authorized or permitted by TCEQ. The letter must be submitted to the director before any permit under this subchapter may be issued.

(3) Application completeness. The Commission shall not issue a permit before receiving a complete application. A permit application is complete when the director determines that the application contains information addressing each application requirement of the regulatory program and all information necessary to initiate the final review by the director.

(4) Reports. An applicant must ensure that all descriptive reports are prepared by a qualified and knowledgeable person and in-

clude an interpretation of the results of all logs, surveys, sampling, and tests required in this subchapter. The applicant must include in the application a quality assurance and surveillance plan for all testing and monitoring, which includes, at a minimum, validation of the analytical laboratory data, calibration of field instruments, and an explanation of the sampling and data acquisition techniques.

(5) If otherwise required under Occupations Code, Chapter 1001, relating to Texas Engineering Practice Act, or Chapter 1002, relating to Texas Geoscientists Practice Act, respectively, a licensed professional engineer or geoscientist must conduct the geologic and hydrologic evaluations required under this subchapter and must affix the appropriate seal on the resulting reports of such evaluations.

(b) Surface map and information. Only information of public record is required to be included on this map.

(1) The applicant must file with the director a surface map delineating the proposed location of any injection wells and the boundary of the geologic storage facility for which a permit is sought and the applicable AOR.

(2) The applicant must show within the AOR on the map the number or name and the location of:

(A) all known artificial penetrations through the confining zone, including injection wells, producing wells, inactive wells, plugged wells, or dry holes;

(B) the locations of cathodic protection holes, subsurface cleanup sites, bodies of surface water, springs, surface and subsurface mines, quarries, and water wells; and

(C) other pertinent surface features, including pipelines, roads, and structures intended for human occupancy.

(3) The applicant must identify on the map any known or suspected faults expressed at the surface.

(c) Geologic, geochemical, and hydrologic information.

(1) The applicant must submit a descriptive report prepared by a knowledgeable person that includes an interpretation of the results of appropriate logs, surveys, sampling, and testing sufficient to determine the depth, thickness, porosity, permeability, and lithology of, and the geochemistry of any formation fluids in, all relevant geologic formations.

(2) The applicant must submit information on the geologic structure and reservoir properties of the proposed storage reservoir and overlying formations, including the following information:

(A) geologic and topographic maps and cross sections illustrating regional geology, hydrogeology, and the geologic structure of the area from the ground surface to the base of the injection zone within the AOR that indicate the general vertical and lateral limits of all USDWs within the AOR, their positions relative to the storage reservoir and the direction of water movement, where known;

(B) the depth, areal extent, thickness, mineralogy, porosity, permeability, and capillary pressure of, and the geochemistry of any formation fluids in, the storage reservoir and confining zone and any other relevant geologic formations, including geology/facies changes based on field data, which may include geologic cores, outcrop data, seismic surveys, well logs, and lithologic descriptions, and the analyses of logging, sampling, and testing results used to make such determinations;

(C) the location, orientation, and properties of known or suspected transmissive faults or fractures that may transect the confining zone within the AOR and a determination that such faults or fractures would not compromise containment;

(D) the seismic history, including the presence and depth of seismic sources, and a determination that the seismicity would not compromise containment;

(E) geomechanical information on fractures, stress, ductility, rock strength, and in situ fluid pressures within the confining zone;

(F) a description of the formation testing program used and the analytical results used to determine the chemical and physical characteristics of the injection zone and the confining zone; and

(G) baseline geochemical data for subsurface formations that will be used for monitoring purposes, including all formations containing USDWs within the AOR.

(d) AOR and corrective action. This subsection describes the standards for the information regarding the delineation of the AOR, the identification of penetrations, and corrective action that an applicant must include in an application.

(1) Initial delineation of the AOR and initial corrective action. The applicant must delineate the AOR, identify all wells that require corrective action, and perform corrective action on those wells. Corrective action may be phased.

(A) Delineation of AOR.

(i) Using computational modeling that considers the volumes and/or mass and the physical and chemical properties of the injected CO_2 stream, the physical properties of the formation into which the CO_2 stream is to be injected, and available data including data available from logging, testing, or operation of wells, the applicant must predict the lateral and vertical extent of migration for the CO_2 plume and formation fluids and the pressure differentials required to cause movement of injected fluids or formation fluids into a USDW in the subsurface for the following time periods:

(I) five years after initiation of injection;

(II) from initiation of injection to the end of the injection period proposed by the applicant; and

(III) from initiation of injection until the movement of the CO_2 plume and associated pressure front stabilizes.

(ii) The applicant must use a computational model that:

(I) is based on geologic and reservoir engineering information collected to characterize the injection zone and the confining zone;

(II) is based on anticipated operating data, including injection pressures, rates, temperatures, and total volumes and/or mass over the proposed duration of injection;

(III) takes into account relevant geologic heterogeneities and data quality, and their possible impact on model predictions;

(IV) considers the physical and chemical properties of injected and formation fluids; and

(V) considers potential migration through known faults, fractures, and artificial penetrations and beyond lateral spill points.

(iii) The applicant must provide the name and a description of the model, software, the assumptions used to determine the AOR, and the equations solved.

(B) Identification and table of penetrations. The applicant must identify, compile, and submit a table listing all penetrations, including active, inactive, plugged, and unplugged wells and underground mines in the AOR that may penetrate the confining zone, that are known or reasonably discoverable through specialized knowledge or experience. The applicant must provide a description of each penetration's type, construction, date drilled or excavated, location, depth, and record of plugging and/or completion or closure. Examples of specialized knowledge or experience may include reviews of federal, state, and local government records, interviews with past and present owners, operators, and occupants, reviews of historical information (including aerial photographs, chain of title documents, and land use records), and visual inspections of the facility and adjoining properties.

(C) Corrective action. The applicant must demonstrate whether each of the wells on the table of penetrations has or has not been plugged and whether each of the underground mines (if any) on the table of penetrations has or has not been closed in a manner that prevents the movement of injected fluids or displaced formation fluids that may endanger USDWs or allow the injected fluids or formation fluids to escape the permitted injection zone. The applicant must perform corrective action on all wells and underground mines in the AOR that are determined to need corrective action. The operator must perform corrective action using materials suitable for use with the CO_2 stream. Corrective action may be phased.

(2) AOR and corrective action plan. As part of an application, the applicant must submit an AOR and corrective action plan that includes the following information:

(A) the method for delineating the AOR, including the model to be used, assumptions that will be made, and the site characterization data on which the model will be based;

(B) for the AOR, a description of:

(i) the minimum frequency subject to the annual certification pursuant to §5.206(f) of this title (relating to Permit Standards) at which the applicant proposes to re-evaluate the AOR during the life of the geologic storage facility;

(ii) how monitoring and operational data will be used to re-evaluate the AOR; and

(iii) the monitoring and operational conditions that would warrant a re-evaluation of the AOR prior to the next scheduled re-evaluation; and

(C) a corrective action plan that describes:

(i) how the corrective action will be conducted;

(ii) how corrective action will be adjusted if there are changes in the AOR;

(iii) if a phased corrective action is planned, how the phasing will be determined; and

(iv) how site access will be secured for future corrective action.

(e) Injection well construction.

(1) Criteria for construction of anthropogenic CO_2 injection wells. This paragraph establishes the criteria for the information about the construction and casing and cementing of, and special equipment for, anthropogenic CO_2 injection wells that an applicant must include in an application.

(A) General. The operator of a geologic storage facility must ensure that all anthropogenic CO_2 injection wells are constructed and completed in a manner that will:

(i) prevent the movement of injected CO_2 or displaced formation fluids into any unauthorized zones or into any areas where they could endanger USDWs;

(ii) allow the use of appropriate testing devices and workover tools; and

(iii) allow continuous monitoring of the annulus space between the injection tubing and long string casing.

(B) Casing and cementing of anthropogenic CO_2 injection wells.

(i) The operator must ensure that injection wells are cased and the casing cemented in compliance with §3.13 of this title (relating to Casing, Cementing, Drilling, Well Control, and Completion Requirements), in addition to the requirements of this section.

(ii) Casing, cement, cement additives, and/or other materials used in the construction of each injection well must have sufficient structural strength and must be of sufficient quality and quantity to maintain integrity over the design life of the injection well. All well materials must be suitable for use with fluids with which the well materials may be expected to come into contact and must meet or exceed test standards developed for such materials by the American Petroleum Institute, ASTM International, or comparable standards as approved by the director.

(iii) Surface casing must extend through the base of the lowermost USDW above the injection zone and must be cemented to the surface.

(iv) Circulation of cement may be accomplished by staging. The director may approve an alternative method of cementing in cases where the cement cannot be circulated to the surface, provided the applicant can demonstrate by using logs that the cement does not allow fluid movement between the casing and the well bore.

(v) At least one long string casing, using a sufficient number of centralizers, must extend to the injection zone and must be cemented by circulating cement to the surface in one or more stages. The long string casing must isolate the injection zone and other intervals as necessary for the protection of USDWs and to ensure confinement of the injected and formation fluids to the permitted injection zone using cement and/or other isolation techniques. If the long string casing does not extend through the injection zone, another well string or liner must be cemented through the injection zone (for example, a chrome liner).

(vi) The applicant must verify the integrity and location of the cement using technology capable of radial evaluation of cement quality and identification of the location of channels to ensure that USDWs will not be endangered.

(vii) The director may exempt existing Class II wells that have been associated with injection of CO_2 for the purpose of enhanced recovery, Class V experimental technology wells, and stratigraphic test wells from provisions of these casing and cementing requirements if the applicant demonstrates that the well construction meets the general performance criteria in subparagraph (A) of this paragraph. A converted well must meet all other requirements under this section. The demonstration must include the following:

(I) as-built schematics and construction procedures to demonstrate that repermitting is appropriate;

(II) recent or newly conducted well-log information and mechanical integrity test results;

(III) a demonstration that any needed remedial actions have been performed;

(IV) a demonstration that the well was engineered and constructed to meet the requirements of subparagraph (A) of this paragraph and ensure protection of USDWs;

(V) a demonstration that cement placement and materials are appropriate for CO_2 injection for geologic storage;

(VI) a demonstration that the well has, and is able to maintain, internal and external mechanical integrity over the life of the project; and

(VII) the results of any additional testing of the well to support a demonstration of suitability for geologic storage.

(C) Special equipment.

(i) Tubing and packer. All injection wells must inject fluids through tubing set on a packer. Packers must be set no higher than 100 feet above the top of the permitted injection interval or at a location approved by the director.

(ii) Pressure observation valve. The wellhead of each injection well must be equipped with a pressure observation valve on the tubing and each annulus of the well.

(2) Construction information. The applicant must provide the following information for each well to allow the director to determine whether the proposed well construction and completion design will meet the general performance criteria in paragraph (1) of this subsection:

(A) depth to the injection zone;

(B) hole size;

(C) size and grade of all casing and tubing strings (e.g., wall thickness, external diameter, nominal weight, length, joint specification and construction material, tubing tensile, burst, and collapse strengths);

(D) proposed injection rate (intermittent or continuous), maximum proposed surface injection pressure, and maximum proposed volume and/or mass of the CO_2 stream to be injected;

(E) type of packer and packer setting depth;

(F) a description of the capability of the materials to withstand corrosion when exposed to a combination of the CO_2 stream and formation fluids;

(G) down-hole temperatures and pressures;

(H) lithology of injection and confining zones;

(I) type or grade of cement and additives;

(J) chemical composition and temperature of the CO_2 stream; and

(K) schematic drawings of the surface and subsurface construction details.

(3) Well construction plan. The applicant must submit an injection well construction plan that meets the criteria in paragraph (1) of this subsection.

(4) Well stimulation plan. The applicant must submit, as applicable, a description of the proposed well stimulation program and a determination that well stimulation will not compromise containment.

(f) Plan for logging, sampling, and testing of injection wells after permitting but before injection. The applicant must submit a plan for logging, sampling, and testing of each injection well after permitting but prior to injection well operation. The plan need not include identical logging, sampling, and testing procedures for all wells provided there is a reasonable basis for different procedures. Such plan is not necessary for existing wells being converted to anthropogenic CO_2 injection wells in accordance with this subchapter, to the extent such activities already have taken place. The plan must describe the logs, surveys, and tests to be conducted to verify the depth, thickness, porosity, permeability, and lithology of, and the salinity of any formation fluids in, the formations that are to be used for monitoring, storage, and confinement to assure conformance with the injection well construction requirements set forth in subsection (e) of this section, and to establish accurate baseline data against which future measurements may be compared. The plan must meet the following criteria and must include the following information.

(1) Logs and surveys of newly drilled and completed injection wells.

(A) During the drilling of any hole that is constructed by drilling a pilot hole that is enlarged by reaming or another method, the operator must perform deviation checks at sufficiently frequent intervals to determine the location of the borehole and to assure that vertical avenues for fluid movement in the form of diverging holes are not created during drilling.

(B) Before surface casing is installed, the operator must run appropriate logs, such as resistivity, spontaneous potential, and caliper logs.

(C) After each casing string is set and cemented, the operator must run logs, such as a cement bond log, variable density log, and a temperature log, to ensure proper cementing.

(D) Before long string casing is installed, the operator must run logs appropriate to the geology, such as resistivity, spontaneous potential, porosity, caliper, gamma ray, and fracture finder logs, to gather data necessary to verify the characterization of the geology and hydrology.

(2) Testing and determination of hydrogeologic characteristics of injection and confining zone.

(A) Prior to operation, the operator must conduct tests to verify hydrogeologic characteristics of the injection zone.

(B) The operator must perform an initial pressure falloff or other test and submit to the director a written report of the results of the test, including details of the methods used to perform the test and to interpret the results, all necessary graphs, and the testing log, to verify permeability, injectivity, and initial pressure using water or CO_2.

(C) The operator must determine or calculate the fracture pressures for the injection and confining zone. The Commission will include in any permit it might issue a limit of 90% of the fracture pressure to ensure that the injection pressure does not exceed the fracture pressure of the injection zone.

(3) Sampling.

(A) The operator must record and submit the formation fluid temperature, pH, and conductivity, the reservoir pressure, and the static fluid level of the injection zone.

(B) The operator must submit analyses of whole cores or sidewall cores representative of the injection zone and confining

zone and formation fluid samples from the injection zone. The director may accept data from cores and formation fluid samples from nearby wells or other data if the operator can demonstrate to the director that such data are representative of conditions at the proposed injection well.

(g) Compatibility determination. Based on the results of the formation testing program required by subsection (f) of this section, the applicant must submit a determination of the compatibility of the CO_2 stream with:

(1) the materials to be used to construct the well;

(2) fluids in the injection zone; and

(3) minerals in both the injection and the confining zone.

(h) Mechanical integrity testing.

(1) Criteria. This paragraph establishes the criteria for the mechanical integrity testing plan for anthropogenic CO_2 injection wells that an applicant must include in an application.

(A) Other than during periods of well workover in which the sealed tubing-casing annulus is of necessity disassembled for maintenance or corrective procedures, the operator must maintain mechanical integrity of the injection well at all times.

(B) Before beginning injection operations and at least once every five years thereafter, the operator must demonstrate internal mechanical integrity for each injection well by pressure testing the tubing-casing annulus.

(C) Following an initial annulus pressure test, the operator must continuously monitor injection pressure, rate, temperature, injected volumes and mass, and pressure on the annulus between tubing and long string casing to confirm that the injected fluids are confined to the injection zone. If mass is determined using volume, the operator must provide calculations.

(D) At least once per year until the injection well is plugged, the operator must confirm the absence of significant fluid movement into a USDW through channels adjacent to the injection wellbore (external integrity) using a method approved by the director (e.g., diagnostic surveys such as oxygen-activation logging or temperature or noise logs).

(E) The operator must test injection wells after any workover that disturbs the seal between the tubing, packer, and casing in a manner that verifies internal mechanical integrity of the tubing and long string casing.

(F) An operator must either repair and successfully retest or plug a well that fails a mechanical integrity test.

(2) Mechanical integrity testing plan. The applicant must prepare and submit a mechanical integrity testing plan as part of a permit application. The performance tests must be designed to demonstrate the internal and external mechanical integrity of each injection well. These tests may include:

(A) a pressure test with liquid or inert gas;

(B) a tracer survey such as oxygen-activation logging;

(C) a temperature or noise log;

(D) a casing inspection log; and/or

(E) any alternative method approved by the director, and if necessary by the Administrator of EPA under 40 CFR §146.89(e), that provides equivalent or better information approved by the director.

(i) Operating information.

(1) Operating plan. The applicant must submit a plan for operating the injection wells and the geologic storage facility that complies with the criteria set forth in §5.206(d) of this title, and that outlines the steps necessary to conduct injection operations. The applicant must include the following proposed operating data in the plan:

(A) the average and maximum daily injection rates, temperature, and volumes and/or mass of the CO_2 stream;

(B) the average and maximum surface injection pressure;

(C) the sources of the CO_2 stream and the volume and/or mass of CO_2 from each source; and

(D) an analysis of the chemical and physical characteristics of the CO_2 stream prior to injection.

(2) Maximum injection pressure. The director will approve a maximum injection pressure limit that:

(A) considers the risks of tensile failure and, where appropriate, geomechanical or other studies that assess the risk of tensile failure and shear failure;

(B) with a reasonable degree of certainty will avoid initiation or propagation of fractures in the confining zone or cause otherwise non-transmissive faults transecting the confining zone to become transmissive; and

(C) in no case may cause the movement of injection fluids or formation fluids in a manner that endangers USDWs.

(j) Plan for monitoring, sampling, and testing after initiation of operation.

(1) The applicant must submit a monitoring, sampling, and testing plan for verifying that the geologic storage facility is operating as permitted and that the injected fluids are confined to the injection zone.

(2) The plan must include the following:

(A) the analysis of the CO_2 stream prior to injection with sufficient frequency to yield data representative of its chemical and physical characteristics;

(B) the installation and use of continuous recording devices to monitor injection pressure, rate, temperature, and volume and/or mass, and the pressure on the annulus between the tubing and the long string casing, except during workovers;

(C) after initiation of injection, the performance on a semi-annual basis of corrosion monitoring of the well materials for loss of mass, thickness, cracking, pitting, and other signs of corrosion to ensure that the well components meet the minimum standards for material strength and performance set forth in subsection (e)(1)(A) of this section. The operator must report the results of such monitoring annually. Corrosion monitoring may be accomplished by:

(i) analyzing coupons of the well construction materials in contact with the CO_2 stream;

(ii) routing the CO_2 stream through a loop constructed with the materials used in the well and inspecting the materials in the loop; or

(iii) using an alternative method, materials, or time period approved by the director;

(D) monitoring of geochemical and geophysical changes, including:

(i) periodic sampling of the fluid temperature, pH, conductivity, reservoir pressure and static fluid level of the injection zone and monitoring for pressure changes, and for changes in geochemistry, in a permeable and porous formation near to and above the top confining zone;

(ii) periodic monitoring of the quality and geochemistry of a USDW within the AOR and the formation fluid in a permeable and porous formation near to and above the top confining zone to detect any movement of the injected CO_2 through the confining zone into that monitored formation;

(iii) the location and number of monitoring wells justified on the basis of the AOR, injection rate and volume, geology, and the presence of artificial penetrations and other factors specific to the geologic storage facility; and

(iv) the monitoring frequency and spatial distribution of monitoring wells based on baseline geochemical data collected under subsection (c)(2) of this section and any modeling results in the AOR evaluation;

(E) tracking the extent of the CO_2 plume and the position of the pressure front by using indirect, geophysical techniques, which may include seismic, electrical, gravity, or electromagnetic surveys and/or down-hole CO_2 detection tools;

(F) A pressure fall-off test at least once every five years unless more frequent testing is required by the director based on site-specific information; and

(G) additional monitoring as the director may determine to be necessary to support, upgrade, and improve computational modeling of the AOR evaluation and to determine compliance with the requirements that the injection activity not allow the movement of fluid containing any contaminant into USDWs and that the injected fluid remain within the permitted interval.

(k) Well plugging plan. The applicant must submit a well plugging plan for all injection wells and monitoring wells that penetrate the base of usable quality water that includes the following:

(1) a proposal for plugging all monitoring wells that penetrate the base of usable quality water and all injection wells upon abandonment in accordance with §3.14 of this title (relating to Plugging), in addition to the requirements of this section. The proposal must include:

(A) the type and number of plugs to be used;

(B) the placement of each plug, including the elevation of the top and bottom of each plug;

(C) the type, grade, and quantity of material to be used in plugging and information to demonstrate that the material is compatible with the CO_2 stream; and

(D) the method of placement of the plugs;

(2) proposals for activities to be undertaken prior to plugging an injection well, specifically:

(A) flushing each injection well with a buffer fluid;

(B) performing tests or measures to determine bottomhole reservoir pressure;

(C) performing final tests to assess mechanical integrity; and

(D) ensuring that the material to be used in plugging must be compatible with the CO_2 stream and the formation fluids;

(3) a proposal for giving notice of intent to plug monitoring wells that penetrate the base of usable quality water and all injection wells. The applicant's plan must ensure that:

(A) the operator notifies the director at least 60 days before plugging a well. At this time, if any changes have been made to the original well plugging plan, the operator must also provide a revised well plugging plan. At the discretion of the director, an operator may be allowed to proceed with well plugging on a shorter notice period; and

(B) the operator will file a notice of intention to plug and abandon (Form W-3A) a well with the appropriate Commission district office and the division in Austin at least five days prior to the beginning of plugging operations;

(4) a plugging report for monitoring wells that penetrate the base of usable quality water and all injection wells. The applicant's plan must ensure that within 30 days after plugging the operator will file a complete well plugging record (Form W-3) in duplicate with the appropriate district office. The operator and the person who performed the plugging operation (if other than the operator) must certify the report as accurate;

(5) a plan for plugging all monitoring wells that do not penetrate the base of usable quality water in accordance with 16 TAC Chapter 76 (relating to Water Well Drillers and Water Well Pump Installers); and

(6) a plan for certifying that all monitoring wells that do not penetrate the base of usable quality water will be plugged in accordance with 16 TAC Chapter 76.

(l) Emergency and remedial response plan. The applicant must submit an emergency and remedial response plan that:

(1) accounts for the entire AOR, regardless of whether or not corrective action in the AOR is phased;

(2) describes actions to be taken to address escape from the permitted injection interval or movement of the injection fluids or formation fluids that may cause an endangerment to USDWs during construction, operation, closure, and post-closure periods;

(3) includes a safety plan that includes:

(A) emergency response procedures;

(B) provisions to provide security against unauthorized activity;

(C) CO_2 release detection and prevention measures;

(D) instructions and procedures for alerting the general public and public safety personnel of the existence of an emergency;

(E) procedures for requesting assistance and for follow-up action to remove the public from an area of exposure;

(F) provisions for advance briefing of the public within the AOR on subjects such as the hazards and characteristics of CO_2,

(G) the manner in which the public will be notified of an emergency and steps to be taken in case of an emergency; and

(H) if necessary, proposed actions designed to minimize and respond to risks associated with potential seismic events, including seismic monitoring; and

(4) includes a description of the training and testing that will be provided to each employee at the storage facility on operational safety and emergency response procedures to the extent applicable to the employee's duties and responsibilities. The operator must train all

employees before commencing injection and storage operations at the facility. The operator must train each subsequently hired employee before that employee commences work at the storage facility. The operator must hold a safety meeting with each contractor prior to the commencement of any new contract work at a storage facility. Emergency measures specific to the contractor's work must be explained in the contractor safety meeting. Training schedules, training dates, and course outlines must be provided to Commission personnel upon request for the purpose of Commission review to determine compliance with this paragraph.

(m) Post-injection storage facility care and closure plan. The applicant must submit a post-injection storage facility care and closure plan. The plan must include:

(1) a demonstration containing substantial evidence that the geologic storage project will no longer pose a risk of endangerment to USDWs at the end of the post-injection storage facility care timeframe. The demonstration must be based on significant, site-specific data and information, including all data and information collected pursuant subsections (b)-(d) of this section and §5.206(b)(5) of this title;

(2) the pressure differential between pre-injection and predicted post-injection pressures in the injection zone;

(3) the predicted position of the CO_2 plume and associated pressure front at closure as demonstrated in the AOR evaluation required under subsection (d) of this section;

(4) a description of the proposed post-injection monitoring location, methods, and frequency;

(5) a proposed schedule for submitting post-injection storage facility care monitoring results to the director;

(6) the estimated cost of proposed post-injection storage facility care and closure; and

(7) consideration and documentation of:

(A) the results of computational modeling performed pursuant to delineation of the AOR under subsection (d) of this section;

(B) the predicted timeframe for pressure decline within the injection zone, and any other zones, such that formation fluids may not be forced into any USDWs, and/or the timeframe for pressure decline to pre-injection pressures;

(C) the predicted rate of CO_2 plume migration within the injection zone, and the predicted timeframe for the stabilization of the CO_2 plume and associated pressure front;

(D) a description of the site-specific processes that will result in CO_2 trapping including immobilization by capillary trapping, dissolution, and mineralization at the site;

(E) the predicted rate of CO_2 trapping in the immobile capillary phase, dissolved phase, and/or mineral phase;

(F) the results of laboratory analyses, research studies, and/or field or site-specific studies to verify the information required in subparagraphs (D) and (E) of this paragraph;

(G) a characterization of the confining zone(s) including a demonstration that it is free of transmissive faults, fractures, and micro-fractures and of appropriate thickness, permeability, and integrity to impede fluid (e.g., CO_2, formation fluids) movement;

(H) the presence of potential conduits for fluid movement including planned injection wells and project monitoring wells associated with the proposed geologic storage project or any other projects in proximity to the predicted/modeled, final extent of the CO_2 plume and area of elevated pressure;

(I) a description of the well construction and an assessment of the quality of plugs of all abandoned wells within the AOR;

(J) the distance between the injection zone and the nearest USDWs above and/or below the injection zone; and

(K) any additional site-specific factors required by the director; and

(8) information submitted to support the demonstration in paragraph (1) of this subsection, which shall meet the following criteria:

(A) all analyses and tests performed to support the demonstration must be accurate, reproducible, and performed in accordance with the established quality assurance standards;

(B) estimation techniques must be appropriate and EPA-certified test protocols must be used where available;

(C) predictive models must be appropriate and tailored to the site conditions, composition of the CO_2 stream, and injection and site conditions over the life of the geologic storage project;

(D) predictive models must be calibrated using existing information where sufficient data are available;

(E) reasonably conservative values and modeling assumptions must be used and disclosed to the director whenever values are estimated on the basis of known, historical information instead of site-specific measurements;

(F) an analysis must be performed to identify and assess aspects of the alternative PISC timeframe demonstration that contribute significantly to uncertainty. The operator must conduct sensitivity analyses to determine the effect that significant uncertainty may contribute to the modeling demonstration;

(G) an approved quality assurance and quality control plan must address all aspects of the demonstration; and

(H) any additional criteria required by the director.

(n) Fees, financial responsibility, and financial assurance. The applicant must pay the fees, demonstrate that it has met the financial responsibility requirements, and provide the Commission with financial assurance as required under §5.205 of this title (relating to Fees, Financial Responsibility, and Financial Assurance).

(1) The applicant must demonstrate financial responsibility and resources for corrective action, injection well plugging, post-injection storage facility care and storage facility closure, and emergency and remedial response until the director has provided to the operator a written verification that the director has determined that the facility has reached the end of the post-injection storage facility care period.

(2) In determining whether the applicant is financially responsible, the director must rely on the following:

(A) the person's most recent audited annual report filed with the U. S. Securities and Exchange Commission under Section 13 or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or 78o(d)). The date of the audit may not be more than one year before the date of submission of the application to the division; and

(B) the person's most recent quarterly report filed with the U. S. Securities and Exchange Commission under Section 13 or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or 78o(d)); or

(C) if the person is not required to file such a report, the person's most recent audited financial statement. The date of the audit must not be more than one year before the date of submission of the application to the division.

(o) Letter from the Groundwater Advisory Unit of the Oil and Gas Division. The applicant must submit a letter from the Groundwater Advisory Unit of the Oil and Gas Division in accordance with Texas Water Code, §27.046.

(p) Other information. The applicant must submit any other information requested by the director as necessary to discharge the Commission's duties under Texas Water Code, Chapter 27, Subchapter B-1, or deemed necessary by the director to clarify, explain, and support the required attachments.

§5.204. Notice of Permit Actions and Public Comment Period.

(a) Notice requirements.

(1) The Commission shall give notice of the following actions:

(A) a draft permit has been prepared under §5.202(e) of this title (relating to Permit Required, and Draft Permit and Fact Sheet); and

(B) a hearing that has been scheduled under subsection (b)(2) of this section.

(2) General notice by publication. The Commission shall publish notice of a draft permit once a week for three consecutive weeks in a newspaper of general circulation in each county where the storage facility is located or is to be located. The Commission shall also post notice of a draft permit on the Commission's website.

(3) Methods of notification. The Commission shall give notice by the following methods:

(A) Individual notice. Notice of a draft permit or a public hearing shall be given by mailing a copy of the notice to the following persons:

(i) the applicant;

(ii) the United States Environmental Protection Agency;

(iii) the Texas Commission on Environmental Quality, the Texas Water Development Board, the Texas Department of State Health Services, the Texas Parks and Wildlife Department, the Texas General Land Office, the Texas Historical Commission, the United States Fish and Wildlife Service, other Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources, and coastal zone management plans, the Advisory Council on Historic Preservation, including any affected States (Indian Tribes) and any agency that the Commission knows has issued or is required to issue a permit for the same facility under any federal or state environmental program;

(iv) each adjoining mineral interest owner, other than the applicant, of the outermost boundary of the proposed geologic storage facility;

(v) each leaseholder and interest owner of minerals lying above or below the proposed geologic storage facility;

(vi) each adjoining leaseholder of minerals offsetting the outermost boundary of the proposed geologic storage facility;

(vii) each owner or leaseholder of any portion of the surface overlying the proposed geologic storage facility and the adjoining area of the outermost boundary of the proposed geologic storage facility;

(viii) the clerk of the county or counties where the proposed geologic storage facility is located or is proposed to be located;

(ix) the city clerk or other appropriate city official where the proposed geologic storage facility is located within city limits;

(x) any other unit of local government having jurisdiction over the area where the geologic storage facility is or is proposed to be located, and each state agency having any authority under state law with respect to the construction or operation of the geologic storage facility;

(xi) persons on the mailing list developed by the Commission, including those who request in writing to be on the list and by soliciting participants in public hearings in that area for their interest in being included on area mailing lists; and

(xii) any other class of persons that the director determines should receive notice of the application.

(B) Any person otherwise entitled to receive notice under this paragraph may waive his or her rights to receive notice of a draft permit under this subsection.

(4) Content of notice. Individual notice must consist of:

(A) the applicant's intention to construct and operate an anthropogenic CO_2 geologic storage facility;

(B) a description of the geologic storage facility location;

(C) a copy of any draft permit and fact sheet;

(D) each physical location and the internet address at which a copy of the application may be inspected;

(E) a statement that:

(i) affected persons may protest the application;

(ii) protests must be filed in writing and must be mailed or delivered to Technical Permitting, Oil and Gas Division, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711; and

(iii) protests must be received by the director within 30 days of the date of receipt of the application by the division, receipt of individual notice, or last publication of notice, whichever is later; and

(F) information satisfying the requirements of 40 CFR §124.10(d)(1).

(5) Individual notice by publication. The applicant must make diligent efforts to ascertain the name and address of each person identified under paragraph (3)(A) of this subsection. The exercise of diligent efforts to ascertain the names and addresses of such persons requires an examination of county records where the facility is located and an investigation of any other information that is publicly and/or reasonably available to the applicant. If, after diligent efforts, an applicant has been unable to ascertain the name and address of one or more persons required to be notified under paragraph (3)(A) of this subsection, the applicant satisfies the notice requirements for those persons by the publication of the notice of application as required in paragraph (2) of this subsection. The applicant must submit an affidavit to the director specifying the efforts that the applicant took to identify each person whose name and/or address could not be ascertained.

(6) Notice to certain communities. The applicant shall identify whether any portions of the AOR encompass an Environmental Justice (EJ) or Limited English-Speaking Household community using the most recent U.S. Census Bureau American Community Survey data. If the AOR incudes an EJ or Limited English-Speaking Household community, the applicant shall conduct enhanced public outreach activities to these communities. Efforts to include EJ and Limited English-Speaking Household communities in public involvement activities in such cases shall include:

(A) published meeting notice in English and the identified language (e.g., Spanish);

(B) comment forms posted on the applicant's webpage and available at public meeting in English and the alternate language;

(C) interpretation services accommodated upon request;

(D) English translation of any comments made during any comment period in the alternate language; and

(E) to the extent possible, public meeting venues near public transportation.

(7) Comment period for a draft permit. Public notice of a draft permit, including a notice of intent to deny a permit application, shall allow at least 30 days for public comment.

(b) Public comment and hearing requirements.

(1) Public comment.

(A) During the public comment period, any interested person may submit written comments on the draft permit and may request a hearing if one has not already been scheduled.

(B) Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required.

(C) The public comment period shall automatically be extended to the close of any public hearing under this section. The hearing examiner may also extend the comment period by so stating at the hearing.

(2) Public hearing.

(A) If the Commission receives a protest regarding an application for a new permit or for an amendment of an existing permit for a geologic storage facility from a person notified pursuant to subsection (a) of this section or from any other affected person within 30 days of the date of receipt of the application by the division, receipt of individual notice, or last publication of notice, whichever is later, then the director will notify the applicant that the director cannot administratively approve the application. Upon the written request of the applicant, the director will schedule a hearing on the application.

(B) The director shall hold a public hearing whenever the director finds, on the basis of requests, a significant degree of public interest in a draft permit.

(C) The director may also hold a public hearing at the director's discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision.

(D) Public notice of a public hearing shall be given at least 30 days before the hearing. Public notice of a hearing may be given at the same time as public notice of the draft permit and the two notices may be combined.

(E) Upon the written request of the applicant, the Commission must give notice of a hearing to all affected persons, local governments, and other persons who express, in writing, an interest in the application. After the hearing, the examiner will recommend a final action by the Commission. Notices shall include information satisfying the requirements of 40 CFR §124.10(d)(2) and the Texas Government Code, §2001.052.

(3) If the Commission receives no protest regarding an application for a new permit or for the amendment of an existing permit for a geologic storage facility from a person notified pursuant to subsection (a) of this section or from any other affected person, the director may administratively approve the application.

(4) If the director administratively denies an application for a new permit or for the amendment of an existing permit for a geologic storage facility, upon the written request of the applicant, the director will schedule a hearing. After hearing, the examiner will recommend a final action by the Commission.

§5.205. Fees, Financial Responsibility, and Financial Assurance.

(a) Fees. In addition to the fee for each injection well required by §3.78 of this title (relating to Fees and Financial Security Requirements), the following non-refundable fees must be remitted to the Commission with the application:

(1) Base application fee.

(A) The applicant must pay to the Commission an application fee of $50,000 for each permit application for a geologic storage facility.

(B) The applicant must pay to the Commission an application fee of $25,000 for each application to amend a permit for a geologic storage facility.

(2) Injection fee. The operator must pay to the Commission an annual fee of $0.025 per metric ton of CO_2 injected into the geologic storage facility.

(3) Post-injection care fee. The operator must pay to the Commission an annual fee of $50,000 each year the operator does not inject into the geologic storage facility until the director has authorized storage facility closure.

(b) Financial responsibility.

(1) A person to whom a permit is issued under this subchapter must provide annually to the director evidence of financial responsibility that is satisfactory to the director. The operator must demonstrate and maintain financial responsibility and resources for corrective action, injection well plugging, post-injection storage facility care and storage facility closure, and emergency and remedial response until the director has provided written verification that the director has determined that the facility has reached the end of the post-injection storage facility care period.

(2) In determining whether the person is financially responsible, the director must rely on:

(A) the person's most recent audited annual report filed with the U. S. Securities and Exchange Commission under Section 13 or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or 78o(d)); and

(B) the person's most recent quarterly report filed with the U. S. Securities and Exchange Commission under Section 13 or 15(d), Securities Exchange Act of 1934 (15 U.S.C. Section 78m or 78o(d)); or

(C) if the person is not required to file such a report, the person's most recent audited financial statement. The date of the audit

must not be more than one year before the date of submission of the application to the director.

(3) The applicant's demonstration of financial responsibility must account for the entire AOR, regardless of whether corrective action in the AOR is phased.

(c) Financial assurance.

(1) Injection and monitoring wells. The operator must comply with the requirements of §3.78 of this title for all monitoring wells that penetrate the base of usable quality water and this subsection for all injection wells.

(2) Geologic storage facility.

(A) The applicant must include in an application for a geologic storage facility permit:

(i) a written estimate of the highest likely dollar amount necessary to perform post-injection monitoring and closure of the facility that shows all assumptions and calculations used to develop the estimate;

(ii) a copy of the form of the bond or letter of credit that will be filed with the Commission; and

(iii) information concerning the issuer of the bond or letter of credit including the issuer's name and address and evidence of authority to issue bonds or letters of credit in Texas.

(B) A geologic storage facility shall not receive CO_2 until a bond or letter of credit in an amount approved by the director under this subsection and meeting the requirements of this subsection as to form and issuer has been filed with and approved by the director.

(C) The determination of the amount of financial assurance for a geologic storage facility is subject to the following requirements:

(i) The director must approve the dollar amount of the financial assurance. The amount of financial assurance required to be filed under this subsection must be equal to or greater than the maximum amount necessary to perform corrective action, emergency response, and remedial action, post-injection monitoring and site care, and closure of the geologic storage facility at any time during the permit term in accordance with all applicable state laws, Commission rules and orders, and the permit;

(ii) A qualified professional engineer licensed by the State of Texas, as required under Occupations Code, Chapter 1001, relating to Texas Engineering Practice Act, must prepare or supervise the preparation of a written estimate of the highest likely amount necessary to close the geologic storage facility. The operator must submit to the director the written estimate under seal of a qualified licensed professional engineer, as required under Occupations Code, Chapter 1001, relating to Texas Engineering Practice Act; and

(iii) The Commission may use the proceeds of financial assurance filed under this subsection to pay the costs of plugging any well or wells at the facility if the financial assurance for plugging costs filed with the Commission is insufficient to pay for the plugging of such well or wells.

(D) Bonds and letters of credit filed in satisfaction of the financial assurance requirements for a geologic storage facility must comply with the following standards as to issuer and form.

(i) The issuer of any geologic storage facility bond filed in satisfaction of the requirements of this subsection must be a corporate surety authorized to do business in Texas. The form of bond filed under this subsection must provide that the bond be renewed and continued in effect until the conditions of the bond have been met or its release is authorized by the director.

(ii) Any letter of credit filed in satisfaction of the requirements of this subsection must be issued by and drawn on a bank authorized under state or federal law to operate in Texas. The letter of credit must be an irrevocable, standby letter of credit subject to the requirements of Texas Business and Commerce Code, §§5.101 - 5.118. The letter of credit must provide that it will be renewed and continued in effect until the conditions of the letter of credit have been met or its release is authorized by the director.

(E) The operator of a geologic storage facility must provide to the director annual written updates of the cost estimate to increase or decrease the cost estimate to account for any changes to the AOR and corrective action plan, the emergency response and remedial action plan, the injection well plugging plan, and the post-injection storage facility care and closure plan. The operator must provide to the director upon request an adjustment of the cost estimate if the director has reason to believe that the original demonstration is no longer adequate to cover the cost of injection well plugging and post-injection storage facility care and closure.

(3) The director may consider allowing the phasing in of financial assurance for only corrective action based on project-specific factors.

(4) The director may approve a reduction in the amount of financial assurance required for post-injection monitoring and/or corrective action based on project-specific monitoring results.

(d) Notice of adverse financial conditions.

(1) The operator must notify the Commission of adverse financial conditions that may affect the operator's ability to carry out injection well plugging and post-injection storage facility care and closure. An operator must file any notice of bankruptcy in accordance with §3.1(f) of this title (relating to Organization Report; Retention of Records; Notice Requirements). The operator must give such notice by certified mail.

(2) The operator filing a bond must ensure that the bond provides a mechanism for the bond or surety company to give prompt notice to the Commission and the operator of any action filed alleging insolvency or bankruptcy of the surety company or the bank or alleging any violation that would result in suspension or revocation of the surety or bank's charter or license to do business.

(3) Upon the incapacity of a bank or surety company by reason of bankruptcy, insolvency or suspension, or revocation of its charter or license, the Commission must deem the operator to be without bond coverage. The Commission must issue a notice to any operator who is without bond coverage and must specify a reasonable period to replace bond coverage, not to exceed 60 days.

§5.206. Permit Standards.

(a) Each condition applicable to a permit shall be incorporated into the permit either expressly or by reference. If incorporated by reference, a specific citation to the rules in this chapter shall be given in the permit. The requirements listed in this section are directly enforceable regardless of whether the requirement is a condition of the permit.

(b) General criteria. The director may issue a permit under this subchapter if the applicant demonstrates and the director finds that:

(1) the injection and geologic storage of anthropogenic CO_2 will not endanger or injure any existing or prospective oil, gas, geothermal, or other mineral resource, or cause waste as defined by Texas Natural Resources Code, §85.046(11);

(2) with proper safeguards, both USDWs and surface water can be adequately protected from CO_2 migration or displaced formation fluids;

(3) the injection of anthropogenic CO_2 will not endanger or injure human health and safety;

(4) the reservoir into which the anthropogenic CO_2 is injected is suitable for or capable of being made suitable for protecting against the escape or migration of anthropogenic CO_2 from the storage reservoir;

(5) the geologic storage facility will be sited in an area with suitable geology, which at a minimum must include:

(A) an injection zone of sufficient areal extent, thickness, porosity, and permeability to receive the total anticipated volume of the CO_2 stream; and

(B) a confining zone that is laterally continuous and free of known transecting transmissive faults or fractures over an area sufficient to contain the injected CO_2 stream and displaced formation fluids and allow injection at proposed maximum pressures and volumes without compromising the confining zone or causing the movement of fluids that endangers USDWs;

(6) the applicant for the permit meets all of the other statutory and regulatory requirements for the issuance of the permit;

(7) the applicant has provided a letter from the Groundwater Advisory Unit of the Oil and Gas Division in accordance with §5.203(o) of this title (relating to Application Requirements);

(8) the applicant has provided a letter of determination from TCEQ concluding that drilling and operating an anthropogenic CO_2 injection well for geologic storage or constructing or operating a geologic storage facility will not impact or interfere with any previous or existing Class I injection well, including any associated waste plume, or any other injection well authorized or permitted by TCEQ;

(9) the applicant has provided a signed statement that the applicant has a good faith claim to the necessary and sufficient property rights for construction and operation of the geologic storage facility for at least the first five years after initiation of injection in accordance with §5.203(d)(1)(A) of this title;

(10) the applicant has paid the fees required in §5.205(a) of this title (relating to Fees, Financial Responsibility, and Financial Assurance);

(11) the director has determined that the applicant has sufficiently demonstrated financial responsibility as required in §5.205(b) of this title; and

(12) the applicant submitted to the director financial assurance in accordance with §5.205(c) of this title.

(c) Injection well construction.

(1) Construction of anthropogenic CO_2 injection wells must meet the criteria in §5.203(e) of this title.

(2) Within 30 days after the completion or conversion of an injection well subject to this subchapter, the operator must file with the division a complete record of the well on the appropriate form showing the current completion.

(3) Except in the case of an emergency repair, the operator of a geologic storage facility must notify the director in writing at least 30 days prior to conducting any well workover that involves running tubing and setting packers, beginning any workover or remedial operation, or conducting any required pressure tests or surveys. Such activities shall not commence before the end of the 30 days unless authorized by the director. In the case of an emergency repair, the operator must notify the director of such emergency repair as soon as reasonably practical.

(d) Operating a geologic storage facility.

(1) Operating plan. The operator must maintain and comply with the approved operating plan.

(2) Operating criteria.

(A) Injection between the outermost casing protecting USDWs and the well bore is prohibited.

(B) The total volume of CO_2 injected into the storage facility must be metered through a master meter or a series of master meters. The volume and/or mass of CO_2 injected into each injection well must be metered through an individual well meter. If mass is determined using volume, the operator must provide calculations.

(C) The operator must comply with a maximum surface injection pressure limit approved by the director and specified in the permit. In approving a maximum surface injection pressure limit, the director must consider the results of well tests and, where appropriate, geomechanical or other studies that assess the risks of tensile failure and shear failure. The director must approve limits that, with a reasonable degree of certainty, will avoid initiation or propagation of fractures in the confining zone or cause otherwise non-transmissive faults or fractures transecting the confining zone to become transmissive. In no case may injection pressure cause movement of injection fluids or formation fluids in a manner that endangers USDWs. The Commission shall include in any permit it might issue a limit of 90 percent of the fracture pressure to ensure that the injection pressure does not initiate new fractures or propagate existing fractures in the injection zone(s). In no case may injection pressure initiate fractures in the confining zone(s) or cause the movement of injection or formation fluids that endangers a USDW. The director may approve a plan for controlled artificial fracturing of the injection zone.

(D) The operator must fill the annulus between the tubing and the long string casing with a corrosion inhibiting fluid approved by the director. The owner or operator must maintain on the annulus a pressure that exceeds the operating injection pressure, unless the director determines that such requirement might harm the integrity of the well or endanger USDWs.

(E) The operator must install and use continuous recording devices to monitor the injection pressure, and the rate, volume, and temperature of the CO_2 stream. The operator must monitor the pressure on the annulus between the tubing and the long string casing. The operator must continuously record, continuously monitor, or control by a preset high-low pressure sensor switch the wellhead pressure of each injection well.

(F) The operator must comply with the following requirements for alarms and automatic shut-off systems.

(i) The operator must install and use alarms and automatic shut-off systems designed to alert the operator and shut-in the well when operating parameters such as annulus pressure, injection rate or other parameters diverge from permitted ranges and/or gradients. On offshore wells, the automatic shut-off systems must be installed down-hole.

(ii) If an automatic shutdown is triggered or a loss of mechanical integrity is discovered, the operator must immediately investigate and identify as expeditiously as possible the cause. If, upon investigation, the well appears to be lacking mechanical integrity, or if

monitoring otherwise indicates that the well may be lacking mechanical integrity, the operator must:

(I) immediately cease injection;

(II) take all steps reasonably necessary to determine whether there may have been a release of the injected CO_2 stream into any unauthorized zone;

(III) notify the director as soon as practicable, but within 24 hours;

(IV) restore and demonstrate mechanical integrity to the satisfaction of the director prior to resuming injection; and

(V) notify the director when injection can be expected to resume.

(e) Monitoring, sampling, and testing requirements.

(1) The operator of an anthropogenic CO_2 injection well must maintain and comply with the approved monitoring, sampling, and testing plan to verify that the geologic storage facility is operating as permitted and that the injected fluids are confined to the injection zone.

(2) All permits shall include the following requirements:

(A) the proper use, maintenance, and installation of monitoring equipment or methods;

(B) monitoring including type, intervals, and frequency sufficient to yield data that are representative of the monitored activity including, when required, continuous monitoring;

(C) reporting no less frequently than as specified in §5.207 of this title (relating to Reporting and Record-Keeping).

(3) The director may require additional monitoring as necessary to support, upgrade, and improve computational modeling of the AOR evaluation and to determine compliance with the requirement that the injection activity not allow movement of fluid that would endanger USDWs.

(4) The director may require measures and actions designed to minimize and respond to risks associated with potential seismic events, including seismic monitoring.

(f) Mechanical integrity.

(1) The operator must maintain and comply with the approved mechanical integrity testing plan submitted in accordance with §5.203(j) of this title.

(2) Other than during periods of well workover in which the sealed tubing-casing annulus is of necessity disassembled for maintenance or corrective procedures, the operator must maintain mechanical integrity of the injection well at all times.

(3) The operator must either repair and successfully retest or plug a well that fails a mechanical integrity test.

(4) The director may require additional or alternative tests if the results presented by the operator do not demonstrate to the director that there is no significant leak in the casing, tubing, or packer or movement of fluid into or between formations containing USDWs resulting from the injection activity.

(g) AOR and corrective action. Notwithstanding the requirement in §5.203(d)(2)(B)(i) of this title to perform a re-evaluation of the AOR, at the frequency specified in the AOR and corrective action plan or permit, the operator of a geologic storage facility also must conduct the following whenever warranted by a material change in the monitoring and/or operational data or in the evaluation of the monitoring and operational data by the operator:

(1) a re-evaluation of the AOR by performing all of the actions specified in §5.203(d)(1)(A) - (C) of this title to delineate the AOR and identify all wells that require corrective action;

(2) identify all wells in the re-evaluated AOR that require corrective action;

(3) perform corrective action on wells requiring corrective action in the re-evaluated AOR in the same manner specified in §5.203(d)(1)(C) of this title; and

(4) submit an amended AOR and corrective action plan or demonstrate to the director through monitoring data and modeling results that no change to the AOR and corrective action plan is needed.

(h) Emergency, mitigation, and remedial response.

(1) Plan. The operator must maintain and comply with the approved emergency and remedial response plan required by §5.203(l) of this title. The operator must update the plan in accordance with §5.207(a)(2)(D)(vi) of this title (relating to Reporting and Record-Keeping). The operator must make copies of the plan available at the storage facility and at the company headquarters.

(2) Training.

(A) The operator must prepare and implement a plan to train and test each employee at the storage facility on occupational safety and emergency response procedures to the extent applicable to the employee's duties and responsibilities. The operator must make copies of the plan available at the geological storage facility. The operator must train all employees before commencing injection and storage operations at the facility. The operator must train each subsequently hired employee before that employee commences work at the storage facility.

(B) The operator must hold a safety meeting with each contractor prior to the commencement of any new contract work at a storage facility. The operator must explain emergency measures specific to the contractor's work in the contractor safety meeting.

(C) The operator must provide training schedules, training dates, and course outlines to Commission personnel annually and upon request for the purpose of Commission review to determine compliance with this paragraph.

(3) Action. If an operator obtains evidence that the injected CO_2 stream and associated pressure front may cause an endangerment to USDWs, the operator must:

(A) immediately cease injection;

(B) take all steps reasonably necessary to identify and characterize any release;

(C) notify the director as soon as practicable but within at least 24 hours; and

(D) implement the approved emergency and remedial response plan.

(4) Resumption of injection. The director may allow the operator to resume injection prior to remediation if the operator demonstrates that the injection operation will not endanger USDWs.

(i) Commission witnessing of testing and logging. The operator must provide the division with the opportunity to witness all planned well workovers, stimulation activities, other than stimulation for formation testing, and testing and logging. The operator must submit a proposed schedule of such activities to the Commission at least 30 days

prior to conducting the first such activity and submit notice at least 48 hours in advance of any actual activity. Such activities shall not commence before the end of the 30 days unless authorized by the director.

(j) Well plugging. The operator of a geologic storage facility must maintain and comply with the approved well plugging plan required by §5.203(k) of this title.

(k) Post-injection storage facility care and closure.

(1) Post-injection storage facility care and closure plan.

(A) The operator of an injection well must maintain and comply with the approved post-injection storage facility care and closure plan.

(B) The operator must update the plan in accordance with §5.207(a)(2)(D)(vi) of this title. At any time during the life of the geologic sequestration project, the operator may modify and resubmit the post-injection site care and site closure plan for the director's approval within 30 days of such change. Any amendments to the post-injection site care and site closure plan must be approved by the director, be incorporated into the permit, and are subject to the permit modification requirements in §5.202 of this title (relating to Permit Required), as appropriate.

(C) Upon cessation of injection, the operator of a geologic storage facility must either submit an amended plan or demonstrate to the director through monitoring data and modeling results that no amendment to the plan is needed.

(2) Post-injection storage facility monitoring. Following cessation of injection, the operator must continue to conduct monitoring as specified in the approved plan until the director determines that the position of the CO_2 plume and pressure front are such that the geologic storage facility will not endanger USDWs.

(3) Prior to closure. Prior to authorization for storage facility closure, the operator must demonstrate to the director, based on monitoring, other site-specific data, and modeling that is reasonably consistent with site performance that no additional monitoring is needed to assure that the geologic storage facility will not endanger USDWs. The operator must demonstrate, based on the current understanding of the site, including monitoring data and/or modeling, all of the following:

(A) the estimated magnitude and extent of the facility footprint (the CO_2 plume and the area of elevated pressure);

(B) that there is no leakage of either CO_2 or displaced formation fluids that will endanger USDWs;

(C) that the injected or displaced fluids are not expected to migrate in the future in a manner that encounters a potential leakage pathway into USDWs;

(D) that the injection wells at the site completed into or through the injection zone or confining zone will be plugged and abandoned in accordance with these requirements; and

(E) any remaining facility monitoring wells will be properly plugged or are being managed by a person and in a manner approved by the director.

(4) Notice of intent for storage facility closure. The operator must notify the director in writing at least 120 days before storage facility closure. At the time of such notice, if the operator has made any changes to the original plan, the operator also must provide the revised plan. The director may approve a shorter notice period.

(5) Authorization for storage facility closure. No operator may initiate storage facility closure until the director has approved closure of the storage facility in writing. After the director has authorized storage facility closure, the operator must plug all wells in accordance with the approved plan required by §5.203(k) of this title.

(6) Storage facility closure report. Once the director has authorized storage facility closure, the operator must submit a storage facility closure report within 90 days that must thereafter be retained by the Commission in Austin. The report must include the following information:

(A) documentation of appropriate injection and monitoring well plugging. The operator must provide a copy of a survey plat that has been submitted to the Regional Administrator of Region 6 of the United States Environmental Protection Agency. The plat must indicate the location of the injection well relative to permanently surveyed benchmarks including the Latitude/Longitude or X/Y coordinates of the surface location in the NAD 27, NAD 83, or WGS 84 coordinate system, a labeled scale bar, and northerly direction arrow;

(B) documentation of appropriate notification and information to such state and local authorities as have authority over drilling activities to enable such state and local authorities to impose appropriate conditions on subsequent drilling activities that may penetrate the injection and confining zones; and

(C) records reflecting the nature, composition, volume and mass of the CO_2 stream. If mass is determined using volume, the operator must provide calculations.

(7) Certificate of closure. Upon completion of the requirements in paragraphs (3) - (6) of this subsection, the director will issue a certificate of closure. At that time, the operator is released from the requirement in §5.205(c) of this title to maintain financial assurance.

(l) Deed notation. The operator of a geologic storage facility must record a notation on the deed to the facility property; on any other document that is normally examined during title search; or on any other document that is acceptable to the county clerk for filing in the official public records of the county that will in perpetuity provide any potential purchaser of the property the following information:

(1) a complete legal description of the affected property;

(2) that land has been used to geologically store CO_2;

(3) that the survey plat has been filed with the Commission;

(4) the address of the office of the United States Environmental Protection Agency, Region 6, to which the operator sent a copy of the survey plat; and

(5) the volume and mass of fluid injected, the injection zone or zones into which it was injected, and the period over which injection occurred. If mass is determined using volume, the operator must provide calculations.

(m) Retention of records. The operator must retain for 10 years following storage facility closure records collected during the post-injection storage facility care period. The operator must deliver the records to the director at the conclusion of the retention period, and the records must thereafter be retained at the Austin headquarters of the Commission.

(n) Signs. The operator must identify each location at which geologic storage activities take place, including each injection well, by a sign that meets the requirements specified in §3.3(1), (2), and (5) of this title (relating to Identification of Properties, Wells, and Tanks). In addition, each sign must include a telephone number where the operator or a representative of the operator can be reached 24 hours a day, seven days a week in the event of an emergency.

(o) Other permit terms and conditions.

(1) Protection of USDWs. In any permit for a geologic storage facility, the director must impose terms and conditions reasonably necessary to protect USDWs. Permits issued under this subchapter continue in effect until revoked, modified, or terminated by the Commission. The operator must comply with each requirement set forth in this subchapter as a condition of the permit unless modified by the terms of the permit.

(2) Other conditions. The following conditions shall also be included in any permit issued under this subchapter.

(A) Duty to comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Safe Drinking Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application. However, the permittee need not comply with the provisions of the permit to the extent and for the duration such noncompliance is authorized in an emergency permit under 40 CFR §144.34.

(B) Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(C) Duty to mitigate. The permittee shall take all reasonable steps to minimize or correct any adverse impact on the environment resulting from noncompliance with this permit.

(D) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance includes effective performance, adequate funding, adequate operator staffing and training, and adequate laboratory and process controls, including appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems only when necessary to achieve compliance with the conditions of the permit.

(E) Property rights not conveyed. The issuance of a permit does not convey property rights of any sort, or any exclusive privilege.

(F) Activities not authorized. The issuance of a permit does not authorize any injury to persons or property or invasion of other private rights, or any infringement of State or local law or regulations.

(G) Coordination with exploration. The permittee of a geologic storage well shall coordinate with any operator planning to drill through the AOR to explore for oil and gas or geothermal resources and take all reasonable steps necessary to minimize any adverse impact on the operator's ability to drill for and produce oil and gas or geothermal resources from above or below the geologic storage facility.

(H) Duty to provide information. The operator shall furnish to the Commission, within a time specified by the Commission, any information that the Commission may request to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit, or to determine compliance with the permit. The operator shall also furnish to the Commission, upon request, copies of records required to be kept under the conditions of the permit.

(I) Inspection and entry. The operator shall allow any member or employee of the Commission, on proper identification, to:

(i) enter upon the premises where a regulated activity is conducted or where records are kept under the conditions of the permit;

(ii) have access to and copy, during reasonable working hours, any records required to be kept under the conditions of the permit;

(iii) inspect any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under the permit; and

(iv) sample or monitor any substance or parameter for the purpose of assuring compliance with the permit or as otherwise authorized by the Texas Water Code, §27.071, or the Texas Natural Resources Code, §91.1012.

(J) Schedule of compliance: The permit may, when appropriate, specify a schedule of compliance leading to compliance with all provisions of this subchapter and Chapter 3 of this title.

(i) Any schedule of compliance shall require compliance as soon as possible, and in no case later than three years after the effective date of the permit.

(ii) If the schedule of compliance is for a duration of more than one year from the date of permit issuance, then interim requirements and completion dates (not to exceed one year) must be incorporated into the compliance schedule and permit.

(iii) Progress reports must be submitted no later than 30 days following each interim date and the final date of compliance.

§5.207. Reporting and Record-Keeping.

(a) The operator of a geologic storage facility must provide, at a minimum, the following reports to the director and retain the following information.

(1) Test records. The operator must file a complete record of all tests in duplicate with the district office within 30 days after the testing. In conducting and evaluating the tests enumerated in this subchapter or others to be allowed by the director, the operator and the director must apply methods and standards generally accepted in the industry. When the operator reports the results of mechanical integrity tests to the director, the operator must include a description of any tests and methods used. In making this evaluation, the director must review monitoring and other test data submitted since the previous evaluation.

(2) Operating reports. The operator also must include summary cumulative tables of the information required by the reports listed in this paragraph.

(A) Report within 24 hours. The operator must report to the appropriate district office the discovery of any significant pressure changes or other monitoring data that indicate the presence of leaks in the well or the lack of confinement of the injected gases to the geologic storage reservoir. Such report must be made orally as soon as practicable, but within 24 hours, following the discovery of the leak, and must be confirmed in writing within five working days.

(B) Report within 30 days. The operator must report:

(i) the results of periodic tests for mechanical integrity;

(ii) the results of any other test of the injection well conducted by the operator if required by the director; and

(iii) a description of any well workover.

(C) Semi-annual report. The operator must report:

(i) a summary of well head pressure monitoring;

(ii) changes to the source as well as the physical, chemical, and other relevant characteristics of the CO_2 stream from the proposed operating data;

(iii) monthly average, maximum and minimum values for injection pressure, flow rate, temperature, and volume and/or mass, and annular pressure;

(iv) monthly annulus fluid volume added;

(v) a description of any event that significantly exceeds operating parameters for annulus pressure or injection pressure as specified in the permit;

(vi) a description of any event that triggers a shutdown device and the response taken; and

(vii) the results of monitoring prescribed under §5.206(e) of this title (relating to Permit Standards).

(D) Annual reports. The operator must submit an annual report detailing:

(i) corrective action performed;

(ii) new wells installed and the type, location, number, and information required in §5.203(e) of this title (relating to Application Requirements);

(iii) re-calculated AOR unless the operator submits a statement signed by an appropriate company official confirming that monitoring and operational data supports the current delineation of the AOR on file with the Commission;

(iv) the updated area for which the operator has a good faith claim to the necessary and sufficient property rights to operate the geologic storage facility;

(v) tons of CO_2 injected; and

(vi) The operator must maintain and update required plans in accordance with the provisions of this subchapter.

(I) Operators must submit an annual statement, signed by an appropriate company official, confirming that the operator has:

(-a-) reviewed the monitoring and operational data that are relevant to a decision on whether to reevaluate the AOR and the monitoring and operational data that are relevant to a decision on whether to update an approved plan required by §5.203 or §5.206 of this title; and

(-b-) determined whether any updates were warranted by material change in the monitoring and operational data or in the evaluation of the monitoring and operational data by the operator.

(II) Operators must submit either the updated plan or a summary of the modifications for each plan for which an update the operator determined to be warranted pursuant to subclause (I) of this clause. The director may require submission of copies of any updated plans and/or additional information regarding whether or not updates of any particular plans are warranted.

(vii) other information as required by the permit.

(3) The director may require the revision of any required plan following any significant changes to the facility, such as addition of injection or monitoring wells, on a schedule determined by the director or whenever the director determines that such a revision is necessary to comply with the requirements of this subchapter.

(b) Report format.

(1) The operator must report the results of injection pressure and injection rate monitoring of each injection well on Form H-10, Annual Disposal/Injection Well Monitoring Report, and the results of internal mechanical integrity testing on Form H-5, Disposal/Injection Well Pressure Test Report. Operators must submit other reports in a format acceptable to the Commission. At the discretion of the director, other formats may be accepted.

(2) The operator must submit all required reports, submittals, and notifications under this subchapter to the director and to the Environmental Protection Agency in an electronic format approved by the director.

(c) Signatories to reports.

(1) Reports. All reports required by permits and other information requested by the director, shall be signed by a person described in §5.203(a)(1)(B) of this title, or by a duly authorized representative of that person. A person is a duly authorized representative only if:

(A) the authorization is made in writing by a person described in §5.203(a)(1)(B) of this title;

(B) the authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent, or position of equivalent responsibility; and

(C) the written authorization is submitted to the director.

(2) Changes to authorization. If an authorization under paragraph (1) of this subsection is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of paragraph (1) of this subsection must be submitted to the director prior to or together with any reports, information, or applications to be signed by an authorized representative.

(d) Certification. All reports required by permits and other information requested by the director under this subchapter, shall be certified as follows: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

(e) Record retention. The operator must retain all wellhead pressure records, metering records, and integrity test results for at least 10 years. The operator must retain all documentation of good faith claim to necessary and sufficient property rights to operate the geologic storage facility until the director issues the final certificate of closure in accordance with §5.206(k)(7) of this title.

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, 2022.

TRD-202203328

Haley Cochran
Rules Attorney, Office of General Counsel
Railroad Commission of Texas
Effective date: September 19, 2022
Proposal publication date: May 20, 2022
For further information, please call: (512) 475-1295

♦ ♦ ♦

TITLE 22. EXAMINING BOARDS

PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS AND LAND SURVEYORS

CHAPTER 138. COMPLIANCE AND PROFESSIONALISM FOR SURVEYORS

SUBCHAPTER B. SEALING REQUIREMENTS

22 TAC §138.33

The Texas Board of Professional Engineers and Land Surveyors (Board) adopts amendments to 22 Texas Administrative Code, Chapter 138, regarding Compliance and Professionalism for Surveyors, and specifically §138.33, relating to Sealing Procedures, without changes to the proposed text as published in the July 22, 2022 issue of the *Texas Register* (47 TexReg 4251). The rules will not be republished.

REASONED JUSTIFICATION FOR RULE ADOPTION

The adopted amendments to §138.33 state that state land surveying work does not have to be sealed with a registered professional land surveyor seal, that the rule applies only to land located in Texas, and that state land surveying work must be sealed with the licensed state land surveyor's seal, signature, printed name, and license number. These amendments better communicate the sealing requirements to licensed state land surveyors.

The seal of a licensed state land surveyor is not customized to each surveyor. By adding the name and license number to the sealing requirements, the public will be able to locate any surveyor through the Board's roster should they have questions about the surveying work. Further, while a licensed state land surveyor must be a registered professional land surveyor to obtain the licensed state land surveyor license, he or she does not have to keep the registered professional land surveyor license per rule to remain a licensed state land surveyor. As such, the removal of the registered professional land surveyor seal on state land surveying work is justified.

PUBLIC COMMENT

Pursuant to §2001.029 of the Texas Government Code, the Board gave all interested persons a reasonable opportunity to provide oral and/or written commentary concerning the adoption of the rules. The public comment period began on July 22, 2022 and ended August 12, 2022. The Board received no comments from the public.

STATUTORY AUTHORITY

The amendments are adopted pursuant to Texas Occupations Code §§1001.201 and 1001.202, which authorize the Board to regulate engineering and land surveying and make and enforce all rules and bylaws necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practices of engineering and land surveying in this state.

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, 2022.

TRD-202203333
Lance Kinney
Executive Director
Texas Board of Professional Engineers and Land Surveyors
Effective date: September 19, 2022
Proposal publication date: July 22, 2022
For further information, please call: (512) 440-7723

♦ ♦ ♦

PART 34. TEXAS STATE BOARD OF SOCIAL WORKER EXAMINERS

CHAPTER 781. SOCIAL WORKER LICENSURE

SUBCHAPTER C. APPLICATION AND LICENSING

22 TAC §781.404

The Texas Behavioral Health Executive Council adopts amended §781.404, relating to Recognition as a Council-approved Supervisor and the Supervision Process. Section 781.404 is adopted without changes to the proposed text as published in the April 22, 2022, issue of the *Texas Register* (47 TexReg 2085) and will not be republished.

Reasoned Justification.

This adopted amendment removes the requirements for maintaining and renewing a licensee's supervisor status from subsection (b) of this rule, because similar requirements have been added to new §781.501, pertaining to requirements for continuing education, where it is more appropriate.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

A commenter suggested that instead of removing the continuing education requirements in the rule and moving them to a new rule, the rule should clearly identify the requirements of the new rule here in this rule. And the commenter requests the Executive Council to identify specific time frames that supervisors are required to maintain supervision records.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

The Executive Council declines to amend the rule as requested by the commenter. The purpose of adopting new §781.501 is so all continuing education requirements will be located in one rule,

and not throughout multiple rules. Therefore, the repeal of continuing education requirements in this rule is in line with this purpose. The current rules address record retention requirements, for example see §781.309, and at this time the Executive Council declines to make the requested changes regarding supervision records; additionally, such a requested change is beyond the scope and purpose of this proposed and adopted rule change which pertains to continuing education.

Statutory Authority.

The rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Texas State Board of Social Worker Examiners previously voted and, by a majority, approved to propose the adoption of this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also adopts this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed the rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may adopt this rule.

Lastly, the Executive Council adopts this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 September 1, 2022.

TRD-202203455
Darrel D. Spinks
Executive Director
Texas State Board of Social Worker Examiners
Effective date: September 21, 2022
Proposal publication date: April 22, 2022
For further information, please call: (512) 305-7706

♦ ♦ ♦

SUBCHAPTER C. APPLICATION AND LICENSING

22 TAC §781.501

The Texas Behavioral Health Executive Council adopts new §781.501, relating to Requirements for Continuing Education. In response to comments, §781.501 is adopted with changes to the proposed text as published in the April 22, 2022, issue of the *Texas Register* (47 TexReg 2088) and will be republished.

Reasoned Justification.

This adopted new rule consolidates all the continuing education requirements contained in multiple rules into this single rule. Additionally, this rule adds and changes some of the requirements for each renewal cycle. For example, licensees will now be required to complete three hours of cultural diversity or competency, licensees with supervisor status will be required to complete six hours in supervision instead of three previously but these hours can be counted towards the minimum hours required, licensees who take the jurisprudence exam can claim one hour of ethics credit, and lastly licensees can now claim up to one hour of self-study continuing education credit.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

Many commenters objected to subsection (f), which requires at least fifty percent of continuing education to come from one of the providers listed in that subsection. Some commenters asked that subsection (f) not be included in the rule, while other comments asked for different types of providers to be added to subsection (f), such as teaching hospitals, non-profit hospitals, and other entities or stakeholders. Some commenters asked for clarification regarding the definition of self-study. Some commenters believe self-study will limit their ability to claim credit for continuing education, such as coursework completed by watching presentations online. Some commenters believe that this rule change, namely the addition of subsection (f), will require licensees to attend in person workshops, trainings, seminars, and the like in person, as opposed to virtually or online. A commenter opined that increasing the number of hours related to supervision for supervisors will potentially create a financial burden; and another commenter objected to the removal of the currently required three hours in supervision for a supervisor as the commenter believed this education to be essential for supervisors. A commenter objected to not including in this rule continuing education credit for some of the time a licensee spends under supervision. A commenter asked that undergraduate courses be included instead of just graduate ones. Commenters requested that credit be included for field instructors working with interns. A commenter believes there is a contradiction between subsection (a)(2), which allows up to ten hours to be carried forward to the next renewal cycle if not used, and subsection (e)(1), which requires all hours to be completed during a renewal period. A commenter asked for further clarity regarding what is required under certain parts of the rule, such as cultural diversity and if field instructors qualify as teaching a graduate level course. A commenter opposed this rule because the commenter believes it may limit private providers to provide only fifty percent of continuing education, which in turn may limit the diversification and accessibility of materials; the commenter suggested allowing licensed clinical practitioners to be able to provide continuing education.

List of interested groups or associations for the rule.

National Association of Social Workers - Texas

Summary of comments for the rule.

Some commenters appreciated the addition of requiring cultural competency to the continuing education rule, but some proposed adding additional subject matter requirements such as addiction and trauma. Other commenters voiced support for the changes to self-study and teaching, but requested the jurisprudence exam to be extended to three hours of credit and that credits for teaching and attending graduate-level courses be expanded to all college courses. A commenter supported the addition of cultural competency or diversity but the commenter requested that this requirement be combined with the ethics requirements, as there may be educational opportunities that cover both. A commenter voiced support for the increase of required supervision hours from three to six, but requested that additional language describing the type of supervision areas required be added. A commenter voice support for the list of providers in subsection (f) because this diverse list is an attempt to identify groups or organizations with a connection to social work. A commenter voiced support for the addition of self-study credit to the rule but requested the rule clarify that it is for activities that are done on your own, without any third-party or external provider.

Agency Response.

The Council declines to make all the changes requested by commenters, but the Council does adopt this rule with some changes responsive to comments. For example, the Council has included a definition for the term self-study in subsection (h), so that there should be no confusion as to what this term is intended to mean. Self-study is defined as credit that is obtained from any type of activity that is performed by an individual licensee acting alone. Such activities include, but are not limited to, reading materials directly related to the practice of social work. Time spent individually viewing or listening to audio, video, digital, or print media as part of an organized continuing education activity, program or offering from a third-party is not subject to this self-study limitation and may count as acceptable continuing education under other parts of this rule. Additionally, the Council has added licensees with supervisor status to the list of providers in subsection (f). Therefore, if a licensee with supervisor status provides continuing education or a licensee with supervisor status approves or endorses continuing education provided then the continuing education will qualify under subsection (f). While the rule will require at least fifty percent of a licensee's continuing education to come from a provider listed in subsection (f) there is no requirement that these providers only offer in-person continuing education, there is no prohibition or limitation regarding online continuing education hours. The Council believes the addition of licensees with supervisor status to subsection (f) should include other well-trained providers, as commenters requested, because other structured organizations or entities devoted and designed to address mental health issues will likely have a licensee with supervisor status on staff or under contract, and therefore should be able to qualify under subsection (f) if so desired. The Council added language to subsection (e)(1), in response to comments, to clarify that all hours must be completed during a renewal cycle except for those hours that are allowed to be carried forward from the previous cycle by subsection (a)(2). In response to comments, the Council changed subsection (h)(4) to allow for teaching or attending any university or college level course to be claimed for continuing education credit instead of just graduate-level courses. The Council has made other clarifying changes such as, that subsection (h) is not impacted by the requirements of subsection (f), meaning the activities stated in subsection (h) do not have to come from a provider listed in subsection (f).

Statutory Authority.

The rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Texas State Board of Social Worker Examiners previously voted and, by a majority, approved to propose the adoption of this rule to the Executive Council. The rule is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also adopts this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed the rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may adopt this rule.

Lastly, the Executive Council adopts this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§781.501. Requirements for Continuing Education

(a) Minimum Continuing Education Hours Required:

(1) A licensee must complete 30 hours of continuing education during each renewal period that they hold a license. The 30 hours of continuing education must include 6 hours in ethics and 3 hours in cultural diversity or competency.

(2) A licensee may carry forward to the next renewal period, a maximum of 10 hours accrued during the current renewal period if those hours are not needed for renewal.

(b) Special Continuing Education Requirements.

(1) A licensee with supervisory status must complete 6 hours of continuing education in supervision.

(2) The special continuing education requirements set out in this subsection may be counted toward the minimum continuing education hours required under subsection (a).

(c) Acceptable ethics hours include, but are not limited to continuing education on:

(1) state or federal laws, including agency rules, relevant to the practice of social work;

(2) practice guidelines established by local, regional, state, national, or international professional organizations;

(3) training or education designed to demonstrate or affirm the ideals and responsibilities of the profession; and

(4) training or education intended to assist licensees in determining appropriate decision-making and behavior, improve consistency in or enhance the professional delivery of services, and provide a minimum acceptable level of practice.

(d) Acceptable cultural diversity or competency hours include, but are not limited to continuing education regarding age, disability, ethnicity, gender, gender identity, language, national origin, race, religion, culture, sexual orientation, and socio-economic status.

(e) Acceptable Continuing Education Activities.

(1) All continuing education hours must have been received during the renewal period unless allowed under subsection (a)(2) of this section, and be directly related to the practice of social work;

(2) The Council shall make the determination as to whether the activity claimed by the licensee is directly related to the practice of social work;

(3) Except for hours claimed under subsection (h), all continuing education hours obtained must be designated by the provider in a letter, email, certificate, or transcript that displays the licensee's name, topic covered, date(s) of training, and hours of credit earned; and

(4) Multiple instances or occurrences of a continuing education activity may not be claimed for the same renewal period.

(f) Licensees must obtain at least fifty percent of their continuing education hours from one or more of the following providers:

(1) an international, national, regional, state, or local association of medical, mental, or behavioral health professionals;

(2) public school districts, charter schools, or education service centers;

(3) city, county, state, or federal governmental entities;

(4) an institution of higher education accredited by a regional accrediting organization recognized by the Council for Higher Education Accreditation, the Texas Higher Education Coordinating Board, or the United States Department of Education;

(5) religious or charitable organizations devoted to improving the mental or behavioral health of individuals;

(6) a licensee that is Council-approved supervisor; or

(7) any provider approved or endorsed by a provider listed herein.

(g) Licensees shall receive credit for continuing education activities according to the number of hours designated by the provider, or if no such designation, on a one-for-one basis with one credit hour for each hour spent in the continuing education activity.

(h) Notwithstanding subsection (f) of this section, licensees may claim continuing education credit for each of the following activities:

(1) Passage of the jurisprudence examination. Licensees who pass the jurisprudence examination may claim 1 hour of continuing education in ethics.

(2) Preparing and giving a presentation at a continuing education activity. The maximum number of hours that may be claimed for this activity is 5 hours.

(3) Authoring a book or peer reviewed article. The maximum number of hours that may be claimed for this activity is 5 hours.

(4) Teaching or attending a university or college level course. The maximum number of hours that may be claimed for this activity is 5 hours.

(5) Self-study. The maximum number of hours that may be claimed for this activity is 1 hour. Self-study is credit that is obtained from any type of activity that is performed by an individual licensee acting alone. Such activities include, but are not limited to, reading materials directly related to the practice of social work. Time spent individually viewing or listening to audio, video, digital, or print media as part of an organized continued education activity, program or offering from a third-party is not subject to this self-study limitation and may count as acceptable continuing education under other parts of this rule.

(6) Successful completion of a training course on human trafficking prevention described by §116.002 of the Occupations Code. Licensees who complete this training may claim 1 hour of continuing education credit.

(i) The Council does not pre-evaluate or pre-approve continuing education providers or hours.

(j) Licensees shall maintain proof of continuing education compliance for a minimum of 3 years after the applicable renewal period.

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 September 1, 2022.

TRD-202203457
Darrel D. Spinks
Executive Director
Texas State Board of Social Worker Examiners
Effective date: September 21, 2022
Proposal publication date: April 22, 2022
For further information, please call: (512) 305-7706

22 TAC §§781.508 - 78.510, 781.514

The Texas Behavioral Health Executive Council adopts the repeal of §781.508, relating to Hour Requirements for Continuing Education; §781.509, relating to Types of Acceptable Continuing Education; §781.510, relating to Activities Unacceptable as Continuing Education; and §781.514, relating to Credit Hours Granted. The repeal of §§781.508, 781.509, 781.510, and 781.514 are adopted without changes to the proposed text as published in the April 22, 2022, issue of the *Texas Register* (47 TexReg 2090) and will not be republished.

Reasoned Justification.

These rules have repealed because these same requirements have been added to new §781.501, pertaining to continuing education, where all licensee continuing education requirements have been consolidated.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The rule repeal is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule repeal pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §505.2015 of the Tex. Occ. Code the Texas State Board of Social Worker Examiners previously voted and, by a majority, approved to propose the adoption of this rule repeal to the Executive Council. The rule repeal is specifically authorized by §505.2015 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also adopts this rule repeal in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed the rule repeal to the Executive Council. Therefore, the Executive Council has complied with Chapters 505 and 507 of the Texas Occupations Code and may adopt this rule repeal.

Lastly, the Executive Council adopts this rule repeal under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 September 1, 2022.

TRD-202203458
Darrel D. Spinks
Executive Director
Texas State Board of Social Worker Examiners
Effective date: September 21, 2022
Proposal publication date: April 22, 2022
For further information, please call: (512) 305-7706

♦ ♦ ♦

PART 35. TEXAS STATE BOARD OF EXAMINERS OF MARRIAGE AND FAMILY THERAPISTS

CHAPTER 801. LICENSURE AND REGULATION OF MARRIAGE AND FAMILY THERAPISTS

SUBCHAPTER B. RULES OF PRACTICE

22 TAC §801.44

The Texas Behavioral Health Executive Council adopts amended §801.44, relating to Relationships with Clients. Section 801.44 is adopted without changes to the proposed text as published in the April 22, 2022, issue of the *Texas Register* (47 TexReg 2092) and will not be republished.

Reasoned Justification.

This rule requires licensees to be competent in a particular professional service before the licensee provides such a service to a client or offers the service to the general public. The adopted amendment clarifies that the same standard applies in emerging areas of practice, where generally recognized standards for preparatory training do not exist yet. In such emerging areas licensees are also required to ensure the competence of their work and protect the recipients of those services from harm or the potential of harm.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which

vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Marriage and Family Therapists previously voted and, by a majority, approved to propose the adoption this rule to the Executive Council. The rule is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also adopts this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may adopt this rule.

Lastly, the Executive Council also adopts this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 September 1, 2022.

TRD-202203459
Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Effective date: September 21, 2022
Proposal publication date: April 22, 2022
For further information, please call: (512) 305-7706

♦ ♦ ♦

SUBCHAPTER B. RULES OF PRACTICE

22 TAC §801.58

The Texas Behavioral Health Executive Council adopts amended §801.58, relating to Technology-Assisted Services. Section 801.58 is adopted without changes to the proposed text as published in the April 22, 2022, issue of the *Texas Register* (47 TexReg 2094) and will not be republished.

Reasoned Justification.

This rule requires licensees to be competent in a particular professional service before the licensee provides such a service to a client or offers the service to the general public. The adopted amendment clarifies that the same standard applies in emerging areas of practice, where generally recognized standards for preparatory training do not exist yet. In such emerging areas licensees are also required to ensure the competence of their work and protect the recipients of those services from harm or the potential of harm.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Marriage and Family Therapists previously voted and, by a majority, approved to propose the adoption this rule to the Executive Council. The rule is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also adopts this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may adopt this rule.

Lastly, the Executive Council also adopts this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 September 1, 2022.

TRD-202203461
Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Effective date: September 21, 2022
Proposal publication date: April 22, 2022
For further information, please call: (512) 305-7706

♦ ♦ ♦

SUBCHAPTER C. APPLICATIONS AND LICENSING

22 TAC §801.143

The Texas Behavioral Health Executive Council adopts amended §801.143, relating to Technology-Assisted Services. Section 801.143 is adopted without changes to the proposed text as published in the April 22, 2022, issue of the *Texas Register* (47 TexReg 2096) and will not be republished.

Reasoned Justification.

This adopted amendment removes the requirements for maintaining and renewing a licensee's supervisor status from subsection (h) of this rule, because these same requirements have been added to new §801.261, pertaining to requirements for continuing education, where it is more appropriate.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Marriage and Family Therapists previously voted and, by a majority, approved to propose the adoption this rule to the Executive Council. The rule is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also adopts this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may adopt this rule.

Lastly, the Executive Council also adopts this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 September 1, 2022.

TRD-202203462
Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Effective date: September 21, 2022
Proposal publication date: April 22, 2022
For further information, please call: (512) 305-7706

♦ ♦ ♦

22 TAC §801.261

The Texas Behavioral Health Executive Council adopts new §801.261, relating to Requirements for Continuing Education. In response to comments, §801.261 is adopted with changes to the proposed text as published in the April 22, 2022, issue of the *Texas Register* (47 TexReg 2098) and will be republished.

Reasoned Justification.

This adopted new rule consolidates all the continuing education requirements contained in multiple rules into this single rule. Additionally, this rule adds and changes some of the requirements for each renewal cycle. For example, LMFTs will now be required to complete three hours of cultural diversity or competency, licensees with supervisor status must now complete six hours in supervision as opposed to three hours previously, and lastly licensees can now claim up to one hour of self-study continuing education credit.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

Comments voiced opposition to the changes made to the continuing education requirements in this new rule. A commenter believed these changes will make acquiring continuing educa-

tion hours more difficult and complicated. A commenter opined that the rule change will require licensees to get fifty percent of all continuing education hours from education entities, which the commenter did not agree with. Another commenter asked for clarification regarding the cultural diversity or competency requirements, whether the requirements were for every two-year renewal period, how Council staff will implement this rule when reviewing a licensee's claimed continuing education credits, and clarification regarding the prohibition against reusing or claiming credit more than once during a renewal cycle. A commenter questioned why international professional organizations have been included in the rule. A commenter opined that requiring at least fifty percent of continuing education to come from one of the providers listed in subsection (f) will make it more difficult for licensees to obtain continuing education that they are interested in and will limit the format and structure of such continuing education because it will need to come from a larger organization that some licensees may not be able to easily access or attend. A commenter objected to the one-hour of self-study because the commenter believed this would apply to online trainings from organizations focused on improving a licensee's professional practice. A commenter objected to the part of the rule that prohibits this agency from pre-evaluating or pre-approving continuing education hours or providers.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

The Council declines to make all the changes requested by commenters, but the Council does adopt this rule with some changes responsive to comments. For example, the Council has included a definition for the term self-study in subsection (h), so that there should be no confusion as to what this term is intended to mean. Self-study is defined as credit that is obtained from any type of activity that is performed by an individual licensee acting alone. Such activities include, but are not limited to, reading materials directly related to the practice of marriage and family therapy. Time spent individually viewing or listening to audio, video, digital, or print media as part of an organized continuing education activity, program, or offering from a third-party is not subject to this self-study limitation and may count as acceptable continuing education under other parts of this rule. Additionally, the Council has added graduate-level licensees with supervisor status to the list of providers in subsection (f). Therefore, if a graduate-level licensee with supervisor status provides continuing education or a graduate-level licensee with supervisor status approves or endorses continuing education provided then the continuing education will qualify under subsection (f). While the rule will require at least fifty percent of a licensee's continuing education to come from a provider listed in subsection (f) there is no requirement that these providers only offer in-person continuing education, there is no prohibition or limitation regarding online continuing education hours. The Council believes the addition of graduate-level licensees with supervisor status to subsection (f) should include other well-trained providers because other structured organizations or entities devoted and designed to address mental health issues will likely have a licensee with supervisor status on staff or under contract, and therefore should be able to qualify under subsection (f) if so desired. The Council made clarifying changes such as, that subsection (h) is not impacted by the requirements of subsection (f), meaning the activities stated in subsection (h) do not have to come from a provider listed in subsection (f). And typographical corrections were made to subsection (a). The Council declines to make any of the other requested changes made by the commenters because the Council believes such requested changes are not currently needed and do not align with the purposes for the adoption of this rule, such as the standardization of continuing education rules for all Boards under the Council.

Statutory Authority.

The rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Marriage and Family Therapists previously voted and, by a majority, approved to propose the adoption this rule to the Executive Council. The rule is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also adopts this rule in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may adopt this rule.

Lastly, the Executive Council also adopts this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

§801.261. Requirements for Continuing Education.

(a) Minimum Continuing Education Hours Required

(1) An LMFT must complete 30 hours of continuing education during each renewal period that they hold a license. The 30 hours of continuing education must include 6 hours in ethics and 3 hours in cultural diversity or competency.

(2) An LMFT Associate must complete 15 hours of continuing education during each renewal period that they hold a license. The 15 hours of continuing education must include 6 hours in ethics and 3 hours in cultural diversity or competency.

(3) A licensee may carry forward to the next renewal period, a maximum of 10 hours accrued during the current renewal period if those hours are not needed for renewal.

(b) Special Continuing Education Requirements. The special continuing education requirements set out in this subsection may be counted toward the minimum continuing education hours required under subsection (a) of this section.

(1) A licensee with supervisory status must complete 6 hours of continuing education in supervision.

(2) A licensee with supervisory status must take and pass the jurisprudence examination. One hour of continuing education in ethics may be claimed for passing the jurisprudence examination.

(3) A licensee who provides telehealth services must complete 2 hours of continuing education in technology-assisted services.

(c) Acceptable ethics hours include, but are not limited to continuing education on:

(1) state or federal laws, including agency rules, relevant to the practice of marriage and family therapy;

(2) practice guidelines established by local, regional, state, national, or international professional organizations;

(3) training or education designed to demonstrate or affirm the ideals and responsibilities of the profession; and

(4) training or education intended to assist licensees in determining appropriate decision-making and behavior, improve consistency in or enhance the professional delivery of services, and provide a minimum acceptable level of practice.

(d) Acceptable cultural diversity or competency hours include, but are not limited to continuing education regarding age, disability, ethnicity, gender, gender identity, language, national origin, race, religion, culture, sexual orientation, and socio-economic status.

(e) Acceptable Continuing Education Activities.

(1) All continuing education hours must have been received during the renewal period unless allowed under subsection (a)(3) of this section, and be directly related to the practice of marriage and family therapy;

(2) The Council shall make the determination as to whether the activity claimed by the licensee is directly related to the practice of marriage and family therapy;

(3) Except for hours claimed under subsection (h)of this section, all continuing education hours obtained must be designated by the provider in a letter, email, certificate, or transcript that displays the licensee's name, topic covered, date(s) of training, and hours of credit earned.

(4) Multiple instances or occurrences of a continuing education activity may not be claimed for the same renewal period.

(f) Licensees must obtain at least fifty percent of their continuing education hours from one or more of the following providers:

(1) an international, national, regional, state, or local association of medical, mental, or behavioral health professionals;

(2) public school districts, charter schools, or education service centers;

(3) city, county, state, or federal governmental entities;

(4) an institution of higher education accredited by a regional accrediting organization recognized by the Council for Higher Education Accreditation, the Texas Higher Education Coordinating Board, or the United States Department of Education;

(5) religious or charitable organizations devoted to improving the mental or behavioral health of individuals;

(6) a graduate-level licensee with supervisor status; or

(7) any provider approved or endorsed by a provider listed herein.

(g) Licensees shall receive credit for continuing education activities according to the number of hours designated by the provider, or if no such designation, on a one-for-one basis with one credit hour for each hour spent in the continuing education activity.

(h) Notwithstanding subsection (f) of this section, licensees may claim continuing education credit for each of the following activities:

(1) Passage of the jurisprudence examination. Licensees who pass the jurisprudence examination may claim 1 hour of continuing education in ethics.

(2) Preparing and giving a presentation at a continuing education activity. The maximum number of hours that may be claimed for this activity is 5 hours.

(3) Authoring a book or peer reviewed article. The maximum number of hours that may be claimed for this activity is 5 hours.

(4) Teaching or attending a graduate level course. The maximum number of hours that may be claimed for this activity is 5 hours.

(5) Self-study. The maximum number of hours that may be claimed for this activity is 1 hour. Self-study is credit that is obtained from any type of activity that is performed by an individual licensee acting alone. Such activities include, but are not limited to, reading materials directly related to the practice of marriage and family therapy. Time spent individually viewing or listening to audio, video, digital, or print media as part of an organized continuing education activity, program, or offering from a third-party is not subject to this self-study limitation and may count as acceptable education under other parts of this rule.

(6) Successful completion of a training course on human trafficking prevention described by §116.002 of the Occupations Code. Licensees who complete this training may claim 1 hour of continuing education credit.

(i) The Council does not pre-evaluate or pre-approve continuing education providers or hours.

(j) Licensees shall maintain proof of continuing education compliance for a minimum of 3 years after the applicable renewal period.

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 September 1, 2022.

TRD-202203463

Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Effective date: September 21, 2022
Proposal publication date: April 22, 2022
For further information, please call: (512) 305-7706

♦ ♦ ♦

22 TAC §§801.263, 801.264, 801.266

The Texas Behavioral Health Executive Council adopts the repeal of §801.263, relating to Requirements for Continuing Education; §801.264, relating to Types of Acceptable Continuing Education; and §801.266, relating to Determination of Clock Hour Credits and Credit Hours Granted. The repeal of §§801.263, 801.264, and 801.266 are adopted without changes to the proposed text as published in the April 22, 2022, issue of the *Texas Register* (47 TexReg 2100) and will not be republished.

Reasoned Justification.

These rules are repealed because these same requirements have been added to new §801.261, pertaining to requirements for continuing education, where all licensee continuing education requirements have been consolidated.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The rule repeal is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule repeal pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

In accordance with §502.1515 of the Tex. Occ. Code the Texas State Board of Examiners of Marriage and Family Therapists previously voted and, by a majority, approved to propose the adoption this rule repeal to the Executive Council. The rule repeal is specifically authorized by §502.1515 of the Tex. Occ. Code which states the Board shall propose to the Executive Council rules regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice; continuing education requirements for license holders; and a schedule of sanctions for violations of this chapter or rules adopted under this chapter.

The Executive Council also adopts this rule repeal in compliance with §507.153 of the Tex. Occ. Code. The Executive Council may not propose and adopt a rule regarding the qualifications necessary to obtain a license; the scope of practice, standards of care, and ethical practice for a profession; continuing education requirements; or a schedule of sanctions unless the rule has been proposed by the applicable board for the profession. In this instance, the underlying board has proposed this rule repeal to the Executive Council. Therefore, the Executive Council has complied with Chapters 502 and 507 of the Texas Occupations Code and may adopt this rule repeal.

Lastly, the Executive Council also adopts this rule repeal under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 September 1, 2022.

TRD-202203464
Darrel D. Spinks
Executive Director
Texas State Board of Examiners of Marriage and Family Therapists
Effective date: September 21, 2022
Proposal publication date: April 22, 2022
For further information, please call: (512) 305-7706

♦ ♦ ♦

PART 39. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS

CHAPTER 851. TEXAS BOARD OF PROFESSIONAL GEOSCIENTISTS LICENSING AND ENFORCEMENT RULES

SUBCHAPTER B. P.G. LICENSING, FIRM REGISTRATION, AND GIT CERTIFICATION

22 TAC §851.22

The Texas Board of Professional Geoscientists (TBPG) adopts an amendment to 22 TAC §851.22 Waivers and Substitutions: Policy, Procedures, and Criteria.

This amendment is adopted with minor clarifying changes to the proposed text as published in the July 8, 2022, issue of the *Texas Register* (47 TexReg 3884) and will be republished.

The adopted amendment to 22 TAC §851.22(e) includes adding a new paragraph (8) that describes the eligibility requirements and procedures for waiving the Texas Geophysics Examination (TGE), a practice-level exam the board otherwise requires. The changes added at adoption clarify that the years of work and supervisory experience required for a waiver must be completed years.

No public comments were received regarding the proposal.

This amendment is authorized by the Texas Geoscience Practice Act, Texas Occupations Code §1002.151, which authorizes the Board to adopt and enforce all rules and regulations consistent with the Act as necessary for the performance of its duties, and the regulation of the practice of geoscience in this state.

§851.22. Waivers and Substitutions: Policy, Procedures, and Criteria.

(a) Introduction: The Texas Board of Professional Geoscientists is charged with the responsibility of issuing a license to engage in the public practice of geoscience in the state of Texas only to those individuals who meet the qualifications for licensure, as provided by Texas law. The successful completion of the required examination for the specific discipline is an essential element in the Professional Geoscientist licensure process. The Texas Geoscience Practice Act (TGPA) (Texas Occupations Code, Chapter 1002, §1002.259) provides that "Except for the payment of required fees, the board may waive any of the requirements for licensure by a two-thirds vote of the entire board if the applicant makes a written request and shows good cause and the board determines that the applicant is otherwise qualified for a license."

(1) An applicant for licensure as a Professional Geoscientist may request a waiver by submitting a copy of Form VI -"Request for Waiver of Licensing Requirement - Board Policy and Procedures," along with supporting documentation. Only an applicant for licensure may request a waiver. An applicant must have submitted a complete application, supporting documentation (such as transcripts and qualifying experience record), and applicable fees for a waiver request to be considered.

(2) Once a request for a waiver and all relevant documents and information supporting the request have been received, subject to scheduling logistics, the request will be placed on the next available meeting of the TBPG's Application Review and Continuing Education Committee.

(b) Guidance Policy: The following policy was developed by the TBPG Board and is intended to be guidance for the Application Review and Continuing Education Committee and the Board in consideration of a request for waiver. In accordance with TOC §1002.259, an approval of a waiver request requires a vote of two-thirds of the TBPG Appointed Board (6 affirmative votes), regardless of the number of Board members in attendance. A request for the substitution of experience for education (provided by TOC §1002.255(b)) requires a simple majority vote of a quorum of the TBPG Appointed Board to be approved.

(c) TBPG's Application Review and Continuing Education Committee Review: TBPG's Application Review and Continuing Education Committee will review the request and supporting documentation and recommend to the full TBPG Board to grant or not grant the requested waiver. An applicant should provide a written justification, along with supporting documentation. An applicant may also appear before the Committee and the full Board to provide testimony to support the request. All requests the Committee recommends for approval will be scheduled for review by the full Board. Requests the Committee does not recommend for approval will not be submitted to the full Board for review, unless the applicant requests review by the full Board.

(d) TBPG's Board Initial Review: TBPG Appointed Board will review requests the Committee recommends for approval and supporting documentation and will determine whether or not to approve the request (grant the requested waiver). An applicant whose request for a waiver or substitution was denied and who believes that there is additional information that was not available to the Board when it reviewed the request, may submit additional information to staff regarding the current application, along with a written request that the Board reconsider the request. If staff determines that new information has been submitted that may be relevant to the Board's review of an application/request, then staff will schedule the application/waiver request for reconsideration. In the review of a request to reconsider its decision on an application/waiver request, because new information has been submitted, the Board will first determine by a simple majority vote whether to reconsider the application/waiver request, based on whether relevant new information has been submitted. If the Board determines by vote that the new information warrants reconsideration of an application/waiver request, the Board will reconsider the waiver request, including all of the new information available at that time. An applicant may appear before the Board and present information related to the request. The Board will reconsider its decision on a waiver request only once.

(e) Examination Waiver Requirements and Criteria.

(1) For TBPG's Appointed Board to waive an examination, an applicant must:

(A) Meet all other qualifications for licensure (qualifying work experience, education, documentation relating to criminal, disciplinary, and civil litigation history);

(B) Meet the criteria in the policy for the specific examination that is the subject of the waiver request; and

(C) Have not failed the examination that is the subject of the waiver request.

(2) Work experience an applicant submits pursuant to the following examination waiver policies must meet the criteria for qualifying work experience under TBPG rule §851.23 regarding qualifying experience record.

(3) ASBOG® Fundamentals of Geology Examination Waiver. An applicant must have acquired one of the following combinations of education and work experience:

(A) B.S. and 15 years qualifying work experience;

(B) M.S. and 13 years qualifying work experience;

(C) Ph.D. and 10 years qualifying work experience.

(4) ASBOG® Practice of Geology Examination Waiver. An applicant must meet minimum criteria in either Generalized Practice Experience or Specialized Practice Experience.

(A) Generalized practice experience (must meet all four criteria):

(i) Completed twenty (20) years of geosciences work experience;

(ii) Completed ten (10) years of supervisory experience (three or more individuals under supervision);

(iii) Completed coursework in six of the eight following ASBOG® task domains:

(I) Field geology;

(II) Mineralogy, petrology, and geochemistry;

(III) Sedimentology, stratigraphy, and paleontology;

(IV) Geomorphology, surficial processes, and quaternary geology;

(V) Structure, tectonics, and seismology;

(VI) Hydrogeology;

(VII) Engineering geology;

(VIII) Economic geology and energy resources.

(iv) Demonstrate the ability to plan and conduct geosciences investigations considering public health, safety, and welfare.

(B) Specialized practice experience: The applicant demonstrates twenty years or more of specialized work history in only one or two of the ASBOG® task domains. One factor TBPG will consider is whether the examination is not relevant to, or largely beyond the scope of, the applicant's specialized experience and the applicant's intended field of practice.

(5) Council of Soil Science Examination (CSSE) - Fundamentals of Soil Science Waiver. An applicant must have acquired one of the following combinations of education and work experience:

(A) B.S. and 15 years qualified work experience;

(B) M.S. and 13 years of qualified work experience; or

(C) Ph.D. and 10 years of qualified work experience.

(6) Council of Soil Science Examination (CSSE) - Professional Practice examination. An applicant must meet minimum criteria in either Generalized practice experience or Specialized practice experience:

(A) Generalized practice experience (must meet all four criteria):

(i) Completed twenty (20) years of soil science work experience;

(ii) Completed ten (10) years of supervisory experience;

(iii) Completed coursework in six of the eight following CSSE Professional Practice Performance Objective (PPPO) domains:

(I) Soil chemistry;

(II) Soil mineralogy;

(III) Soil fertility and nutrient management;

(IV) Soil physics;

(V) Soil genesis and classification;

(VI) Soil morphology;

(VII) Soil biology and soil ecology; and

(VIII) Soil and land use management.

(iv) Demonstrate the ability to plan and conduct soil science investigations considering public health, safety, and welfare.

(B) Specialized practice experience: The applicant demonstrates twenty years or more of specialized work history in only one or two of the CSSE PPPO domains. One factor TBPG will consider is whether the examination is not relevant to, or largely beyond the scope of, the applicant's specialized experience and the applicant's intended field of practice.

(7) Texas Fundamentals of Geophysics Examination (TFGE). No waiver is available.

(8) Texas Geophysics Examination (TGE). An applicant must meet minimum criteria in either Generalized Practice Experience or Specialized Practice Experience.

(A) Generalized practice experience (must meet all four criteria):

(i) Completed twenty (20) years of geophysics work experience;

(ii) Completed ten (10) years of supervisory experience;

(iii) Completed coursework in six of the eight areas:

(I) Fundamentals of Geophysics;

(II) Geophysical Field Methods;

(III) Geophysical Signal Processing;

(IV) Exploration/Applied Geophysics;

(V) Engineering & Environmental Geophysics;

(VI) Hydrogeophysics;

(VII) Seismology; and

(VIII) Near-surface Geophysics: Magnetics, Electromagnetic, Gravity, Electrical Resistivity, Seismic.

(iv) Demonstrate the ability to plan and conduct geophysical surveys considering public health, safety, and welfare.

(B) Specialized practice experience: The applicant demonstrates twenty years or more of specialized work history in only one or two of the tasks domains. One factor TBPG will consider is whether the examination is not relevant to, or largely beyond the scope of, the applicant's specialized experience and the applicant's intended field of practice.

(f) Substitution of Work Experience for Educational Requirements. Before the Appointed Board considers an application for substitution of work experience for an education requirement, the applicant seeking approval of the substitution must meet all of the following minimum criteria:

(1) The applicant must pass, within three (3) attempts, the appropriate qualifying licensing examination (or a substantially similar examination), depending on the discipline in which the applicant seeks to be licensed, as follows:

(A) Geology discipline: both the Fundamentals and Practice of Geology examinations administered by ASBOG®;

(B) Geophysics discipline: the Texas Geophysics Examination (TGE); or

(C) Soil Science discipline: both the Fundamentals and Practice examinations administered by the Council of Soil Science Examiners (CSSE);

(2) The applicant must have at least 15 years of qualifying work experience;

(3) The applicant must demonstrate the following:

(A) Ability to work with others;

(B) Ability to apply scientific methods;

(C) Ability to solve problems;

(D) Honest and ethical behavior;

(E) Ability to communicate effectively; and

(F) Relevant continuing education activities that advance knowledge throughout the applicant's professional career.

(4) The applicant is highly encouraged to appear before the Application Review and Continuing Education Committee for presentation of qualifications.

(g) Waiver of Education Requirement - Generally. Before the Appointed Board considers an application for education waiver, the applicant seeking a waiver of the education requirement must demonstrate mastery of a minimum required knowledge base in geoscience by meeting the following criteria:

(1) The applicant must demonstrate both of the following:

(A) A four-year degree in a field of basic or applied science that includes at least 15 hours of courses in geosciences from an accredited institution of higher education or the equivalent of a total of at least 15 hours of courses in geoscience from an accredited institution of higher education and/or other educational sources, as determined by the Appointed Board;

(B) An established record of continuing education and workshop participation in geoscience fields; and

(C) The Appointed Board may also determine that an individual applicant has satisfactorily completed other equivalent educational requirements after reviewing the applicant's educational credentials.

(2) The applicant must have at least eight years of qualifying geoscience work experience;

(3) The applicant must pass the appropriate qualifying examination, depending on the discipline in which the applicant seeks to be licensed, as follows:

(A) Geology discipline: both the Fundamentals and Practice examinations administered by ASBOG®;

(B) Geophysics discipline: the Texas Geophysics Examination (TGE); or

(C) Soil Science discipline: both the Fundamentals and Practice examinations administered by the Council of Soil Science Examiners (CSSE).

(h) Education Waiver for License in Geology Discipline - Fundamentals. An individual who plans to apply for licensure as a Professional Geoscientist in the discipline of geology who does not fully meet the education requirement for licensure may take the ASBOG® Fundamentals of Geology examination as long as the applicant:

(1) Has submitted any other necessary forms, documents, and fees; and

(2) Has acknowledged that the Appointed Board must approve an education waiver request or approve the substitution of experience for education before the applicant may be licensed as a Professional Geoscientist and that the Appointed Board will not consider an education waiver or a request to substitute experience for education until after both the ASBOG® Fundamentals of Geology and Practice of Geology examinations have been passed.

(i) Education Waiver for License in Geology Discipline - Practice. An applicant for licensure as a Professional Geoscientist in the discipline of geology who does not fully meet the education requirement for licensure may take the ASBOG® Practice of Geology examination as long as the applicant:

(1) Meets or is within six months of meeting the qualifying experience requirement for licensure;

(2) Submits the qualifying work experience claimed (or has verified qualifying work experience claimed through an alternate means, as provided by TBPG rules);

(3) Has submitted a request for an education waiver or a substitution of experience for education;

(4) Has submitted any other necessary forms, documents, and fees; and

(5) Has acknowledged that the Appointed Board must approve the education waiver request or a request to substitute experience for education before the applicant may be licensed as a Professional Geoscientist and that the Appointed Board will not consider an education waiver or a request for substitution of experience for education until after both the ASBOG® Fundamentals of Geology and Practice of Geology examinations have been passed.

(j) Education Waiver for License in Geophysics Discipline. An applicant for licensure as a Professional Geoscientist in the discipline of geophysics who does not fully meet the education requirement for licensure may take the Texas Geophysics Examination as long as the applicant:

(1) Meets or is within six months of meeting the qualifying experience requirement for licensure;

(2) Submits the qualifying work experience claimed (or has verified qualifying work experience claimed through an alternate means, as provided by TBPG rules);

(3) Has submitted a request for an education waiver or a substitution of experience for education;

(4) Has submitted any other necessary forms, documents, and fees; and

(5) Has acknowledged that the Appointed Board must approve the education waiver request or a request to substitute experience for education before the applicant may be licensed as a Professional Geoscientist and that the Appointed Board will not consider an education waiver or a request for substitution of experience for education until after the Texas Geophysics Examination has been passed.

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 September 1, 2022.

TRD-202203474
Rene Truan
Executive Director
Texas Board of Professional Geologists
Effective date: September 21, 2022
Proposal publication date: July 8, 2022
For further information, please call: (512) 936-4428

♦ ♦ ♦

PART 41. TEXAS BEHAVIORAL HEALTH EXECUTIVE COUNCIL

CHAPTER 882. APPLICATIONS AND LICENSING

SUBCHAPTER A. LICENSE APPLICATIONS

22 TAC §882.2

The Texas Behavioral Health Executive Council adopts amended §882.2, relating to General Application File Requirements. Section 882.2 is adopted without changes to the

proposed text as published in the April 22, 2022, issue of the *Texas Register* (47 TexReg 2103) and will not be republished.

Reasoned Justification.

The adopted change is necessary to reflect the agency's ability to receive digitally certified self-query reports from the NPDB, rather than continuing to rely exclusively on self-query reports submitted by mail.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council also adopts this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 September 1, 2022.

TRD-202203465
Darrel D. Spinks
Executive Director
Texas Behavioral Health Executive Council
Effective date: September 21, 2022
Proposal publication date: April 22, 2022
For further information, please call: (512) 305-7706

♦ ♦ ♦

SUBCHAPTER B. LICENSE

22 TAC §882.22

The Texas Behavioral Health Executive Council adopts amended §882.22, relating to Reinstatement of a License. Section 882.22 is adopted without changes to the proposed text as published in the April 22, 2022, issue of the *Texas Register* (47 TexReg 2104) and will not be republished.

Reasoned Justification.

The adopted change is necessary to reflect the agency's ability to receive digitally certified self-query reports from the NPDB, rather than continuing to rely exclusively on self-query reports submitted by mail. The adopted change also clarifies that only a full license can be reinstated, and a transitory license used to obtain required experience for full licensure cannot.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council also adopts this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 September 1, 2022.

TRD-202203466
Darrel D. Spinks
Executive Director
Texas Behavioral Health Executive Council
Effective date: September 21, 2022
Proposal publication date: April 22, 2022
For further information, please call: (512) 305-7706

♦ ♦ ♦

SUBCHAPTER C. DISCIPLINARY GUIDELINES AND SCHEDULE OF SANCTIONS

22 TAC §884.20

The Texas Behavioral Health Executive Council adopts amended §884.20, relating to Disciplinary Guidelines and General Schedule of Sanctions. Section 884.20 is adopted without changes to the proposed text as published in the April 22, 2022, issue of the *Texas Register* (47 TexReg 2105) and will not be republished.

Reasoned Justification.

The adopted amendment is necessary to correct a typographical error in subsection (a)(4) of the rule.

List of interested groups or associations against the rule.

None.

Summary of comments against the rule.

None.

List of interested groups or associations for the rule.

None.

Summary of comments for the rule.

None.

Agency Response.

None.

Statutory Authority.

The rule is adopted under Tex. Occ. Code, Title 3, Subtitle I, Chapter 507, which provides the Texas Behavioral Health Executive Council with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

Additionally, the Executive Council adopts this rule pursuant to the authority found in §507.152 of the Tex. Occ. Code which vests the Executive Council with the authority to adopt rules necessary to perform its duties and implement Chapter 507 of the Tex. Occ. Code.

The Executive Council also adopts this rule under the authority found in §2001.004 of the Tex. Gov't Code which requires state agencies to adopt rules of practice stating the nature and requirements of all available formal and informal procedures.

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 September 1, 2022.

TRD-202203468
Darrel D. Spinks
Executive Director
Texas Behavioral Health Executive Council
Effective date: September 21, 2022
Proposal publication date: April 22, 2022
For further information, please call: (512) 305-7706

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 Department of Agriculture

Title 4, Part 1

The Texas Department of Agriculture (the Department) files this notice of intent to review the rules in Texas Administrative Code, Title 4, Part 1, Chapter 29, Economic Development, Subchapters A, D, and E. Subchapter A, Economic Development Program, is comprised of §29.1 (Maintenance of Economic Development Program), §29.2 (Administration of the Program), and §29.3 (Staffing; Cooperation with Other Agencies). Subchapter D, Texas Rural Investment Fund Program, is comprised of §29.60 (Authority), §29.61 (Purpose), §29.62 (Definitions), §29.63 (Financial Assistance Available Under the Program), §29.64 (Administration), §29.65 (Evaluation of Projects), and §29.66 (Request for Proposals). Subchapter E, Rural Economic Development and Investment Program, is comprised of §29.70 (Authority), §29.71 (Purpose), §29.72 (Definitions), §29.73 (Eligible Entity), §29.74 (Financial Assistance Available Under the Program), §29.75 (Methods of Providing Financial Assistance), §29.76 (Segregation of Funds by Eligible Entity), and §29.77 (Request for Proposals).

This review is being conducted in accordance with the requirements of Texas Government Code §2001.039 (Agency Review of Existing Rules).

The Department will consider whether the initial factual, legal, and policy reasons for adopting each rule continue to exist and whether these rules should be repealed, readopted, or readopted with amendments.

Written comments pertaining to this rule review may be submitted by mail to Karen Reichek, Administrator for Trade & Business Development, at Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711-2847 or by email at Karen.Reichek@TexasAgriculture.gov. The deadline for comments is 30 days after publication of this notice in the *Texas Register.*

TRD-202203566
Skyler Shafer
Assistant General Counsel
Texas Department of Agriculture
Filed: September 7, 2022

♦ ♦ ♦

Texas Commission on Law Enforcement

Title 37, Part 7

The Texas Commission on Law Enforcement (TCOLE) submits this rule review plan in accordance with Government Code § 2001.039.

For administrative continuity and public convenience, TCOLE shall, when practicable, review all rules within a chapter during the chapter's assigned review period regardless of varying effective dates within the chapter.

Actions to amend, repeal, or adopt rules may begin independently of this schedule if required by legislative action, court decision, or other causes. TCOLE reserves the right to review a chapter as part of its routine rulemaking before or after its scheduled review date when deemed appropriate.

Fiscal Year 2022, September 2021

Chapter 211 Administration

Chapter 215 Training and Educational Providers

Chapter 217 Enrollment, Licensing, Appointment, and Separation

Chapter 218 Continuing Education

Chapter 219 Prelicensing, Reactivation, Tests, and Endorsements

Chapter 221 Proficiency Certificates

Chapter 223 Enforcement

Chapter 225 Specialized Licenses

Chapter 227 School Marshals

Chapter 229 Texas Peace Officers' Memorial

Fiscal Year 2024, September 2023

Chapters 211-29

Fiscal Year 2026, September 2025

Chapters 211-29

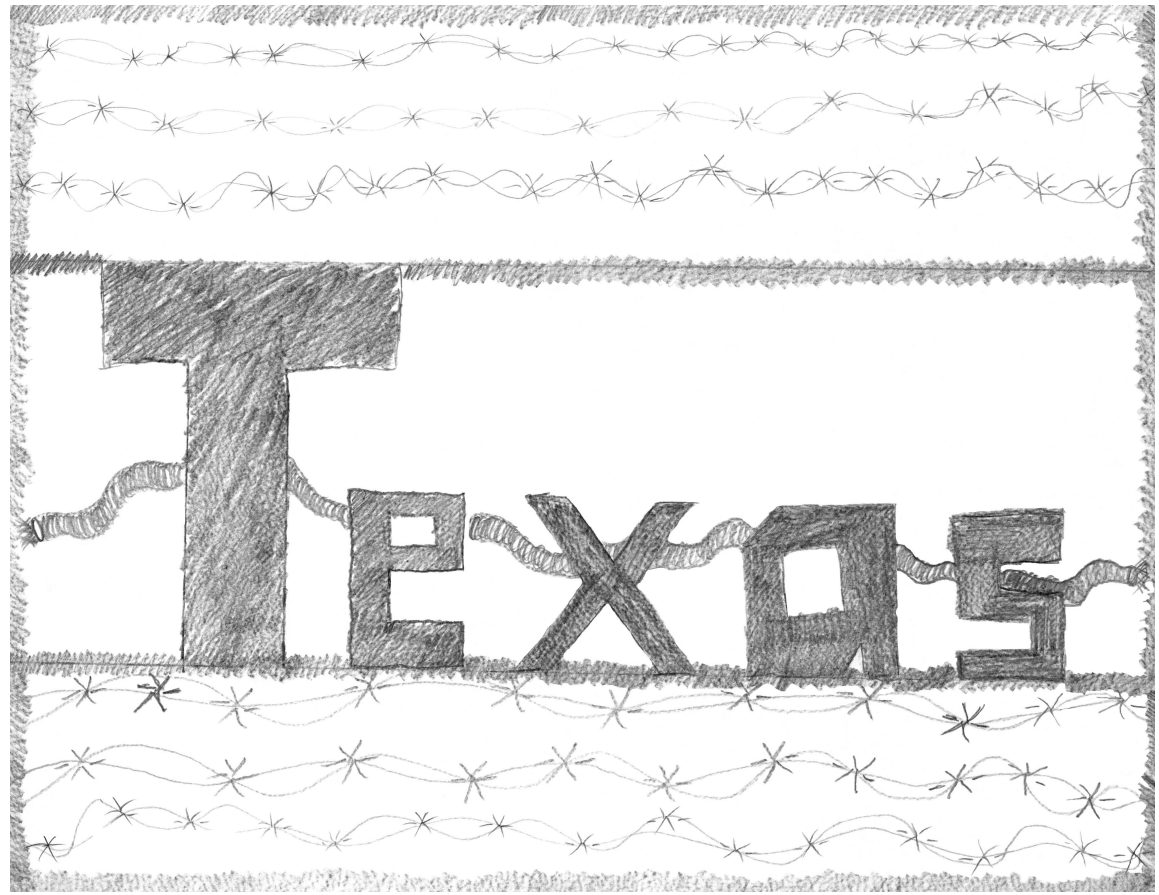
Fiscal Year 2028, September 2027

Chapters 211-29

Written comments may be submitted electronically to public.comment@tcole.texas.gov or to Mr. Kim Vickers, Executive Director, Texas Commission on Law Enforcement, 6330 U.S. 290 East, Austin, Texas 78723

TRD-202203473
John Beauchamp
General Counsel & Interim Executive Director
Texas Commission on Law Enforcement
Filed: September 1, 2022

♦ ♦ ♦


TEXAS

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: 16 TAC §3.66(g)(1)

Classification System

Violation Factors		Factor Value	Points Tally
Oil lease or gas well facility out of compliance with §3.66 produces an average of 5,000 Mcf or more of natural gas per day		4	
Oil lease or gas well facility out of compliance with §3.66 produces an average of 1,000 Mcf or more per day but less than 5,000 Mcf of natural gas per day		3	
Oil lease or gas well facility out of compliance with §3.66 produces an average of 500 Mcf or more per day but less than 1,000 Mcf of natural gas per day		2	
Oil lease or gas well facility out of compliance with §3.66 produces an average of 250 Mcf or more per day but less than 500 Mcf of natural gas per day		1	
Gas processing plant, underground gas storage, or gas pipeline facility out of compliance with §3.66 that resulting in a loss of processing, storage withdrawal, or transportation of 200 MMcf or more of natural gas per day		4	
Gas processing plant, underground gas storage, or gas pipeline facility out of compliance with §3.66 that results in a loss of processing, storage withdrawal, or transportation capacity 100 MMcf or more per day but less than 200 MMcf of natural gas per day		3	
Gas processing plant, underground gas storage, or gas pipeline facility out of compliance with §3.66 that results in a loss of processing, storage withdrawal, or transportation capacity of less than 100 MMcf of natural gas per day		2	
Actual Hazard to health, safety, or economic welfare of the public		5	
Potential hazard to health, safety, or economic welfare of the public		2	
Time out of compliance (calculated as days the operator fails to remedy a violation noted in a Commission notice of violation)	90 days or greater	4	
	60 days or more but less than 90 days	3	
	30 days or more but less than 60 days	2	
	5 days or more but less than 30 days	1	
Reckless conduct of operator		3	
Intentional conduct of operator		5	
Repeat violations based on operator's history of		3	

compliance		
Good faith effort to remedy violation	-2	
No effort to remedy violation	5	
During the weather emergency in which the facility's violation occurred, the operator had no reduction in the natural gas supplied to the Texas electricity supply chain	-3	
During the weather emergency in which the facility's violation occurred, the operator of a saltwater disposal well had no reduction in saltwater disposal capacity made available to Texas electricity supply chain facilities.	-3	
		Total
		Penalty maximum per violation
15 points or more = Class A violation		$More than 5,000[1]
10-14 points = Class B violation		$5,000
5-9 points = Class C violation		$4,000
1-4 points = Class D violation		$3,000

[1] Pursuant to Natural Resources Code §86.222, the required classification system shall provide that a penalty in an amount that exceeds $5,000 may be recovered only if the violation is included in the highest class of violations in the classification system.

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.

Alamo Area Metropolitan Planning Organization

AAMPO Audit Services Request for Proposals

The Alamo Area Metropolitan Planning Organization (AAMPO) is seeking proposals from qualified firms to provide Audit of Expenditures and Compliance Services (five fiscal years).

The Request for Proposals (RFP) may be obtained by downloading the RFP and attachments from AAMPO's website at *www.alamoareampo.org* or calling Sonia Jiménez, Deputy Director, at (210) 227-8651. Anyone wishing to submit a proposal must email it by 12:00 p.m. (CT), Friday, October 21, 2022 to the MPO office at aampo@alamoareampo.org.

Reimbursable funding for these services in the amount of $165,000, is contingent upon the availability of federal transportation planning funds.

TRD-202203538
Sonia Jimenez
Deputy Director
Alamo Area Metropolitan Planning Organization
Filed: September 7, 2022

♦ ♦ ♦

Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ 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 17, 2022.** 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 commission'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 17, 2022.** 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: A&G UNITED LLC dba MATLOCK C STORE; DOCKET NUMBER: 2022-0668-PST-E; IDENTIFIER: RN101533529; LOCATION: Arlington, Tarrant 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: $4,875; ENFORCEMENT COORDINATOR: Courtney Gooris, (817) 588-5863; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(2) COMPANY: Chilton Water Supply and Sewer Service Corporation; DOCKET NUMBER: 2022-0721-MWD-E; IDENTIFIER: RN102285814; LOCATION: Chilton, Falls County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010811001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $4,950; ENFORCEMENT COORDINATOR: Laura Draper, (254) 761-3012; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(3) COMPANY: City of Grand Saline; DOCKET NUMBER: 2022-0765-MWD-E; IDENTIFIER: RN102330081; LOCATION: Grand Saline, Van Zandt County; TYPE OF FACILITY: wastewater treatment facility; RULES VIOLATED: 30 TAC §305.125(1), TWC, §26.121(a)(1), and Texas Pollutant Discharge Elimination System Permit Number WQ0010179001, Effluent Limitations and Monitoring Requirements Number 1, by failing to comply with permitted effluent limitations; PENALTY: $10,500; ENFORCEMENT COORDINATOR: Ellen Ojeda, (512) 239-2581; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(4) COMPANY: City of Huxley; DOCKET NUMBER: 2022-0072-PWS-E; IDENTIFIER: RN101193803; LOCATION: Shelbyville, Shelby County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.115(f)(1) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes, based on the locational running annual average; PENALTY: $2,925; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: $2,925; ENFORCEMENT COORDINATOR: Ashley Lemke, (512) 239-1118; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(5) COMPANY: E. M. C. Water Supply Corporation; DOCKET NUMBER: 2022-0740-PWS-E; IDENTIFIER: RN101282556; LOCATION: Karnack, Marion County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.115(f)(1) and Texas Health and Safety Code, §341.0315(c), by failing to comply with the maximum contaminant level of 0.080 milligrams per liter for total trihalomethanes, based on the locational running annual average;

PENALTY: $1,425; ENFORCEMENT COORDINATOR: Claudia Bartley, (512) 239-1116; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(6) COMPANY: Gladstone Investments Group Incorporated; DOCKET NUMBER: 2021-1398-WQ-E; IDENTIFIER: RN111343414; LOCATION: Lindale, Smith County; TYPE OF FACILITY: residential 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; and TWC, §26.121(a)(1), by failing to prevent an unauthorized discharge of sediment into or adjacent to any water in the state; PENALTY: $5,625; ENFORCEMENT COORDINATOR: Harley Hobson, (512) 239-1337; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(7) COMPANY: H4 FAIRVIEW, L.P. dba Fairview Mobile Home Community; DOCKET NUMBER: 2022-0563-PWS-E; IDENTIFIER: RN101224251; LOCATION: Houston, Harris County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.45(b)(1)(A)(i) and Texas Health and Safety Code (THSC), §341.0315(c), by failing to provide a well capacity of 1.5 gallons per minute per connection; and 30 TAC §290.45(b)(1)(A)(ii) and THSC, §341.0315(c), by failing to provide a pressure tank capacity of 50 gallons per connection; PENALTY: $4,500; ENFORCEMENT COORDINATOR: Carlos Molina, (512) 239-2557; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(8) COMPANY: Hale County; DOCKET NUMBER: 2022-0714-PST-E; IDENTIFIER: RN101767416; LOCATION: Plainview, Hale County; TYPE OF FACILITY: fleet refueling facility; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and §334.54(c)(1) and TWC, §26.3475(c)(1), by failing to either empty the underground storage tank (UST) to less than or equal to 2.5 centimeters of product or monitor a temporarily out-of-service UST in a manner which will detect a release at a frequency of at least once every 30 days; and 30 TAC §334.54(e)(5), by failing to empty the UST system and perform a site check and any necessary corrective actions for a temporarily out-of-service UST system in order to meet financial assurance exemption requirements; PENALTY: $6,750; ENFORCEMENT COORDINATOR: Stephanie McCurley, (512) 239-2607; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(9) COMPANY: Miramar Brands Incorporated dba 7-Eleven Store 39047; DOCKET NUMBER: 2022-0569-PST-E; IDENTIFIER: RN101534360; LOCATION: Irving, Dallas 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 in a manner which will detect a release at a frequency of at least once every 30 days; PENALTY: $3,750; ENFORCEMENT COORDINATOR: Courtney Gooris, (817) 588-5863; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: SAI BUSINESS INVESTMENTS LLC dba Seago Pantry; DOCKET NUMBER: 2022-0724-PST-E; IDENTIFIER: RN101992329; LOCATION: Dallas, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.72, by failing to report a suspected release to the TCEQ within 24 hours of discovery; and 30 TAC §334.74, by failing to investigate and confirm all suspected releases of regulated substances requiring reporting under 30 TAC §334.72 within 30 days; PENALTY: $5,650; ENFORCEMENT COORDINATOR: Stephanie McCurley, (512) 239-2607; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: SP&P INVESTMENTS LLC; DOCKET NUMBER: 2022-0797-WQ-E; IDENTIFIER: 111478277; LOCATION: Winona, Smith County; TYPE OF FACILITY: operator; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit (stormwater); PENALTY: $875; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5865; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(12) COMPANY: SWWC Utilities, Incorporated; DOCKET NUMBER: 2022-0482-MLM-E; IDENTIFIER: RN101717791; LOCATION: Pflugerville, Travis County; TYPE OF FACILITY: wastewater treatment facility; 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 industrial activities; and 30 TAC §305.125(1) and (5) and Texas Pollutant Discharge Elimination System Permit Number WQ0011931001, Operational Requirements Number 1, by failing to properly operate and maintain the facility and all of its systems of collection, treatment, and disposal; PENALTY: $20,937; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5865; REGIONAL OFFICE: P.O. Box 13087, Austin, Texas 78711-3087, (512) 339-2929.

(13) COMPANY: U.S. Department of Veterans' Affairs; DOCKET NUMBER: 2021-0955-PST-E; IDENTIFIER: RN101377182; LOCATION: Big Spring, Howard County; TYPE OF FACILITY: emergency generator; RULES VIOLATED: 30 TAC §334.8(c)(4)(A)(vii) and (5)(B)(ii), by failing to renew a previously issued underground storage tank (UST) delivery certificate by submitting a properly completed UST registration and self-certification form at least 30 days before the expiration date; and 30 TAC §334.8(c)(5)(A)(i) and TWC, §26.3475(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate before accepting delivery of a regulated substance into the UST; PENALTY: $7,125; ENFORCEMENT COORDINATOR: John Fennell, (512) 239-2616; REGIONAL OFFICE: 9900 West IH-20, Suite 100, Midland, Texas 79706, (432) 570-1359.

(14) COMPANY: Wolcott and Seay Realty, LLC; DOCKET NUMBER: 2022-0649-PWS-E; IDENTIFIER: RN107739203; LOCATION: Lubbock, Lubbock County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.41(c)(3)(A), by failing to submit well completion data for review and approval prior to placing the facility's well into service; and 30 TAC §290.46(s)(1), by failing to calibrate the facility's well meter at least once every three years; PENALTY: $238; ENFORCEMENT COORDINATOR: Ecko Beggs, (915) 834-4968; REGIONAL OFFICE: 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(15) COMPANY: YAM UNITED INVESTMENT GROUP, LLC.; DOCKET NUMBER: 2022-0547-PWS-E; IDENTIFIER: RN101212785; LOCATION: Richmond, Fort Bend County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.39(j)(1)(A) and Texas Health and Safety Code, §341.0351, by failing to notify the Executive Director prior to making any significant change or addition where the change in the existing distribution system results in an increase or decrease in production, treatment, storage, or pressure maintenance capacity; and 30 TAC §290.41(c)(3)(A), by failing to submit well completion data for review and approval prior to placing the facility's Well Number 2 into service; PENALTY: $1,000; ENFORCEMENT COORDINATOR: America Ruiz, (512) 239-2601; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

TRD-202203499

Gitanjali Yadav
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: September 6, 2022

♦ ♦ ♦

Enforcement Orders

A default order was adopted regarding Maria F. Valles a.k.a. Maribel Valles, Docket No. 2019-0709-MSW-E on September 7, 2022 assessing $1,312 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting John S. Merculief II, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding KEANE LANDSCAPING, INC., Docket No. 2019-1129-MSW-E on September 7, 2022 assessing $46,878 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting John S. Merculief II, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default and shutdown order was adopted regarding QAAF INC dba The King mart, Docket No. 2020-0437-PST-E on September 7, 2022 assessing $18,000 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting David Keagle, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was adopted regarding Diane Murray and John Murray, Docket No. 2020-0688-MLM-E on September 7, 2022 assessing $2,638 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting David Keagle, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Emilio Chavez Cano, Docket No. 2020-0897-AGR-E on September 7, 2022 assessing $9,125 in administrative penalties with $1,825 deferred. Information concerning any aspect of this order may be obtained by contacting Alejandro Laje, 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 Strawn, Docket No. 2020-1498-MLM-E on September 7, 2022 assessing $32,408 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Samantha Duncan, 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 Copano Processing LLC, Docket No. 2021-0374-AIR-E on September 7, 2022 assessing $13,164 in administrative penalties with $2,632 deferred. Information concerning any aspect of this order may be obtained by contacting Kate Dacy, 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 Monarch Utilities I L.P., Docket No. 2021-0550-PWS-E on September 7, 2022 assessing $4,125 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Samantha Duncan Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

A default order was adopted regarding Sherry Kaufmann dba Caddo-Mesa Water Supply Corporation, Docket No. 2021-0732-PWS-E on September 7, 2022 assessing $900 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Megan L. Grace, Staff Attorney at (512) 239-3400, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Euless, Docket No. 2021-0773-WQ-E on September 7, 2022 assessing $4,875 in administrative penalties. Information concerning any aspect of this order may be obtained by contacting Cheryl Thompson, 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 Liberty Hill, Docket No. 2021-0806-EAQ-E on September 7, 2022 assessing $17,500 in administrative penalties with $3,500 deferred. Information concerning any aspect of this order may be obtained by contacting Alejandro Laje, 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 ARGOS USA LLC, Docket No. 2021-0877-WQ-E on September 7, 2022 assessing $10,350 in administrative penalties with $2,070 deferred. Information concerning any aspect of this order may be obtained by contacting Laura Draper, 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 SAAHEL, INC. dba Snappy Foods 18, Docket No. 2021-1042-PST-E on September 7, 2022 assessing $8,024 in administrative penalties with $1,604 deferred. Information concerning any aspect of this order may be obtained by contacting Karolyn Kent, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-202203609
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 7, 2022

♦ ♦ ♦

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 148826

APPLICATION. Silva Industries, LLC, 550 Leissner School Road, Seguin, Texas 78155-1795 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 148826 to authorize the modification of the existing permanent concrete batch plant and construction of a second permanent concrete batch plant. The facility is proposed to be located at 1100 Sweet Home Road, Seguin, Guadalupe County, Texas 78155. 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=29.489722&lng=-98.046944&zoom=13&type=r. This application was submitted to the TCEQ on August 18, 2022. 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 24, 2022.

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/. 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.** he 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:

Tuesday, October 11, 2022, at 6:00 p.m.

Holiday Inn Express & Suites Seguin

2801 Jay Road

Seguin, Texas 78155

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 San Antonio Regional Office, located at 14250 Judson Road, San Antonio, Texas 78233-4480, 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 Silva Industries, LLC, 550 Leissner School Road, Seguin, Texas 78155-1795, or by calling Mrs. Melissa Fitts, Vice President, Westward Environmental, Inc. at (830) 249-8284.

Notice Issuance Date: August 31, 2022

TRD-202203496
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 2, 2022

♦ ♦ ♦

Notice of District Petition

Notice issued August 31, 2022

TCEQ Internal Control No. D-08092022-016; Cayetano Development, L.L.C., on behalf of the State of Texas ("Petitioner") filed a petition for creation of Centex Drainage District (District) of Bastrop County with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states that: (1) the Petitioner is the owner of the majority of the land to be included in the proposed District; (2) there are no lienholders on the property to be included in the proposed District; (3) the proposed District will contain approximately 192.367 acres, more or less, located within Bastrop County, Texas; and (4) the proposed District is not within the extraterritorial jurisdiction of any city. The petition further states that the proposed District will maintain and operate water, wastewater, drainage, road and park and recreational facilities within the proposed District. It further states that the planned residential and commercial development of the area and the present and future inhabitants of the area will be benefited by the above-referenced work, which will promote the purity and sanitary condition of the State's waters and the public health and welfare of the community. According to the petition, the District will be operating and maintaining water, wastewater, drainage, detention, park, and recreation facilities and does not anticipate issuing bonds. It is estimated by the Petitioner, from the information available at this time, that the cost of said operations and maintenance (O&M) will be approximately $149,152 annually ($77,152 for O&M and $72,000 in administrative costs).

INFORMATION SECTION

To view the complete issued notice, view the notice on our website at www.tceq.texas.gov/agency/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the website, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our website at www.tceq.texas.gov.

TRD-202203435
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: August 31, 2022

♦ ♦ ♦

Notice of Opportunity to Comment on Agreed Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ 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 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 17, 2022.** 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 commission'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 A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the attorney designated for the AO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 17, 2022.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The designated attorneys are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075, provides that comments on an AO shall be submitted to the commission in **writing.**

(1) COMPANY: Blazing Bouncers LLC; DOCKET NUMBER: 2021-0718-PWS-E; TCEQ ID NUMBER: RN111257341; LOCATION: 11401 United States Highway 87 near Lubbock, Lubbock County; TYPE OF FACILITY: public water system (PWS); RULES VIOLATED: Texas Health and Safety Code, §341.035(a) and 30 TAC §290.39(e)(1) and (h)(1), by failing to submit plans and specifications to the executive director for review and approval prior to the construction of a new PWS; and 30 TAC §290.41(c)(3)(A), by failing to submit well completion data for review and approval prior to placing the facility's public drinking water well into service; PENALTY: $1,000; STAFF ATTORNEY: Megan Grace, Litigation, MC 175, (512) 239-3334; REGIONAL OFFICE: Lubbock Regional Office, 5012 50th Street, Suite 100, Lubbock, Texas 79414-3426, (806) 796-7092.

(2) COMPANY: GULF COAST RAIL SERVICE, INC.; DOCKET NUMBER: 2020-0564-MSW-E; TCEQ ID NUMBER: RN110477528; LOCATION: 1301 West Front Street, Orange, Orange County; TYPE OF FACILITY: locomotive maintenance and repair shop; RULES VIOLATED: 30 TAC §330.15(a), by causing, suffering, allowing, or permitting the unauthorized disposal of municipal solid waste; 30 TAC §324.6 and 40 Code of Federal Regulations(CFR) §279.22(c)(1), by failing to mark or clearly label used oil storage containers with the words "Used Oil"; and 30 TAC §324.15 and 40 CFR §279.22(d), by failing to clean up and properly manage a release of used oil to the environment; PENALTY: $1,750; STAFF ATTORNEY: Cynthia Sirois, Litigation, MC 175, (512) 239-3392; REGIONAL OFFICE: Beaumont Regional Office, 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(3) COMPANY: Gulshan Investments Inc dba Fast Trip; DOCKET NUMBER: 2021-1146-PST-E; TCEQ ID NUMBER: RN102353620; LOCATION: 8014 Jones Maltsberger Road, San Antonio, Bexar County; TYPE OF FACILITY: underground storage tank (UST) system and a convenience store with retail sales of gasoline; RULES VIOLATED: TWC, §26.3475(c)(1) and 30 TAC §334.50(b)(1)(A), by failing to monitor the USTs for releases in a manner which will detect a release at a frequency of at least once every 30 days; PENALTY: $4,500; STAFF ATTORNEY: Jennifer Peltier, Litigation, MC 175, (512) 239-0544; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(4) COMPANY: Leslie D. Turner and Roger Glass; DOCKET NUMBER: 2020-0137-WR-E; TCEQ ID NUMBER: RN110777588; LOCATION: approximately 0.5 river miles upstream of the intersection of the North Concho River and Post Oak Road, 2.5 miles northwest of Carlsbad, Tom Green County; TYPE OF FACILITY: property with an impoundment; RULES VIOLATED: TWC, §11.121 and 30 TAC §297.11 and §297.21(c), by failing to obtain authorization to divert, store, impound, take or use state water; PENALTY: $500; STAFF ATTORNEY: James Sallans, Litigation, MC 175, (512) 239-2053; REGIONAL OFFICE: San Angelo Regional Office, 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

TRD-202203510
Gitanjali Yadav
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: September 6, 2022

♦ ♦ ♦

Notice of Opportunity to Comment on Default Orders of Administrative Enforcement Actions

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Default Orders (DOs). The commission staff proposes a DO when the staff has sent the Executive Director's Preliminary Report and Petition (EDPRP) to an entity outlining the alleged violations; the proposed penalty; the proposed technical requirements necessary to bring the entity back into compliance; and the entity fails to request a hearing on the matter within 20 days of its receipt of the EDPRP or requests a hearing and fails to participate at the hearing. Similar to the procedure followed with respect to Agreed Orders entered into by the executive director of the commission, in accordance with Texas Water Code (TWC), §7.075, this notice of the proposed order and the opportunity to comment is 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 17, 2022.** The commission will consider any written comments received, and the commission may withdraw or withhold approval of a DO if a comment discloses facts or considerations that indicate that consent to the proposed DO is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission'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 DO is not required to be published if those changes are made in response to written comments.

A copy of each proposed DO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building A, 3rd Floor, Austin, Texas 78753, (512) 239-3400 and at the applicable regional office listed as follows. Written comments about the DO should be sent to the attorney designated for the DO at the commission's central office at P.O. Box 13087, MC 175, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on October 17, 2022.** Comments may also be sent by facsimile machine to the attorney at (512) 239-3434. The commission's attorneys are available to discuss the DOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075, provides that comments on the DOs shall be submitted to the commission in **writing.**

(1) COMPANY: Andrew William Nelson dba Drew's Drip Irrigation and Horticulture Services; DOCKET NUMBER: 2021-1255-LII-E; TCEQ ID NUMBER: RN110818796; LOCATION: 17114 Fawn Crossing Drive, San Antonio, Bexar County; TYPE OF FACILITY: landscape irrigation business; RULES VIOLATED: TWC, §37.003, Texas Occupations Code, §1903.251, and 30 TAC §30.5(a), by failing to hold an irrigator license prior to selling, designing, installing, maintaining, altering, repairing, servicing, or providing consulting services relating to an irrigation system, or connecting an irrigation system to any water supply; PENALTY: $944; STAFF ATTORNEY: Cynthia Sirois, Litigation, MC 175, (512) 239-3392; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: Ruiz and Forsh JV LLC; DOCKET NUMBER: 2020-0851-AIR-E; TCEQ ID NUMBER: RN110491362; LOCATION: 6210 Northwest Loop 410, San Antonio, Bexar County; TYPE OF FACILITY: autobody repair and refinishing shop; RULES VIOLATED: Texas Health and Safety Code, §382.0518(a) and §382.085(b) and 30 TAC §116.110(a), by failing to obtain authorization prior to constructing or modifying a source of air contaminants; PENALTY: $1,250; STAFF ATTORNEY: Cynthia Sirois, Litigation, MC 175, (512) 239-3392; REGIONAL OFFICE: San Antonio Regional Office, 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-202203511
Gitanjali Yadav
Deputy Director, Litigation
Texas Commission on Environmental Quality
Filed: September 6, 2022

♦ ♦ ♦

Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of A S K C-STORES, INC. dba AMIGO MART: SOAH Docket No. 582-22-08384; TCEQ Docket No. 2020-0255-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. - September 22, 2022

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 First Amended Report and Petition mailed November 3, 2021 concerning assessing administrative penalties against and requiring certain actions of A S K C-STORES, INC. dba AMIGO MART, for violations in Galveston County, Texas, of: Texas Water Code §26.3475(c)(1) and (d), and 30 Texas Administrative Code §334.49(a)(1), and §334.50(b)(1)(A) and (d)(1)(B)(ii).

The hearing will allow A S K C-STORES, INC. dba AMIGO MART, 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 A S K C-STORES, INC. dba AMIGO MART, 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 A S K C-STORES, INC. dba AMIGO MART 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 First Amended Report and Petition, attached hereto and incorporated herein for all purposes.** A S K C-STORES, INC. dba AMIGO MART, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Texas Water Code §7.054 and chs. 7 and 26, and 30 Texas Administrative Code chs. 70 and 334; Texas 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 John S. Merculief II, Staff Attorney, Texas Commission on Environmental 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 **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**, 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: August 24, 2022

TRD-202203485

Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 2, 2022

♦ ♦ ♦

Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of Donald R. Cole dba Blue Ridge Water System and Susan E. Cole dba Blue Ridge Water System: SOAH Docket No. 582-22-08383; TCEQ Docket No. 2020-1508-PWS-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. - September 22, 2022

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 January 31, 2022 concerning assessing administrative penalties against and requiring certain actions of Donald R. Cole dba Blue Ridge Water System and Susan E. Cole dba Blue Ridge Water System, for violations in Parker County, Texas, of: Texas Water Code §5.702; 30 Texas Administrative Code §§290.51(a)(6), 290.106(e), 290.107(e), and 290.122(c)(2)(A) and (f); and TCEQ Agreed Order Docket No. 2018-0876-PWS-E, Ordering Provision No. 2.a.iii.

The hearing will allow Donald R. Cole dba Blue Ridge Water System and Susan E. Cole dba Blue Ridge Water System, 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 Donald R. Cole dba Blue Ridge Water System and Susan E. Cole dba Blue Ridge Water System, 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 Donald R. Cole dba Blue Ridge Water System and Susan E. Cole dba Blue Ridge Water System 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.** Donald R. Cole dba Blue Ridge Water System and Susan E. Cole dba Blue Ridge Water System, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Texas Water Code ch. 5, Texas Health & Safety Code ch. 341, and 30 Texas Administrative Code chs. 70 and 290; Texas 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 John S. Merculief II, Staff Attorney, Texas Commission on Environmental 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 **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**, 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: August 24, 2022

TRD-202203486
Laurie Gharis
Chief Clerk
Texas Commission on Environmental Quality
Filed: September 2, 2022

♦ ♦ ♦

Notice of a Public Meeting and a Proposed Renewal with Amendment of General Permit TXR150000 Authorizing the Discourse of Stormwater Associated with Construction Activities

The Texas Commission on Environmental Quality (TCEQ or commission) is proposing to renew and amend the Texas Pollutant Discharge Elimination System General Permit TXR150000. This general permit authorizes the discharge of stormwater and certain non-stormwater discharges from construction activities into or adjacent to surface water in the state. The proposed general permit applies to the entire state of Texas. General permits are authorized by Texas Water Code, §26.040.

PROPOSED GENERAL PERMIT. The executive director (ED) has prepared a proposed general permit renewal with amendments to the existing general permit that authorizes the discharge of stormwater and certain types of non-stormwater from small construction sites (one acre to less than five acres) and large construction sites (five acres or larger) into or adjacent to surface water in the state. The proposed changes to the general permit are described in the fact sheet. No significant degradation of high-quality waters is expected and existing uses will be maintained and protected.

The ED proposes to require certain dischargers to submit a Notice of Intent (NOI) to obtain authorization to discharge. The proposed general permit also specifies when permit coverage can be obtained without submitting a NOI, when a waiver from permit coverage may be obtained, and when permit coverage under a separate individual TPDES

permit must be obtained. This general permit would also authorize the discharge of stormwater from industrial activities at construction sites that directly support the construction activity and are located at, adjacent to, or in close proximity to the permitted construction site.

The ED has reviewed this action for consistency with the goals and policies of the Texas Coastal Management Program (CMP), according to General Land Office regulations, and has determined that the action is consistent with applicable CMP goals and policies.

On the date that this notice is published, a copy of the proposed general permit and fact sheet will be available for a minimum of 30 days for viewing and copying at the TCEQ Office of the Chief Clerk located at the TCEQ Austin office, at 12100 Park 35 Circle, Building F. These documents will also be available at the TCEQ's 16 regional offices and on the TCEQ website at *https://www.tceq.texas.gov/permitting/wastewater/general/index.html.*

PUBLIC COMMENT AND PUBLIC MEETING. You may submit public comments about this proposed general permit in writing or orally at the public meeting held by the TCEQ. The purpose of a public meeting is to provide the opportunity to submit written or oral comment or to ask questions about the proposed general permit. A public meeting is not a contested case hearing.

The public meeting will be held at **1:30 p.m., October 17, 2022**, in TCEQ's complex at 12100 Park 35 Circle, Building E, Room 201S, Austin, Texas.

Written public comments must be received by the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087 or electronically at *https://www14.tceq.texas.gov/epic/eComment/* within 30 days from the date this notice is published.

APPROVAL PROCESS. After the comment period, the ED will consider all the public comments and prepare a written response. The response will be filed with the TCEQ Office of the Chief Clerk at least 10 days before the scheduled commission meeting when the commission will consider approval of the general permit. The commission will consider all public comment in making its decision and will either adopt the executive director's response or prepare its own response. The commission will issue its written response on the general permit at the same time the commission issues or denies the general permit. A copy of any issued general permit and response to comments will be made available to the public for inspection at the agency's Austin office and website. A notice of the commissioners' action on the proposed general permit and a copy of its response to comments will be mailed to each person who submitted a comment or requested to be on the mailing list. Also, a notice of the commission's action on the proposed general permit with a weblink to the response to comments will be published in the *Texas Register.*

MAILING LISTS. In addition to submitting public comments, you may ask to be placed on a mailing list to receive future public notices mailed by the TCEQ Office of the Chief Clerk. You may request to be added to: 1) the mailing list for this specific general permit; 2) the permanent mailing list for a specific county; or 3) both. Clearly specify the mailing lists to which you wish to be added and send your request to the TCEQ Office of the Chief Clerk at the address previously mentioned. Unless you otherwise specify, you will be included only on the mailing list for this specific general permit.

INFORMATION. If you need more information about this proposed general permit or the permitting process, please call the TCEQ Public Education Program, toll free, at 1 (800) 687-4040. General information about the TCEQ can be found at our website at: *https://www.tceq.texas.gov.*

Further information may also be obtained by calling the Stormwater Team, TCEQ Water Quality Division, at (512) 239-4671.

Si desea información en español, puede llamar 1 (800) 687-4040.

TRD-202203500
Charmaine Backens
Deputy Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: September 6, 2022

♦ ♦ ♦

General Land Office

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 *Federal Register* pp. 1439 - 1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of July 7, 2022 to September 2, 2022. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period extends 30 days from the date published on the Texas General Land Office web site. The notice was published on the web site on Friday, September 9, 2022. The public comment period for this project will close at 5:00 p.m. on Sunday, October 9, 2022.

FEDERAL AGENCY ACTIONS:

Applicant: City of League City

Location: The project site is located in Magnolia Creek and Cedar Gully, west of Interstate 45 and south of Main Street, in League City, Galveston County, Texas.

Latitude & Longitude (NAD 83): 29.478651, -95.148884

Project Description: The applicant proposes to discharge dredged or fill material into a total of 7,361 linear feet of streams (1.72 acres), 4.22 acres of emergent wetlands and 0.1 acre of open water. This project proposes modifications to Magnolia Creek, Cedar Gully, and three existing detention basins. The tributaries will be regraded and resized to accommodate for NOAA Atlas 14 rainfall data. The resizing will help ensure that drainage into the system from residential subdivisions (Westover Park, Countryside, Magnolia Creek, Rustic Oaks, and Jensen Colony) is meeting design standards and does not result in structural flooding within the neighborhoods. De-snagging of the waterways will also occur with this work. Another aspect of the project is correcting failed erosion control structures and stabilizing side-slopes. These corrections will increase long-term channel stability, reduce long-term maintenance costs, and maintain flood control function of the channels. The project will modify stormwater outlets in the Magnolia Creek Subdivision to improve conveyance to the channel. The existing culvert at the Summer Place crossing of Magnolia Creek will also be modified into a staged culvert opening by placing multiple barrels at different elevations. The project proposes impacts to a detention basin.

Type of Application: U.S. Army Corps of Engineers permit application # SWG-2022-00077. This application will be reviewed pursuant to Section 404 of the Clean Water Act. Note: The consistency review for this project may be conducted by the Texas Commission on Envi-

ronmental Quality as part of its certification under §401 of the Clean Water Act.

CMP Project No: 22-1345-F1

Applicant: Entergy Services LLC, OBO Entergy Texas, Inc.

Location: The project site is located in wetlands adjacent to the Neches River, at 1000 Powerhouse Road, in Orange, Orange County, Texas.

Latitude & Longitude (NAD 83): 30.024432, -93.872987

Project Description: The applicant proposes to permanently discharge approximately 20,848 cubic yards of dredged or fill material into 1.81 acres of wetlands and 0.002 acre of other waters and temporarily discharge dredged or fill material into 0.95 acres of wetlands and 0.002 acre of other waters for the purpose of constructing the Orange County Advanced Power Station. This project includes construction of a power generating facility, administrative building, transmission line, substation and switchyard modifications, re-routing existing transmission line infrastructure, development of a new outfall ditch and outfall structure, constructing/improving new and existing access road(s), and construction of laydown areas. This project intends to utilize an existing boat ramp and barge dock.

Type of Application: U.S. Army Corps of Engineers permit application # SWG-2020-00266. This application will be reviewed pursuant to Section 404 of the Clean Water Act. Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality as part of its certification under §401 of the Clean Water Act.

CMP Project No: 22-1346-F1

Further information on the applications listed above, including a copy of the consistency certifications or consistency determinations for inspection, may be obtained from the Texas General Land Office Public Information Officer at 1700 N. Congress Avenue, Austin, Texas 78701, or via email at pialegal@glo.texas.gov. Comments should be sent to the Texas General Land Office Coastal Management Program Coordinator at the above address or via email at federal.consistency@glo.texas.gov.

TRD-202203509
Mark Havens
Chief Clerk, Deputy Land Commissioner
General Land Office
Filed: September 6, 2022

♦ ♦ ♦

Texas Health and Human Services Commission

Public Notice: Texas State Plan Amendment

The Texas Health and Human Services Commission (HHSC) announces its intent to submit transmittal number 22-0027 to the Texas State Plan for Medical Assistance, under Title XIX of the Social Security Act.

Senate Bill (S.B.) 1921, 87th Texas Legislature, Regular Session, 2021, requires the Texas Health and Human Services Commission (HHSC) to provide fee-for-service (FFS) Medicaid reimbursement to qualified public and private providers of behavioral health services. Section 1915(g)(1) of the Social Security Act is currently invoked to limit the providers of targeted case management services to local mental health authority and local behavioral health authority (LMHA/LBHA: public providers). The proposed amendment would remove limitations on FFS reimbursement for non-LMHA/non-LBHA (private providers) providers of mental health targeted case management. An amendment to the state plan provisions regarding state plan rehabilitative services is not needed because the state plan currently allows public and private providers to be reimbursed for mental health rehabilitative services. The proposed amendment is effective September 1, 2022.

Texas Medicaid already reimburses public providers of targeted case management services through the FFS delivery model. Allowing private providers to also be reimbursed via FFS for these services would likely only shift utilization between the public and private providers. A significant increase in utilization is not anticipated because the LMHA/LBHA already provides these services. Therefore, the fiscal impact for this SPA would likely be insignificant.

Copy of Proposed Amendment - To obtain copies of the proposed amendment, interested parties may contact Shae James, State Plan Coordinator, by mail at the Health and Human Services Commission, PO Box 13247, Mail Code H-600, Austin, Texas 78711; by telephone at (512) 438-2264; by facsimile at (512) 730-7472; or by email at Medicaid_Chip_SPA_Inquiries@hhsc.state.tx.us. Copies of the proposal will also be made available for public review at the local offices of the Texas Health and Human Services Commission.

Written Comments - Written comments about the proposed amendment and/or requests to review comments may be sent by U.S, mail, overnight mail special delivery mail, hand delivery, fax, or email:

U.S. Mail

Texas Health and Human Services Commission

Attention: Medical Benefits Office of Policy

Mail Code H-310 P.O. Box 149030

Austin, Texas 78756

Overnight Mail, special Deliver mail, or hand delivery

Texas Health and Human Services Commission

Attention: Medical Benefits Office of Policy

John H. Winters Building

Mail Code H-310

701 W. 51st St.

Austin, Texas 78751

Fax

Attention: Office of Policy at (512) 730-7474

Email

MedicaidBenefitRequest@hhsc.state.tx.us

Preferred Communication - During the current state of disaster due to COVID-19, physical forms of communication are checked with less frequency than normal business operations. For the quickest response, and to help curb the possible transmission of infection, please use email or phone if possible for communication with HHSC related to this state plan amendment.

TRD-202203456
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: September 1, 2022

♦ ♦ ♦

Public Notice - YES Waiver April 1, 2023 Renewal

The Texas Health and Human Services Commission (HHSC) is submitting a request to the Centers for Medicare & Medicaid Services (CMS) for the renewal of the waiver application for the Youth Empowerment

Services (YES) Program. HHSC administers the YES Program under the authority of Section 1915(c) of the Social Security Act. CMS has approved the YES waiver application through March 31, 2023. The proposed effective date for the renewal is April 1, 2023.

The YES Program is designed to provide home and community-based services to children and youth with serious emotional disturbances and their families, with a goal of reducing or preventing children's inpatient psychiatric treatment and the consequent removal from their families. The program currently serves eligible children who are at least three years of age and under 19 years of age.

The renewal request proposes to make the following changes:

Corrects acronyms, unit names, references to the Department of Family and Protective Services (DFPS) to HHSC where applicable, and terminology to ensure accurate terms are used.

Updates the unduplicated number of participants, reserve capacity group numbers, as well as the service projections, and projections for annual average per capita Medicaid costs for all non-waiver institutional services (Factor G), and other Medicaid costs for the institutional population (Factor G') for all five waiver years in Appendices B, and J.

Revises Texas Administrative Code (TAC) references, based on updated titles and chapters.

Appendix A

Provides information about the process the State uses to discover and identify problems and the methods and strategies HHSC uses to resolve performance measure issues in a timely manner including internal conversations, action memos and plans of correction as remedies.

Adds the following Administrative Authority Performance Measure:

A.a.1.Number and percent of applicants on the YES waiver inquiry list offered an assessment for eligibility on a first-come first-served basis by local mental health authorities and local behavioral authorities. N: Number of applicants on the YES waiver inquiry list offered an assessment for eligibility on a first-come first-served basis by local mental health authorities and local behavioral authorities. D: Number of waiver applicants assessed.

Appendix B

Clarifies YES participants are eligible to receive services until the day before their 19th birthday.

Clarifies in the "Method of Implementation of the Individual Cost Limit" section, that a recommendation may be made for the waiver participant to reside in a more restrictive setting if the waiver participant is determined to be a danger to self or others, and adequate safety cannot be assured in the community.

Updates the unduplicated number of participants and reserved capacity numbers for all five waiver years.

Revises the "Children and adolescents at imminent risk of relinquishment to state conservatorships" target group, to include individuals on a waiting list for inpatient psychiatric or residential care or those in Department of Family and Protective Services (DFPS) conservatorship.

Revises the clinical eligibility expiration from 30 days to 45 days to align with the existing YES waiver policy.

Performance measures data aggregation revised:

Regarding performance measure B.a.1, the frequency of the data aggregation and analysis was changed from annually to quarterly and annually.

Regarding performance measure B.c.1., the frequency of the data aggregation and analysis was changed from annually to continuously and ongoing.

Deletes Performance measure B.b.1, set forth below, based on guidance from the Centers for Medicare and Medicaid Services (CMS) that this measure is no longer required for reporting.

B.b.1. Number and percent of waiver participants who re-enroll and receive a level of care re-evaluation prior to the expiration of their last level of care. N: Number of reviewed waiver participants who re-enroll and receive a level of care re-evaluation prior to the expiration of their last level of care. D: Number of re-enrolled waiver participants reviewed during the review period.

Clarifies in the "methods for remediation/fixing individual problems" section that HHSC approves level of care (clinical eligibility) through the Clinical Management for Behavioral Health Services (CMBHS) system.

Appendix C

Clarifies that respite may be provided by a qualified individual.

Clarifies existing language for supported employment that the service is not available to individuals under a program funded under section 110 of the Rehabilitation Act of 1973.

Clarifies that waiver provider agencies are responsible for reviewing the qualifications of a sample and not all employees and subcontractors.

Removes "By contrast, Community Living Supports consists of clinical skills training provided by a professional licensed clinician" in the "Family Supports service" definition. Also, under "other standards," removes the cumulative year of receiving mental health community services for a mental health disorder.

Clarifies existing language for supported employment that the service is not available to individuals under a program funded under section 110 of the Rehabilitation Act of 1973.

Adds additional criteria that allows for greater flexibility in the "other standards" for Community Living Supports (CLS) service as it relates to the bachelor's degree field of study and masters field of study to allow "or equivalent area of study in the field of mental health or social services."

Removes "Systems of care and wraparound training within six months of hire," for the paraprofessional services as there is not a specific systems of care training requirement to complete the wraparound training for every service provider during orientation, this will align with current policy.

Revises the specialized therapies licensure criteria to include provisional interns under the supervision of a licensed clinician.

Performance measures data aggregation revised:

Regarding performance measure C.a.3. the frequency of the data aggregation and analysis was changed to quarterly, and the frequency of data collection was changed to annually.

Clarifies subsection (ii) additional information regarding the strategies employed by HHSC to discover/identify problems/issues within the waiver to include: For the sub-assurance, "the State monitors non-licensed/non-certified providers to assure adherence to waiver requirements." There is no performance measure for the sub-assurance since the YES waiver does not utilize non-licensed or non-certified provider agencies.

Removes reference to the Department of Aging and Disability Services (DADS) in the "limits on sets of services" section.

Appendix D

Adds language to "Service Plan Development" section to clarify that the level of care designation is based on the uniform assessment, a standardized tool.

Revises the "Process for Making Service Plan Subject to the Approval of the Medicaid Agency" section to include review of the service plan to include looking at the duration and location of the service. HHSC also updated the term, "Performance Improvement Plan (PIP)" to "Corrective Action Plan (CAP)."

Adds in the "Service Plan Implementation and Monitoring Section," a virtual option if clinically appropriate to allow the case manager to meet with the waiver participant virtually in addition to in person, to align with House Bill 4 recommendations.

Combines Performance measures D.a.2 and D.a.3 into the new D.a.2 below:

D.a.2. Number and percent of waiver participants with service plans that reflect the participant's assessed needs (including health and safety risk factors) and personal goals, either by the provision of waivers services or through other means. N: Number of waiver participants with service plans that reflect the participant's assessed needs (including health and safety risk factors) and personal goals, either by the provision of waiver services or through other means. D: Number of waiver participants reviewed.

Removes Performance measure D.a.3 set forth below:

D.a.3. Number and percent of waiver participants with service plans that reflect the assessed personal goals. N: Number of waiver participants' service plans that reflect the assessed personal goals. D: Number of waiver participants reviewed.

Removes Performance measure D.b.1. set forth below:

D.b.1. Number and percent of waiver participants' service plan (crisis and safety plan) developed during the first Child and Family Team meeting. N: Number of waiver participants' service plan (crisis and safety plan) developed during the first Child and Family Team meeting. D: Number of new waiver participants reviewed.

Removes Performance measure D.e.1, set forth below, because CMS no longer requires states to report on this measure.

D.e.1. Number and percent of waiver participants who are afforded choice between home and community-based services and institutional care. N: Number of waiver participants who are afforded choice between home and community-based services and institutional care. D: Number of waiver participants reviewed.

Performance measure revised:

Revises performance measure D.a.2. to read as follows: Number and percent of waiver participants with service plans that reflect the participant's assessed needs (including health and safety risk factors) and personal goals, either by the provision of waiver services or through other means. N: Number of waiver participants with service plans that reflect the participant's assessed needs (including health and safety risk factors) and personal goals, either by the provision of waiver services or through other means. D: Number of waiver participants reviewed. HHSC combined D.a.2 with D.a.3 to align with sub-assurance: Service plans address all participants assessed needs (including health and safety risk factors) and personal goals, either by the provision of waiver services or through other means).

Regarding performance measure D.c.1., the sampling approach was changed to less than 100% review and representative sample.

Revises performance measure D.d.1. to read as follows: Number and percent of waiver participants whose services are delivered according to the type, scope and amount specified in their service plans. N: Number of waiver participants whose services are delivered according to the type, scope and amount specified in their service plans. D: Number of waiver participants reviewed.

Performance measure added

Adds performance measure D.d.2. Number and percent of waiver participants whose services are delivered according to the frequency specified in their service plans. N: Number of waiver participants whose services are delivered according to the frequency specified in their service plans. D: Number of waiver participants reviewed.

Adds performance measure D.d.3. Number and percent of waiver participants whose services are delivered according to the duration specified in their service plans. N: Number of waiver participants whose services are delivered according to the duration specified in their service plans. D: Number of waiver participants reviewed.

Renumbers Performance measure D.e.2 to D.e.1 as set forth below:

D.e.1.Number and percent of waiver participants who are afforded choice between and among the home and community-based waiver services during service plan preparation. N: Number of waiver participants who are afforded choice between and among the home and community-based services during service plan preparation. D: Number of waiver participants reviewed.

Renumbers Performance measure D.e.4 to D.e.2 as set forth below:

D.e.2. Number and percent of waiver participants who are afforded choice of waiver provider agencies. N: Number of waiver participants who are afforded choice of waiver provider agencies. D: Number of waiver participants reviewed.

Appendix F

Revises "Opportunity to Request a Fair Hearing" section to clarify the existing process on how the individual (or his/her legal representative) is informed of the opportunity to request a fair hearing under 42 CFR Part 431, Subpart E. Specifies information in the notice(s) to reflect existing policy, that is used to offer individuals the opportunity to request a Fair Hearing.

Revises "State Grievance/Complaint System" section to clarify the existing process by stating that "the first step for the individual or legally authorized representative to submit a complaint regarding YES Waiver services is to contact the management of the organization providing the service." Also, the "State Grievance/Complaint System" section, clarifies the existing process by naming DFPS Statewide Intake as the agency for reporting allegations of abuse, neglect, and exploitation. If the allegation is regarding a YES waiver provider, then it is forwarded to HHSC Provider Investigations.

Appendix G

Updates "responsibility for review of and response to critical events or incidents" section to clarify existing policy pertaining to the critical incident categories.

Adds submission of a Critical Incident Report form to HHSC within 72 hours of case manager notification of an incident in Responsibility for Oversight of Critical Incidents and Events section.

Updates the "submission of critical incident report" section to state that the waiver provider agency must submit a critical incident report to HHSC summarizing the incident within 72 hours of the restraint.

Removes "If there is a revision to the service plan, it must be submitted to HHSC for approval with reasons for the change documented" in

"additional information" section as YES staff do not approve changes made to participant's crisis/safety plans.

Performance measures data aggregation and sampling approach revised:

Regarding performance measured G.a.1., the sampling approach was changed to less than 100% review and representative sample, Confidence Interval = Confidence interval: +/-5 Confidence level: 95%.

Regarding performance measured G.a.4., the sampling approach was changed to less than 100% review and representative sample, Confidence Interval = Confidence interval: +/-5 Confidence level: 95% and the frequency of data aggregation and analysis was changed to indicate quarterly in addition to annually.

Regarding performance measured G.a.5., the frequency of data aggregation and analysis was changed to indicate annually in addition to quarterly.

Regarding performance measured G.b.1., the frequency of data collection was changed from annually and monthly to monthly and frequency of data aggregation and analysis to include quarterly and annually.

Regarding performance measured G.c.1., the frequency of data aggregation and analysis was changed to include quarterly and annually.

Regarding performance measured G.d.1., the frequency of data aggregation and analysis was changed to include quarterly and annually.

Appendix H

Revises the term "Quality Oversight Plan" to "Quality Improvement Strategy."

Removes the checkbox for "monthly" in the "System Improvement Activities" section.

Appendix I

Updates "Financial Integrity and Accountability" section with local behavioral health authorities, entities subject to examination and audit by the Comptroller's Office.

Updates Electronic Visit Verification section language to comply with §1903(l) of the Social Security Act, as added by the 21st Century Cures Act, HHSC required YES program providers to use electronic visit verification (EVV). HHSC also updated the language about the automated matching process language with an EVV claims matching process and provided additional information about if providers fail to comply with EVV requirements, the progressive enforcement actions that may be taken.

Updates the unit's name "Rate Analysis" to "Provider Finance."

Performance measures frequency of data collection revised

Regarding performance measure I.a.2., the frequency of data collection was changed to include continuously and ongoing and to remove the annual requirement.

Regarding performance measure I.a.3., the frequency of data collection was changed from annual to continuously and ongoing.

Regarding performance measure I.b.1., revises the data source to align with updated unit name from "Rate Analysis" to "Provider Finance."

Appendix J

Updates the unduplicated number of participants, as well as the service projections, and projections for annual average per capita Medicaid costs for all non-waiver institutional services (Factor G) and other Medicaid costs for the institutional population (Factor G') for all five waiver years.

Quality Improvements

As notated in each section, HHSC identified the specific performance measure changes. Changing measures to come into compliance with CMS guidance, to make improvements to the measures, clarify language, revise language, and to add some new measures.

If you want to obtain a free copy of the proposed renewal or if you have questions, need additional information, or want to submit comments regarding this renewal, you may contact Jayasree Sankaran by U.S. mail, telephone, fax or email at the address and numbers listed below. Comments about the proposed waiver amendment request must be submitted to HHSC **by October 17, 2022.**

U.S. Mail

Texas Health and Human Services Commission

Attention: Jayasree Sankaran, Waiver Coordinator, Federal Coordination, Rules, and Committees

John H. Winters Building, East Tower

701 W. 51st Street

Mail Code: H-310

Austin, Texas 78751

Telephone

(512) 438-4331

Fax

(512) 323-1905 Attention: Jayasree Sankaran

Email

TX_Medicaid_Waivers@hhsc.state.tx.us.

The HHSC local offices will post this notice for 30 days.

The complete request for the renewal for the waiver can be found online on the HHSC website at https://hhs.texas.gov/laws-regulations/policies-rules/waivers.

TRD-202203575
Karen Ray
Chief Counsel
Texas Health and Human Services Commission
Filed: September 7, 2022

♦ ♦ ♦

Department of State Health Services

Licensing Actions for Radioactive Materials

LICENSING ACTIONS FOR RADIOACTIVE MATERIALS

During the first half of July 2022, the Department of State Health Services (Department) has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables (in alphabetical order by location). The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX [Texas]" indicates that the radioactive material may be used on a temporary basis at locations throughout the state.

In issuing new licenses and amending and renewing existing licenses, the Department's Radiation Section has determined that the applicant has complied with the licensing requirements in Title 25 Texas Administrative Code (TAC), Chapter 289, for the noted action. In granting termination of licenses, the Department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC, Chapter 289. In granting exemptions to the licensing requirements of Chapter 289, the Department has determined that the exemption is not prohibited by law and will not result in a significant risk to public health and safety and the environment.

A person affected by the actions published in this notice may request a hearing within 30 days of the publication date. A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. 25 TAC §289.205(b)(15); Health and Safety Code §401.003(15). Requests must be made in writing and should contain the words "hearing request," the name and address of the person affected by the agency action, the name and license number of the entity that is the subject of the hearing request, a brief statement of how the person is affected by the action what the requestor seeks as the outcome of the hearing, and the name and address of the attorney if the requestor is represented by an attorney. Send hearing requests by mail to: Hearing Request, Radioactive Material Licensing, MC 2835, PO Box 149347, Austin, Texas 78714-9347, or by fax to: (512) 206-3760, or by e-mail to: RAMlicensing@dshs.texas.gov.

NEW LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
THROUGHOUT TX	WICHITA FALLS CONSTRUCTION MATERIALS TESTING LLC	L07159	WICHITA FALLS	00	07/07/21

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
AMARILLO	CITY OF AMARILLO	L02320	AMARILLO	30	07/08/22
AUSTIN	ST DAVIDS HEALTHCARE PARTNERSHIP LP LLP DBA ST DAVIDS MEDICAL CENTER	L06335	AUSTIN	40	07/08/22
AUSTIN	ST DAVIDS HEART & VASCULAR PLLC DBA AUSTIN HEART	L04623	AUSTIN	102	07/06/22
AUSTIN	ARA ST DAVIDS IMAGING LP	L05862	AUSTIN	114	07/01/22
AUSTIN	AUSTIN RADIOLOGICAL ASSOCIATION	L00545	AUSTIN	240	07/06/22
BAYTOWN	COVESTRO LLC	L01577	BAYTOWN	73	07/13/22
COLLEGE STATION	GEOTEK CORING INC C/O TDI BROOKS INTERNATIONAL	L06850	COLLEGE STATION	2	07/11/22
CONROE	CHEVRON PHILLIPS CHEMICAL COMPANY LP	L04825	CONROE	23	07/08/22
DALLAS	RLS (USA) INC	L05529	DALLAS	58	07/06/22

AMENDMENTS TO EXISTING LICENSES ISSUED: (Continued)

DECATUR	DECATUR HOSPITAL AUTHORITY DBA WISE HEALTH SYSTEM	L02382	DECATUR	47	7/6/2022
DEER PARK	HEXION COATINGS AND COMPOSITES (US) INC	L05323	DEER PARK	13	07/14/22
EL PASO	TENET HOSPITALS LIMITED	L04758	EL PASO	36	07/05/22
FORT WORTH	BAYLOR ALL SAINTS MEDICAL CENTER DBA BAYLOR SCOTT & WHITE ALL SAINTS MEDICAL CENTER – FORT WORTH RADIOLOGY DEPARTMENT	L02212	FORT WORTH	118	07/08/22
GRAPEVINE	BAYLOR REGIONAL MEDICAL CENTER AT GRAPEVINE DBA BAYLOR SCOTT & WHITE MEDICAL CENTER GRAPEVINE	L03320	GRAPEVINE	44	07/01/22
HOUSTON	SOFIE CO	L06174	DALLAS	36	07/05/22
HOUSTON	CHOPRA IMAGING CENTER INC	L05566	HOUSTON	12	07/05/22
LUBBOCK	METHODIST CHILDRENS HOSPITAL DBA JOE ARRINGTON CANCER CENTER	L06903	LUBBOCK	07	07/01/22
LUBBOCK	METHODIST CHILDRENS HOSPITAL DBA JOE ARRINGTON CANCER CENTER	L06900	LUBBOCK	16	07/05/22

AMENDMENTS TO EXISTING LICENSES ISSUED: (Continued)

LUBBOCK	LUBBOCK COUNTY HOSPITAL DISTRICT OF LUBBOCK COUNTY TEXAS	L04719	LUBBOCK	172	7/12/22
NASSAU BAY	HOUSTON METHODIST ST JOHN HOSPITAL DBA HOUSTON METHODIST CLEAR LAKE HOSPITAL	L06550	NASSAU BAY	11	7/6/2022
NORTH RICHLAND HILLS	COLUMBIA NORTH HILLS HOSPITAL SUBSIDIARY LP	L02271	NORTH RICHLAND HILLS	87	07/05/22
PASADENA	TURNER INDUSTRIES GROUP LLC	L06235	PASADENA	14	07/06/22
PLANO	ORANO MED LLC	L06781	PLANO	25	07/05/22
ROCKWALL	ROCKWALL REGIONAL HOSPITAL LLC DBA TEXAS HEALTH PRESBYTERIAN HOSPITAL ROCKWALL	L06103	ROCKWALL	11	07/06/22
SAN ANTONIO	SOUTHWEST GENERAL HOSPITAL LP DBA TEXAS VISTA MEDICAL CENTER	L02689	SAN ANTONIO	53	07/13/22
SAN ANTONIO	CARDINAL HEALTH 414 LLC	L02033	SAN ANTONIO	115	07/08/22
SUGAR LAND	SCHLUMBERGER TECHNOLOGY CORPORATION	L06303	SUGAR LAND	23	07/07/22
THE WOODLANDS	MILLENNIUM PHYSICIANS ASSOCIATION PLLC	L05901	THE WOODLANDS	14	07/05/22
THREE RIVERS	DIAMOND SHAMROCK REFINING COMPANY LP	L03699	THREE RIVERS	30	07/13/22
	CMT ASSOCIATES LLC	L06945	DENTON	02	07/12/22

THROUGHOUT TX	NINYO & MOORE GEOTECHNICAL AND ENVIRONMENTAL SCIENCES CONSULTANTS	L06379	HOUSTON	05	07/12/22
THROUGHOUT TX	JRB ENGINEERING LLC	L06689	HOUSTON	09	07/05/22
THROUGHOUT TX	UNIVERSAL PRESSURE PUMPING INC	L06871	HOUSTON	09	07/12/22
THROUGHOUT TX	GEOSCIENCE ENGINEERING & TESTING INC	L05180	HOUSTON	23	07/13/22
THROUGHOUT TX	NUCLEAR SOURCES & SERVICES INC DBA NSSI	L02991	HOUSTON	51	07/07/22
THROUGHOUT TX	KLEINFELDER INC	L06960	IRVING	09	07/14/22
THROUGHOUT TX	AMERICAN PIPING INSPECTION INC	L06835	LONGVIEW	14	07/12/22
THROUGHOUT TX	TIER 1 INTEGRITY LLC	L06718	PASADENA	22	07/14/22
THROUGHOUT TX	AMERAPEX CORPORATION	L06417	PASADENA	24	07/13/22
THROUGHOUT TX	PROFESSIONAL SERVICE INDUSTRIES INC	L04946	SAN ANTONIO	22	07/11/22

RENEWAL OF LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
HOUSTON	TRINITY PHYSICS CONSULTING LLC	L05639	HOUSTON	07	07/08/22

TERMINATIONS OF LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
BEAUMONT	CLEAN HARBORS INDUSTRIAL SERVICES INC	L07101	BEAUMONT	01	07/13/22
EL PASO	VITALANT	L05841	EL PASO	14	07/13/22

TRD-202203576
Cynthia Hernandez
General Counsel
Department of State Health Services

Filed: September 7, 2022

♦ ♦ ♦

Licensing Actions for Radioactive Materials

LICENSING ACTIONS FOR RADIOACTIVE MATERIALS

During the second half of July 2022, the Department of State Health Services (Department) has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables (in alphabetical order by location). The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout TX [Texas]" indicates that the radioactive material may be used on a temporary basis at locations throughout the state.

In issuing new licenses and amending and renewing existing licenses, the Department's Radiation Section has determined that the applicant has complied with the licensing requirements in Title 25 Texas Administrative Code (TAC), Chapter 289, for the noted action. In granting termination of licenses, the Department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC, Chapter 289. In granting exemptions to the licensing requirements of Chapter 289, the Department has determined that the exemption is not prohibited by law and will not result in a significant risk to public health and safety and the environment.

A person affected by the actions published in this notice may request a hearing within 30 days of the publication date. A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. 25 TAC §289.205(b)(15); Health and Safety Code §401.003(15). Requests must be made in writing and should contain the words "hearing request," the name and address of the person affected by the agency action, the name and license number of the entity that is the subject of the hearing request, a brief statement of how the person is affected by the action what the requestor seeks as the outcome of the hearing, and the name and address of the attorney if the requestor is represented by an attorney. Send hearing requests by mail to: Hearing Request, Radioactive Material Licensing, MC 2835, PO Box 149347, Austin, Texas 78714-9347, or by fax to: (512) 206-3760, or by e-mail to: RAMlicensing@dshs.texas.gov.

NEW LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
HOUSTON	MEMORIAL AMBULATORY SURGERY CENTER LLC	L07161	HOUSTON	00	07/22/22
KATY	SPARTEK SYSTEMS INC	L07162	KATY	00	07/25/22
THROUGHOUT X	SCHNABEL ENGINEERING LLC	L07160	AUSTIN	00	07/19/22

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
AUSTIN	PPD DEVELOPMENT LP	L04348	AUSTIN	26	07/25/22
AUSTIN	ST DAVIDS HEALTHCARE PARTNERSHIP LP LLP DBA ST DAVIDS MEDICAL CENTER	L06335	AUSTIN	41	07/25/22
AUSTIN	ST DAVIDS HEART & VASCULAR PLLC DBA AUSTIN HEART	L04623	AUSTIN	103	07/25/22
COLLEGE STATION	TEXAS A&M UNIVERSITY	L06561	COLLEGE STATION	07	07/18/22
CORPUS CHRISTI	CARDINAL HEALTH 414 LLC DBA CARDINAL HEALTH NUCLEAR PHARMACY SERVICES	L04043	CORPUS CHRISTI	59	07/27/22
DALLAS	SOFIE CO	L06174	DALLAS	37	07/15/22
FREEPORT	BASF CORPORATION	L01021	FREEPORT	70	07/29/22

AMENDMENTS TO EXISTING LICENSES ISSUED: (Continued)

GRAPEVINE	BAYLOR REGIONAL MEDICAL CENTER AT GRAPEVINE DBA BAYLOR SCOTT & WHITE MEDICAL CENTER GRAPEVINE	L03320	GRAPEVINE	45	07/25/22
GROESBECK	SOUTH LIMESTONE HOSPITAL DISTRICT DBA LIMESTONE MEDICAL CENTER	L05932	GROESBECK	10	07/22/22
HOUSTON	VISURAY LLC	L06602	HOUSTON	03	07/15/22
HOUSTON	MEMORIAL CARDIOLOGY ASSOCIATES PA	L05349	HOUSTON	16	07/29/22
HOUSTON	THE UNIVERSITY OF TEXAS MD ANDERSON CANCER CENTER	L06366	HOUSTON	23	07/27/22
HOUSTON	METHODIST HEALTH CENTERS DBA HOUSTON METHODIST WILLOWBROOK HOSPITAL	L05472	HOUSTON	69	07/15/22
HOUSTON	MEMORIAL HERMANN HEALTH SYSTEM DBA MEMORIAL HERMANN NORTHEAST HOSPITAL	L02412	HOUSTON	148	07/15/22
HOUSTON	MEMORIAL HERMANN HEALTH SYSTEM	L03772	HOUSTON	171	07/15/22
KINGWOOD	LIEBER-MOORE CARDIOLOGY ASSOCIATES DBA TEXAS CARDIOLOGY ASSOCIATES OF HOUSTON	L04622	KINGWOOD	25	07/15/22

AMENDMENTS TO EXISTING LICENSES ISSUED: (Continued)

LUBBOCK	ISORX TEXAS LTD	L05284	LUBBOCK	38	07/19/22
NACOGDOCHES	LION STAR NACOGDOCHES HOSPITAL LLC DBA NACOGDOCHES MEMORIAL HOSPITAL	L01071	NACOGDOCHES	57	07/27/22
PLANO	TEXAS HEALTH RESOURCES	L06480	PLANO	19	07/27/22
PLANO	TEXAS HEART HOSPITAL OF THE SOUTHWEST LLP	L06004	PLANO	36	07/27/22
RICHARDSON	THE UNIVERSITY OF TEXAS AT DALLAS	L02114	RICHARDSON	68	07/27/22
SAN ANTONIO	TEXAS ONCOLOGY PA	L06759	SAN ANTONIO	10	07/27/22
SAN ANTONIO	SOUTHWEST RESEARCH INSTITIUTE	L04958	SAN ANTONIO	25	07/21/22
SAN ANTONIO	RLS (USA) INC	L04764	SAN ANTONIO	56	07/29/22
SHERMAN	SHERMAN/GRAYSON HOSPITAL LLC DBA WILSON N JONES MEDICAL CENTER	L06354	SHERMAN	20	07/15/22
TEXAS CITY	BLANCHARD REFINING COMPANY LLC	L06526	TEXAS CITY	25	07/25/22
THROUGHOUT TX	IRISNDT INC	L06435		32	07/27/22
THROUGHOUT TX	KLX ENERGY SERVICES LLC	L06620		33	07/22/22
THROUGHOUT TX	CMT ASSOCIATES LLC	L06945	ARGYLE	03	07/21/22
THROUGHOUT TX	PROFRAC SERVICES LLC	L06808	CISCO	09	07/26/22
THROUGHOUT TX	GEOSCIENCE ENGINEERS LLC	L06398	DALLAS	03	07/18/22
THROUGHOUT TX	RONE ENGINEERING SERVICES LTD	L02356	DALLAS	57	07/18/22

AMENDMENTS TO EXISTING LICENSES ISSUED: (Continued)

THROUGHOUT TX	INTEGRITY TESTING & INSPECTION INC	L06027	DEER PARK	12	07/15/22
THROUGHOUT TX	NATIONAL INSPECTION SERVICES LLC	L05930	FORT WORTH	50	07/22/22
THROUGHOUT TX	QUANTUM TECHNICAL SERVICES LLC	L06406	HOUSTON	22	07/15/22
THROUGHOUT TX	TERRACON CONSULTANTS INC	L05268	HOUSTON	70	07/21/22
THROUGHOUT TX	VARCO LP	L00287	HOUSTON	162	07/21/22
THROUGHOUT TX	CLEAR INSPECTION LLC	L06994	INGLESIDE	05	07/18/22
THROUGHOUT TX	SOUTHWEST RESEARCH INSTITUTE	L00775	SAN ANTONIO	90	07/25/22
TYLER	TYLER REGIONAL HOSPITAL LLC DBA UT HEALTH EAST TEXAS TYLER REGIONAL HOSPITAL	L06973	TYLER	06	07/27/22
WACO	BAYLOR UNIVERSITY	L00343	WACO	50	07/15/22
WAXAHACHIE	BAYLOR MEDICAL CENTER AT WAXAHACHIE	L04536	WAXAHACHIE	59	07/29/22

RENEWAL OF LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
HOUSTON	MOHAMMED ATTAR MD PA	L05615	HOUSTON	08	07/18/22

TERMINATIONS OF LICENSES ISSUED:

Location of Use/Possession of Material	Name of Licensed Entity	License Number	City of Licensed Entity	Amend-ment Number	Date of Action
CLEVELAND	NADIM M ZACCA MD PA	L05570	CLEVELAND	10	07/27/22
FORT WORTH	FTS INTERNATIONAL SERVICES LLC	L06188	FORT WORTH	26	07/27/22
HOUSTON	GULF COAST REGIONAL BLOOD CENTER	L04755	HOUSTON	11	07/29/22
HOUSTON	NEXTIER COMPLETION SOLUTIONS INC	L06662	HOUSTON	16	07/21/22
LA PORTE	APPLIED TECHNICAL SERVICES INC	L07049	LA PORTE	01	07/18/22
THROUGHOUT TX	CLEARWELL WIRELINE SERVICES LLC	L06220	CONVERSE	47	07/15/22

TRD-202203577
Cynthia Hernandez
General Counsel
Department of State Health Services
Filed: September 7, 2022

♦ ♦ ♦

Texas Higher Education Coordinating Board

Notice of Opportunity to Comment on Proposed Field of Study Curriculum for Political Science

The Texas Higher Education Coordinating Board (THECB or Coordinating Board) staff is providing an opportunity for written public comment on a revision of the Field of Study Curriculum (FOSC) for Political Science.

Texas Education Code (TEC) Chapter 61, Subchapter S, establishes policies to facilitate statewide transfer, including the FOSC. Institutions must accept partially or fully completed Field of Study Curricula for academic credit toward the degree program in which the transfer student enrolls (TEC §61.823). The Coordinating Board has promulgated rules related to transfer policy in 19 Texas Administrative Code (TAC) Chapter 1, Subchapter V, and Chapter 4, Subchapter B. Posting requirements may be found in 19 TAC §§4.33(f) and 1.239(b).

The Political Science Discipline-Specific Subcommittee met on February 23-24, 2022, to consider and make recommendations to the Texas Transfer Advisory Committee regarding the FOSC for this discipline. On April 13, 2022, the Texas Transfer Advisory Committee adopted the subcommittee recommendations for the designated Texas Core Curriculum courses and the Discipline Foundation Courses and recommended their submission to the Commissioner of Higher Education for final approval.

The recommended courses are as follows:

Designated Core Courses in the Field of Study: There were no courses identified to be included in the designated core courses for the revied political science Field of Study.

Discipline Foundation Courses (12 semester credit hours): MATH 1342: Elementary Statistical Methods; GOVT 2304: Introduction to Political Science; GOVT 2305: Federal Government (Federal Constitution & Topics); GOVT 2306: Texas Government (Texas Constitution & Topics).

In addition to these courses, each general academic institution will have the opportunity to submit to the Coordinating Board six (6) semester credit hours of **Directed Electives** selected by the institution from the Academic Course Guide Manual. The complete FOSC will consist of the Designated Core Courses and Discipline Foundation Courses listed above, as well as Directed Electives selected by the relevant general academic institutions in compliance with the transfer rules in TAC Chapter 4, Subchapter B, including §§4.23(4), 4.32(b)(3), and 4.33.

General academic institutions will be required to transfer these courses and apply them for academic credit towards degree programs with majors in the following CIP Code:

45.1001: Political Science and Government, General

Written comments about the proposed changes must be sent to Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711, or via email to Elizabeth.mayer@highered.texas.gov.

Comments must be **received by 5:00 p.m., October 17, 2022,** to be considered.

TRD-202203558
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Filed: September 7, 2022

♦ ♦ ♦

Notice of Opportunity to Comment on Proposed Field of Study Curriculum for Social Work

The Texas Higher Education Coordinating Board (THECB or Coordinating Board) staff is providing an opportunity for written public comment on a revision of the Field of Study Curriculum (FOSC) for Social Work.

Texas Education Code (TEC), Chapter 61, Subchapter S, establishes policies to facilitate statewide transfer, including the FOSC. Institutions must accept partially or fully completed Field of Study Curricula for academic credit toward the degree program in which the transfer student enrolls (TEC §61.823). The Coordinating Board has promulgated rules related to transfer policy in 19 Texas Administrative Code (TAC) Chapter 1, Subchapter V, and Chapter 4, Subchapter B. Posting requirements may be found in 19 TAC §§4.33(f) and 1.239(b).

The Social Work Discipline-Specific Subcommittee met on March 8, 9, and 24, 2022, to consider and make recommendations to the Texas Transfer Advisory Committee regarding the FOSC for this discipline. On April 13, 2022, the Texas Transfer Advisory Committee adopted the subcommittee recommendations for the designated Texas Core Curriculum courses and the Discipline Foundation Courses and recommended their submission to the Commissioner of Higher Education for final approval.

The recommended courses are as follows:

Designated Core Courses in the Field of Study: ENGL 1301: Composition I, ENGL 1302, Composition II.

Discipline Foundation Courses (12 semester credit hours): SOCW 2361: Introduction to Social Work; SOCW 2362: Social Welfare as a Social Institution; SOCW 2389: Academic Cooperative; SOCI 1306: Social Problems.

In addition to these courses, each general academic institution will have the opportunity to submit to the Coordinating Board six (6) semester credit hours of **Directed Electives** selected by the institution from the Academic Course Guide Manual. The complete FOSC will consist of the Designated Core Courses and Discipline Foundation Courses listed above, as well as Directed Electives selected by the relevant general academic institutions in compliance with the transfer rules in TAC Chapter 4, Subchapter B, including 19 TAC §§4.23(4), 4.32(b)(3), and 4.33.

General academic institutions will be required to transfer these courses and apply them for academic credit towards degree programs with majors in the following CIP Code:

44.0701 Social Work

Written comments about the proposed changes must be sent to Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711, or via email to Elizabeth.mayer@highered.texas.gov. Comments must be **received by 5:00 p.m., October 17, 2022,** to be considered.

TRD-202203560
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Filed: September 7, 2022

♦ ♦ ♦

Notice of Opportunity to Comment on Proposed Field of Study Curriculum for Sociology

The Texas Higher Education Coordinating Board (THECB or Coordinating Board) staff is providing an opportunity for written public comment on a revision of the Field of Study Curriculum (FOSC) for Sociology.

Texas Education Code (TEC) Chapter 61, Subchapter S, establishes policies to facilitate statewide transfer, including the FOSC. Institutions must accept partially or fully completed Field of Study Curricula for academic credit toward the degree program in which the transfer student enrolls (TEC §61.823). The Coordinating Board has promulgated rules related to transfer policy in 19 Texas Administrative Code (TAC) Chapter 1, Subchapter V, and Chapter 4, Subchapter B. Posting requirements may be found in 19 TAC §§4.33(f) and 1.239(b).

The Sociology Discipline-Specific Subcommittee met on February 8-9, 2022, to consider and make recommendations to the Texas Transfer Advisory Committee regarding the FOSC for this discipline. On April 13, 2022, the Texas Transfer Advisory Committee adopted the subcommittee recommendations for the designated Texas Core Curriculum courses and the Discipline Foundation Courses and recommended their submission to the Commissioner of Higher Education for final approval.

The recommended courses are as follows:

Designated Core Courses in the Field of Study: SOCI 1301: Introduction to Sociology.

Discipline Foundation Courses (9 semester credit hours): SOCI 1306: Social Problems; SOCI 2301: Marriage and Family; SOCI 2319: Minority Studies.

In addition to these courses, each general academic institution will have the opportunity to submit to the Coordinating Board nine (9) semester credit hours of **Directed Electives** selected by the institution from the Academic Course Guide Manual. The complete FOSC will consist of the Designated Core Courses and Discipline Foundation Courses listed above, as well as Directed Electives selected by the relevant general academic institutions in compliance with the transfer rules in TAC Chapter 4, Subchapter B, including §§4.23(4), 4.32(b)(3), and 4.33.

General academic institutions will be required to transfer these courses and apply them for academic credit towards degree programs with majors in the following CIP Code:

45.1101: Sociology, General

Written comments about the proposed changes must be sent to Elizabeth Mayer, Assistant Commissioner for Academic and Health Affairs, Texas Higher Education Coordinating Board, P.O. Box 12788, Austin, Texas 78711, or via email to Elizabeth.mayer@highered.texas.gov. Comments must be **received by 5:00 p.m., October 17, 2022,** to be considered.

TRD-202203563
Nichole Bunker-Henderson
General Counsel
Texas Higher Education Coordinating Board
Filed: September 7, 2022

♦ ♦ ♦

Texas Department of Housing and Community Affairs

Notice of Public Comment Period and Public Hearing on Department of Energy Bipartisan Infrastructure Law Weatherization Assistance Program State Plan

The Texas Department of Housing and Community Affairs (TDHCA) announces the opening of an 11-day public comment period and a virtual public hearing for the Department of Energy Bipartisan Infrastructure Law Weatherization Assistance Program (DOE BIL WAP) State Plan.

The public comment period begins Sunday, September 18, 2022, and ends September 28, 2022, at 5:00 p.m. Austin local time.

The virtual public hearing will convene at 10:00 a.m. Austin local time, Wednesday, September 28, 2022.

Please visit the TDHCA Public Comment Center at: http://www.tdhca.state.tx.us/public-comment.htm to access the Plan.

Comments concerning the Plan may be conveyed verbally during the public hearing or in writing during the public comment period. Written comments should be submitted to Gavin Reid via email at gavin.reid@tdhca.state.tx.us by 5:00 p.m. Austin local time, Wednesday, September 28, 2022.

The public hearing for the DOE BIL WAP State Plan will be held virtually and is accessible to the public via the web link information below. In order to engage in two-way communication during the hearing, persons must first register (at no cost) to attend the webinar via the link provided below. Anyone who calls into the hearing without registering online will not be able to provide comment, but the hearing will still be audible.

Wednesday, September 28, 2022

10:00 a.m. Austin local time

GoToWebinar

To register: https://attendee.gotowebinar.com/register/5207930709065112334

Dial-in number: +1 (562) 247-8321, access code (440) 466-366 (persons who use the dial-in number and access code without registering online will only be able to hear the public hearing and will not be able to provide comment).

After registering, you will receive a confirmation email containing information about joining the Public Hearing Webinar.

Local officials and citizens are encouraged to participate in the hearing process. Written and oral comments received will be used to finalize the Plan.

Individuals who require auxiliary aids, services or sign language interpreters for this meeting should contact Rita Gonzales-Garza at (512) 475-3905, at least five days before the meeting so that appropriate arrangements can be made. Non-English speaking individuals who require interpreters for this meeting should contact Rita Gonzales-Garza, (512) 475-3905, at least five days before the meeting so that appropriate arrangements can be made. Personas que hablan español y requieren un intérprete, favor de llamar a Rita Gonzales-Garza , al siguiente número (512) 475-3905 por lo menos cinco días antes de la junta para hacer los preparativos apropiados.

If you have any questions, please contact Gavin Reid via email at gavin.reid@tdhca.state.tx.us or at (512) 936-7828.

TRD-202203595
Bobby Wilkinson
Executive Director
Texas Department of Housing and Community Affairs
Filed: September 7, 2022

♦ ♦ ♦

Texas Juvenile Justice Department

TAC Chapter 344 Guidelines for Consideration of Criminal History with Regard to Certifications Issued by the Texas Juvenile Justice Department

The Texas Juvenile Justice Department (TJJD) grants certification for individuals employed in Texas as juvenile probation officers, juvenile supervision officers, and community activities officers. These guidelines are issued by TJJD as required by Section 53.025(a), Occupations Code. These guidelines describe the process TJJD uses to determine whether a criminal conviction or deferred adjudication renders an individual unsuitable for a certification or whether a criminal conviction or deferred adjudication warrants revocation or suspension of a previously granted certification. These guidelines present the general factors that are taken into consideration as well as the reasons why particular criminal offenses are considered to relate to certifications issued by TJJD. These guidelines are written in accordance with the legislative intent set out in Section 53.003, Occupations Code, which provides that it is "the intent of the legislature to enhance opportunities for a person to obtain gainful employment after the person has been convicted of an offense and discharged the sentence for the offense" and that the statute is to be liberally construed to carry out the intent of the legislature.

CRIMINAL HISTORY RULES, GENERALLY

Certain criminal offenses make an individual ineligible for a certification from TJJD while others must be reviewed and approved by TJJD in order for the person to be certified.

The following criminal history makes a person ineligible for certification by TJJD:

conviction or deferred adjudication for an offense listed in Art. 42A.054, Code of Criminal Procedure, or a substantially equivalent violation against the laws of another state or the United States; or

conviction or deferred adjudication for a sexually violent offense as defined in Art. 62.001, Code of Criminal Procedure, or a substantially equivalent violation against the laws of another state or the United States.

The following criminal history requires a review and approval from TJJD prior to a person being employed or otherwise engaged in providing service in a position requiring certification from TJJD:

misdemeanor conviction or deferred adjudication if less than 5 years has passed since the date of conviction or placement on deferred adjudication; or

felony conviction or deferred adjudication (other than those listed in 1 and 2 above) if less than 10 years has passed since the date of conviction or deferred adjudication.

In addition to the timelines above, at least one year must have passed since the completion of any period of incarceration, community supervision, or parole or a review is required. A review is also required for individuals with a current requirement to register as a sex offender for an offense other than a disqualifying offense.

GENERAL FACTORS TO BE CONSIDERED

In making its determination of whether an offense directly relates to the duties and responsibilities of the certification, TJJD will consider the following factors:

the nature and seriousness of the crime;

the relationship of the crime to the purposes for requiring the certification to engage in the occupation;

the extent to which a certification might offer an opportunity to engage in further criminal activity of the same type as that which the person previously had been involved in;

the relationship of the crime to the ability or capacity required to perform the duties and discharge the responsibilities of the certified occupation; and

any correlation between the elements of the crime and the duties and responsibilities of the certified occupation.

If TJJD determines the criminal history directly relates to the duties and responsibilities of the certification, TJJD will consider the following factors in determining whether to deny the certification:

the extent and nature of past criminal activity;

the age of the person at the time the crime was committed;

the amount of time that has elapsed since the most recent criminal activity;

the conduct and work activity of the person before and after the criminal activity;

evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release;

evidence of the person's compliance with any conditions of community supervision, parole, or mandatory supervision; and

evidence of the person's fitness for the occupation that requires the certification, including letters of recommendation.

In making its determination, TJJD will not consider an arrest that did not result in a conviction or placement on deferred adjudication.

PROCESS FOR NEW CERTIFICATION

Most certifying and licensing entities provide a certification or license to an individual without regard to that individual's employment. The juvenile justice system is different. Individuals are not provided a certification until after they are employed by and trained by a juvenile probation department or juvenile justice facility in Texas. As such, TJJD's process is designed so that the review of a criminal history by TJJD is triggered by a request from a hiring entity (juvenile probation department or facility) that wishes to hire a person with a criminal history. TJJD understands that juvenile probation departments and juvenile facilities must receive confirmation from TJJD that a person's criminal history will not disqualify the person from certification before an employment offer is made. This section sets out the steps for processing such a request. This section is also the process that will be followed when a person who is currently employed by the probation department or juvenile justice facility seeks optional certification, as allowed by rule.

When a juvenile probation department or juvenile justice facility has completed its initial selection process and determined it wishes to hire a person with a criminal history that is subject to review by TJJD, the department or facility must, prior to making an employment offer, send a request to TJJD's certification officer for TJJD to conduct a review. The purpose of the review is to determine whether TJJD will deny a certification based on the criminal history.

The requested review must include evidence relating to the factors TJJD will consider in making its determination, including facts of the offense, court results, and the information regarding the individual set out in the "General Factors to Be Considered" section. The individual who is the subject of the review is responsible for providing that information to the hiring entity, which will provide it to TJJD. The hiring entity is responsible for providing TJJD with an email address and phone number for the individual. A failure to provide all required information will result in a delay of TJJD's decision and may result in a denial of the certification.

Upon receipt of the request for review, the Certification Officer will immediately refer to the matter to the Office of General Counsel attorneys responsible for discipline of certified officers. The Office of General Counsel treats these matters as a high priority.

Within two business days of receipt of the request for review, a group consisting of a TJJD attorney, a staff person from the TJJD Probation Services Division, and any other staff persons designated by the executive director will review the information and make a recommendation regarding whether the certification should be denied on the basis of the criminal history.

Within one business day of the group's decision, the attorney will prepare a written summary of the group's recommendation and the reasons therefore and provide it to the executive director or designee for a decision on whether TJJD will deny the certification on the basis of the individual's criminal history.

If the decision is that the criminal history will not prevent the individual from being certified, the certification officer will notify the individual and the hiring authority, which may then proceed with the hiring process if it so chooses.

If the decision is that the criminal history will prevent the individual from being certified, TJJD will provide the individual with written notice of the reason for the intended denial and will give the individual at least 30 days to submit any relevant information for consideration. The written notice will comport with the requirements of Section 53.0231, Occupations Code. TJJD will provide a copy of the written notice to the hiring entity.

PROCESS WHEN A CERTIFIED INDIVIDUAL IS ARRESTED OR CONVICTED

If a juvenile probation department or facility receives notification that a certified individual has been arrested for criminal conduct other than a class C misdemeanor, the department or facility must notify TJJD's certification officer in writing no later than 10 calendar days after receiving notice of the arrest. The department or facility must provide information regarding the circumstances of the arrest and respond to any questions from TJJD regarding the arrest. The TJJD executive director may seek an emergency suspension of the certification as provided by Section 222.053(c), Human Resources Code.

If a juvenile department or facility receives notification that a certified individual has been convicted or placed on deferred adjudication for criminal conduct other than a class C misdemeanor, the department or facility must notify TJJD's certification officer in writing no later than 10 calendar days after receiving such notice. The department or facility must provide information regarding the conviction or deferred adjudication and respond to any questions from TJJD regarding the disposition. TJJD will take one of the following actions upon receipt of this notification.

TJJD will revoke certification if the person was:

convicted or placed on deferred adjudication for an offense listed in Art. 42A.054, Code of Criminal Procedure, or a substantially equivalent violation against the laws of another state or the United States;

convicted or placed on deferred adjudication for a sexually violent offense as defined in Art. 62.001, Code of Criminal Procedure, or a substantially equivalent violation against the laws of another state or the United States; or

imprisoned following a felony conviction, revocation of community supervision, revocation of probation, or revocation of mandatory supervision.

For all other convictions or deferred adjudications, TJJD will conduct a review considering the factors set out in the "General Factors to be Considered" section in order to determine if certification should be suspended or revoked. The TJJD executive director may seek an emergency suspension of the certification as provided by Section 222.053(c), Human Resources Code.

RELATION OF CRIMES TO CERTIFICATION AS A JUVENILE PROBATION OFFICER, JUVENILE SUPERVISION OFFICER, OR COMMUNITY ACTIVITIES OFFICER

The below guidelines reflect the most common categories of criminal offenses and their relation to the certifications TJJD issues, which are juvenile probation officer, juvenile supervision officer, and community activities officer certifications. The vast majority of criminal convictions reviewed by TJJD will fit within the categories of crimes described below. However, the guidelines are not an exclusive listing, and they do not prohibit TJJD from considering crimes not listed. After due consideration of the circumstances of the criminal act and the general factors listed below, TJJD may find that a conviction not described herein renders a person unfit to hold a certification.

The below guidelines are not intended to address offenses listed in Article 42A.054, Code of Criminal Procedure, or sexually violent offenses as defined by Article 62.001, Code of Criminal Procedure, as such offenses disqualify a person from certification with no requirement for further review.

In addition to the specific crimes listed below, multiple violations of **any** criminal statute will be taken into consideration when making determinations related to issuing, suspending, or revoking certifications as multiple incidents of criminal behavior may indicate a pattern that makes a person unfit for a certification.

Crimes against the person such as homicide, kidnapping, unlawful restraint, and assault

Reasons:

Certified officers interact with children and their families in a supervisory role, sometimes alone with the child.

Certified officers work with a vulnerable population, members of which may be particularly at risk for physical abuse and unwilling or unable to report or protect themselves.

Certified officers may be required to physically restrain students who have impulse-control difficulties. They must safely perform these restraints without intentionally, knowingly, or recklessly causing injury or pain to a child. They must not react violently or emotionally to sudden changes in or actions of the child.

Certified officers who have committed crimes against the person may pose a danger to the children as well as family members.

A person who has committed such crimes may have the opportunity to engage in further similar conduct.

Crimes involving illegal weapons

Reasons:

Criminal activity of this type may reveal a lack of regard for the safety and welfare of others.

Certified officers provide supervision to children due to the children's commission of unlawful conduct. This includes settings that have a potential for confrontation, such as a courtroom, a custodial event, or in a facility, which the certified officer may need to contain or defuse.

Individuals who have committed crimes involving illegal weapons may be more likely to bring illegal weapons with them to a location where they are interacting with these children, which could increase the potential danger to the children when there is a confrontation.

Persons with a history of these types of offenses may not be appropriate persons to teach proper, safe, and legal conduct, particularly to children who have previously engaged in unlawful conduct.

Crimes involving animal cruelty or neglect

Reasons:

Certified officers interact and work with vulnerable populations, members of which may be particularly at risk for physical abuse and unable to report or protect themselves.

Certified officers hold a high degree of control over a child's successful completion of a program or probation conditions.

Committing crimes involving cruel or neglectful conduct toward animals may indicate that a person lacks empathy or appropriate concern for children under that person's control.

Committing crimes involving cruel or neglectful conduct toward animals may indicate that a person will perform similar cruel intentional mistreatment of children.

A person who has committed crimes involving cruel or neglectful conduct toward animals may have the opportunity to engage in similar conduct toward children of children.

Crimes involving prohibited sexual conduct

Reasons:

Certified officers physically interact with children in a supervisory role. They develop a relationship of trust. They have occasion to meet privately with children. This level of trust can be taken advantage of by someone who has committed this type of crime.

Certified officers work with a vulnerable population. Some children may be particularly at risk for sexual exploitation or abuse and unable to report or protect themselves.

Individuals who have committed crimes involving prohibited sexual conduct may pose a danger to the children.

A person who has committed such crimes may have the opportunity to engage in further similar conduct.

Crimes involving human trafficking

Reasons:

Certified officers may work with children who have been victims of human trafficking as well as children who may be vulnerable to becoming victims of human trafficking. They develop a relationship of trust. They have occasion to meet privately with children. This level of trust can be taken advantage of by someone who has committed this type of crime.

Certified officers physically interact with children in a supervisory role. They develop a relationship of trust. They have occasion to meet pri-

vately. This level of trust can be taken advantage of by someone who has committed this type of crime.

Individuals who have committed crimes involving prohibited sexual conduct may pose a danger to the children.

A person who has committed such crimes may have the opportunity to engage in further similar conduct.

Crimes involving children as victims, including abandoning/endangering a child or exploitation of/causing injury to a child

Reasons:

Certified officers work directly with children, in close, physical proximity. Individuals who have committed crimes involving children as victims pose a potential danger.

A person who has committed such crimes may have the opportunity to engage in further similar conduct.

Crimes against property such as theft or burglary with intent to commit theft

Reasons:

Certified officers may have access to the protected private information of children and their families, such as dates of birth, social security numbers, etc. They may have access to the personal property of employers.

Certified officers may testify in court and may create government records that are relied upon to ensure children are cared for. Persons who commit theft have shown a level of dishonesty that poses a potential danger to children.

A person who has committed crimes involving theft may have the opportunity and motivation to engage in further similar conduct.

Crimes involving fraud, forgery, perjury, tampering with a governmental record, or deceptive trade practices

Reasons:

Certified officers may testify in court. Certified officers document interactions with children and assess their compliance with program rules and conditions of probation. Certified officers document their own compliance with standards related to supervising children. A person with a history of dishonesty poses a potential danger to children.

A person who has committed such crimes may have the opportunity to engage in further similar conduct.

Crimes involving the possession, use, possession with intent to deliver, possession with intent to distribute, delivery, distribution or manufacture of drugs or other dangerous or illegal substances

Reasons:

Certified officers are in a position to pressure and/or influence children to purchase, use, possess, deliver, or distribute drugs or other dangerous or illegal substances.

Persons with a history of these types of offenses may not be appropriate persons to teach proper, safe, and legal conduct, especially in the context of children who may have engaged in similar unlawful conduct in the past.

Children or families who have used or delivered substances in the past are potentially vulnerable to someone who may wish to illegally sell or distribute drugs or to enlist their aid in doing so.

These types of criminal offenses may adversely reflect on the tendency or ability of a certified officer to act capably and with integrity and professionalism under the certificate, to uphold the public trust, and/or to protect the health and safety of children.

Criminal activity of this type may reveal a lack of regard for the safety and welfare of others.

A person with a predisposition for criminal activity of this type may pose a risk to the public.

A person who has committed such crimes may have the opportunity to engage in further similar conduct.

Crimes involving the possession or use of alcohol, drugs, or other dangerous or illegal substances in a motor vehicle, or the operation of a motor vehicle, including driving while intoxicated, intoxication assault, intoxication manslaughter, reckless driving, and fleeing or evading a police officer

Reasons:

Certified officers interact with children in a supervisory role to teach proper, safe, and legal conduct, which includes with regard to alcohol and/or drugs and other substances, including in the context of operating a motor vehicle. They also may be called on to operate a vehicle in the course of employment, sometimes transporting a child.

Persons with a history of operating a motor vehicle in a dangerous or illegal manner may not be appropriate persons to teach proper, safe, and legal conduct. They also may not be appropriate to operate vehicles for work purposes, especially if transporting a child.

Criminal activity of this type reveals a lack of regard for the safety of others.

Criminal activity of this type adversely reflects on the tendency or ability of a certified officer to act capably and with integrity and professionalism under the certificate, to uphold the public trust, and/or to protect the health and safety of children under their supervision.

A person who has committed such crimes may have the opportunity to engage in further similar conduct.

Crimes against property, such as arson, criminal mischief, and other property damage or destruction

Reasons:

Persons who engage in crimes that involve destroying the property of others may lack the empathy and compassion necessary to work as a certified officer in the juvenile justice system.

Certified officers may have occasion to be responsible for the property of children in their care or of their employer and would have the opportunity to engage in further similar conduct.

Crimes involving abuse of official capacity

Reasons:

Certified officers have a position of authority over the children they work with. A person who has abused that official authority in the past poses a potential danger to the children.

A person who has committed such crimes may have the opportunity to engage in further similar conduct.

TRD-202203405
Christian von Wupperfeld
General Counsel
Texas Juvenile Justice Department
Filed: August 31, 2022

♦ ♦ ♦

Texas Lottery Commission

Scratch Ticket Game Number 2447 "100X BONUS"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 2447 is "100X BONUS". The play style is "key number match".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 2447 shall be $5.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2447.

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: BAR SYMBOL, BELL SYMBOL, CROWN SYMBOL, DIAMOND SYMBOL, STAR SYMBOL, POT OF GOLD SYMBOL, HORSESHOE SYMBOL, CHERRY SYMBOL, HAT SYMBOL, COINS SYMBOL, CACTUS SYMBOL, RING SYMBOL, GRAPE SYMBOL, PEPPER SYMBOL, STAWBERRY SYMBOL, BANANA SYMBOL, 01, 02, 03, 04, 06, 07, 08, 09, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 5X SYMBOL, 10X SYMBOL, 100X SYMBOL, $5.00, $10.00, $20.00, $50.00, $100, $500, $1,000, $5,000 and $100,000.

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. 2447 - 1.2D

PLAY SYMBOL	CAPTION
BAR SYMBOL	BAR
BELL SYMBOL	BELL
CROWN SYMBOL	CRN
DIAMOND SYMBOL	DMD
STAR SYMBOL	STAR
POT OF GOLD SYMBOL	PTGD
HORSESHOE SYMBOL	SHOE
CHERRY SYMBOL	CHRY
HAT SYMBOL	HAT
COINS SYMBOL	COINS
CACTUS SYMBOL	CACTUS
BAR SYMBOL	BAR
RING SYMBOL	RING
GRAPE SYMBOL	GRPE
PEPPER SYMBOL	PEPPER
STRAWBERRY SYMBOL	STBRY
BANANA SYMBOL	BANANA
01	ONE
02	TWO
03	THR
04	FOR
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
20	TWY
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
5X SYMBOL	WINX5
10X SYMBOL	WINX10
100X SYMBOL	WINX100
$5.00	FIV$
$10.00	TEN$
$20.00	TWY$
$50.00	FFTY$
$100	ONHN
$500	FVHN
$1,000	ONTH
$5,000	FVTH
$100,000	100TH

E. Serial Number - A unique thirteen (13) 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 twenty-four (24) 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 fourteen (14) digit number consisting of the four (4) digit game number (2447), 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: 2447-0000001-001.

H. Pack - A Pack of the "100X BONUS" 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 "100X BONUS" Scratch Ticket Game No. 2447.

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 "100X BONUS" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose forty-nine (49) Play Symbols. $20 BONUS PLAY INSTRUCTIONS: If a player reveals 2 matching symbols in the $20 BONUS play area, the player wins $20. $50 BONUS PLAY INSTRUCTIONS: If the player matches 2 matching symbols in the $50 BONUS play area, the player wins $50. 100X BONUS PLAY INSTRUCTIONS:: 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 "5X" Play Symbol, the player wins 5 TIMES the prize for that symbol. If the player reveals a "10X" Play Symbol, the player wins 10 TIMES the

prize for that symbol. If the player reveals a "100X" Play Symbol, the player wins 100 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-nine (49) 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-nine (49) 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-nine (49) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the forty-nine (49) 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: The top Prize Symbol will appear on every Ticket, unless restricted by other parameters, play action or prize structure.

B. GENERAL: Consecutive Non-Winning Tickets within a Pack will not have matching patterns, in the same order, of either Play Symbols or Prize Symbols.

C. 100X BONUS (Key Number Match): No prize amount in a non-winning spot will correspond with the YOUR NUMBERS Play Symbol (i.e., 20 and $20.)

D. 100X BONUS (Key Number Match): No matching non-winning YOUR NUMBERS Play Symbols on a Ticket.

E. 100X BONUS (Key Number Match): No matching WINNING NUMBERS Play Symbols on a Ticket.

F. 100X BONUS (Key Number Match): A non-winning Prize Symbol will never match a winning Prize Symbol.

G. 100X BONUS (Key Number Match): A Ticket may have up to four (4) matching non-winning Prize Symbols, unless restricted by other parameters, play action or prize structure.

H. 100X BONUS (Key Number Match): The "5X" (WINX5) Play Symbol will only appear on intended winning Tickets, as dictated by the prize structure.

I. 100X BONUS (Key Number Match): The "10X" (WINX10) Play Symbol will only appear on intended winning Tickets, as dictated by the prize structure.

J. 100X BONUS (Key Number Match): The "100X" (WINX100) 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 "100X BONUS" Scratch Ticket Game prize of $5.00, $10.00, $20.00, $25.00, $50.00, $100 or $500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and may 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 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 for-

warded 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 "100X BONUS" Scratch Ticket Game prize of $1,000, $5,000 or $100,000, the claimant must sign the winning Scratch Ticket and may 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 "100X BONUS" Scratch Ticket Game prize the claimant may submit the signed winning Scratch Ticket and a thoroughly completed claim form via mail. If a prize value is $1,000,000 or more, the claimant must also provide proof of Social Security number or Tax Payer Identification (for U.S. Citizens or Resident Aliens). Mail all 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.

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 "100X BONUS" 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 "100X BONUS" 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.

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 7,080,000 Scratch Tickets in Scratch Ticket Game No. 2447. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2447 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$5.00	731,600	9.68
$10.00	542,800	13.04
$20.00	94,400	75.00
$25.00	141,600	50.00
$50.00	94,400	75.00
$100	20,650	342.86
$500	3,540	2,000.00
$1,000	413	17,142.86
$5,000	10	708,000.00
$100,000	6	1,180,000.00

*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 4.35. 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. 2447 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. 2447, 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-202203476
Bob Biard
General Counsel
Texas Lottery Commission
Filed: September 1, 2022

♦ ♦ ♦

Scratch Ticket Game Number 2455 "$5,000,000 ULTIMATE"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 2455 is "$5,000,000 ULTIMATE". The play style is "key number match".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 2455 shall be $50.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2455.

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, 03, 04, 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, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 2X SYMBOL, 5X SYMBOL, 10X SYMBOL, 20X SYMBOL, $50.00, $100, $200, $500, $1,000, $10,000 and $5,000,000.

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. 2455 - 1.2D

PLAY SYMBOL	CAPTION
01	ONE
03	THR
04	FOR
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
41	FRON
42	FRTO
43	FRTH
44	FRFR
45	FRFV
46	FRSX
47	FRSV
48	FRET
49	FRNI
50	FFTY
51	FFON
52	FFTO
53	FFTH
54	FFFR
55	FFFV
2X SYMBOL	DBL
5X SYMBOL	WINX5

10X SYMBOL	WINX10
20X SYMBOL	WINX20
$50.00	FFTY$
$100	ONHN
$200	TOHN
$500	FVHN
$1,000	ONTH
$10,000	10TH
$5,000,000	TPPZ

E. Serial Number - A unique thirteen (13) 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 twenty-four (24) 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 fourteen (14) digit number consisting of the four (4) digit game number (2455), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 020 within each Pack. The format will be: 2455-0000001-001.

H. Pack - A Pack of the "$5,000,000 ULTIMATE" Scratch Ticket Game contains 020 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The back of Ticket 001 will be shown on the front of the Pack; the back of Ticket 020 will be revealed on the back of the Pack. All Packs will be tightly shrink-wrapped. There will be no breaks between the Tickets in a Pack.

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 "$5,000,000 ULTIMATE" Scratch Ticket Game No. 2455.

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 "$5,000,000 ULTIMATE" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose eighty (80) Play Symbols. BONUS PLAY INSTRUCTIONS: If a player reveals 2 matching prize amounts in the same BONUS, the player wins that amount. $5,000,000 ULTIMATE PLAY INSTRUCTIONS: If the 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 "2X" Play Symbol, the player wins DOUBLE the prize for that symbol. If the player reveals a "5X" Play Symbol, the player wins 5 TIMES the prize for that symbol. 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. 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 eighty (80) 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 eighty (80) 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 eighty (80) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the eighty (80) 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: A Ticket can win as indicated by the prize structure.

C. GENERAL: A Ticket can win up to thirty-seven (37) times.

D. GENERAL: The "2X" (DBL), "5X" (WINX5), "10X" (WINX10) and "20X" (WINX20) Play Symbols will never appear in either of the two (2) BONUS play areas.

E. BONUS: A Ticket can win up to one (1) time in each of the two (2) BONUS play areas.

F. BONUS: Winning and Non-winning Tickets will not contain more than two (2) matching Prize Symbols across the two (2) BONUS play areas, excluding Tickets winning thirty-seven (37) times.

G. BONUS: Non-winning Prize Symbols in a BONUS play area will not be the same as winning Prize Symbols from another BONUS play area.

H. BONUS: A non-winning BONUS play area will have two (2) different Prize Symbols.

I. $5,000,000 ULTIMATE: A Ticket can win up to thirty (35) times in the main play area.

J. $5,000,000 ULTIMATE: All non-winning YOUR NUMBERS Play Symbols will be different.

K. $5,000,000 ULTIMATE: Non-winning Prize Symbols will not match a winning Prize Symbol on a Ticket.

L. $5,000,000 ULTIMATE: All WINNING NUMBERS Play Symbols will be different.

M. $5,000,000 ULTIMATE: Tickets winning more than one (1) time will use as many WINNING NUMBERS Play Symbols as possible to create matches, unless restricted by other parameters, play action or prize structure.

N. $5,000,000 ULTIMATE: On all Tickets, a Prize Symbol will not appear more than six (6) times, except as required by the prize structure to create multiple wins.

O. $5,000,000 ULTIMATE: On Non-winning Tickets, a WINNING NUMBERS Play Symbol will never match a YOUR NUMBERS Play Symbol.

P. $5,000,000 ULTIMATE: All YOUR NUMBERS Play Symbols will never equal the corresponding Prize Symbol (i.e., $50 and 50).

Q. $5,000,000 ULTIMATE: On winning and Non-winning Tickets, the top cash prizes of $1,000, $10,000 and $5,000,000 will each appear at least once, with respect to other parameters, play action or prize structure.

R. $5,000,000 ULTIMATE: The "2X" (DBL) Play Symbol will never appear as a WINNING NUMBERS Play Symbol.

S. $5,000,000 ULTIMATE: The "2X" (DBL) Play Symbol will never appear on a Non-winning Ticket.

T. $5,000,000 ULTIMATE: The "2X" (DBL) Play Symbol will win DOUBLE the prize for that Play Symbol and will win as per the prize structure.

U. $5,000,000 ULTIMATE: The "2X" (DBL) Play Symbol will never appear more than one (1) time on a Ticket.

V. $5,000,000 ULTIMATE: The "5X" (WINX5) Play Symbol will never appear as a WINNING NUMBERS Play Symbol.

W. $5,000,000 ULTIMATE: The "5X" (WINX5) Play Symbol will never appear on a Non-winning Ticket.

X. $5,000,000 ULTIMATE: The "5X" (WINX5) Play Symbol will win 5 TIMES the prize for that Play Symbol and will win as per the prize structure.

Y. $5,000,000 ULTIMATE: The "5X" (WINX5) Play Symbol will never appear more than one (1) time on a Ticket.

Z. $5,000,000 ULTIMATE: The "10X" (WINX10) Play Symbol will never appear as a WINNING NUMBERS Play Symbol.

AA. $5,000,000 ULTIMATE: The "10X" (WINX10) Play Symbol will never appear on a Non-winning Ticket.

BB. $5,000,000 ULTIMATE: The "10X" (WINX10) Play Symbol will win 10 TIMES the prize for that Play Symbol and will win as per the prize structure.

CC. $5,000,000 ULTIMATE: The "10X" (WINX10) Play Symbol will never appear more than one (1) time on a Ticket.

DD. $5,000,000 ULTIMATE: The "20X" (WINX20) Play Symbol will never appear as a WINNING NUMBERS Play Symbol.

EE. $5,000,000 ULTIMATE: The "20X" (WINX20) Play Symbol will never appear on a Non-winning Ticket.

FF. $5,000,000 ULTIMATE: The "20X" (WINX20) Play Symbol will win 20 TIMES the prize for that Play Symbol and will win as per the prize structure.

GG. $5,000,000 ULTIMATE: The "20X" (WINX20) Play Symbol will never appear more than one (1) time on a Ticket.

HH. $5,000,000 ULTIMATE: The "2X" (DBL), "5X" (WINX5), "10X" (WINX10) and "20X" (WINX20) Play Symbols can only appear together on the same winning Ticket, as indicated by the prize structure.

2.3 Procedure for Claiming Prizes.

A. To claim a "$5,000,000 ULTIMATE" Scratch Ticket Game prize of $50.00, $100, $150, $200 or $500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and may 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 $50.00, $100, $150, $200 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 "$5,000,000 ULTIMATE" Scratch Ticket Game prize of $1,000 or $10,000, the claimant must sign the winning Scratch Ticket and may 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. To claim a "$5,000,000 ULTIMATE" Scratch Ticket Game top level prize of $5,000,000, the claimant must sign the winning Scratch Ticket and may present it at one of the Texas Lottery's Claim Centers in Austin, Dallas, Fort Worth, Houston or San Antonio, Texas. 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 and proof of Social Security number or Tax Payer Identification (for U.S. Citizens or Resident Aliens). 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.

D. As an alternative method of claiming a "$5,000,000 ULTIMATE" Scratch Ticket Game prize, including the top level prize of $5,000,000, the claimant may submit the signed winning Scratch Ticket and a thoroughly completed claim form via mail. If a prize value is $1,000,000 or more, the claimant must also provide proof of Social Security number or Tax Payer Identification (for U.S. Citizens or Resident Aliens). Mail all 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.

E. 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.

F. 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.

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 "$5,000,000 ULTIMATE" 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 "$5,000,000 ULTIMATE" 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 man-

ufactured, 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.

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 10,080,000 Scratch Tickets in Scratch Ticket Game No. 2455. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2455 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
$50.00	1,008,000	10.00
$100	756,000	13.33
$150	504,000	20.00
$200	287,280	35.09
$500	201,600	50.00
$1,000	10,920	923.08
$10,000	250	40,320.00
$5,000,000	4	2,520,000.00

*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 3.64. 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. 2455 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. 2455, 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-202203477
Bob Biard
General Counsel
Texas Lottery Commission
Filed: September 1, 2022

♦ ♦ ♦

North Central Texas Council of Governments

Request of Proposals for the 511DFW Traveler Information System

The North Central Texas Council of Governments (NCTCOG) is requesting written proposals from consultant firms for the 511DFW Traveler Information System. The North Central Texas Region currently operates 511DFW, a 511 Traveler Information System, and the available renewals to the existing contract will end on June 30, 2023. The new system is anticipated to incorporate elements of the existing 511DFW functionality and recommended improvements. This project will provide development, operations and three years of maintenance and operations support of the 511DFW Traveler Information System and Information Exchange Network, in addition to three optional one-year renewals. The firm(s) will host the 511DFW operations and provide any necessary data, databases, hardware, software, security patches and encryption for a fully functional 511 traveler information system as described in the Scope of Work.

Proposals must be received no later than 5:00 p.m., Central Time, on **Friday, October 14, 2022,** to Marian Thompson, Transportation System Operations Supervisor, North Central Texas Council of Governments, 616 Six Flags Drive, Arlington, Texas 76011 and electronic submissions to TransRFPs@nctcog.org. The Request for Proposals will be available at www.nctcog.org/rfp by the close of business on Friday, September 16, 2022.

NCTCOG encourages participation by disadvantaged business enterprises and does not discriminate on the basis of age, race, color, religion, sex, national origin, or disability.

TRD-202203497
R. Michael Eastland
Executive Director
North Central Texas Council of Governments
Filed: September 2, 2022

♦ ♦ ♦

Public Utility Commission of Texas

Notice of Application to Amend a Certificate of Convenience and Necessity for a Minor Boundary Change

Notice is given to the public of an application filed with the Public Utility Commission of Texas (commission) on August 29, 2022, to amend a certificate of convenience and necessity for a minor service boundary change.

Docket Style and Number: Application of South Plains Telephone Cooperative, Inc. to Amend its Certificate of Convenience and Necessity in Woodrow County, Docket Number 54006.

The Application: South Plains Telephone Cooperative, Inc. filed an application for a minor boundary change to amend the boundary of the Woodrow exchange. South Plains seeks the revision to encompass an uncertificated area situated adjacent to the original boundary of the Woodrow exchange. The total proposed service area to be added to the Woodrow exchange is 12.7 square miles.

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by electronic mail at puc.texas.gov, by phone at (512) 936-7120, or toll-free at (888) 782-8477. The deadline for intervention in this proceeding is November 1, 2022. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission through Relay Texas by dialing 7-1-1. All comments should reference Docket Number 54006.

TRD-202203481
Andrea Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: September 1, 2022

♦ ♦ ♦

Sam Houston State University

Notice of Intent to Seek Consulting Services

In compliance with the provisions of Texas Government Code, Chapter 2254, Sam Houston State University ("SHSU") in Huntsville, Texas, solicits Request for Qualifications ("RFQ") for consultant services to aid the University's with the preparation, submission, and negotiation of the Short Form F&A Cost Proposal. The University must submit its F&A proposal to the HHS-CAS Central Field Office of the Cost Allocation Services (CAS), a unit of the Department of Health and Human Services (DHHS) by February 28, 2023. The President of Sam Houston State University has made a fact finding that the consulting services are necessary and that Sam Houston State University does not have the in-house expertise to complete the proposal. Pursuant to Texas Government Code 2254.029(b) notice is given that the consulting services sought in this solicitation relate to services previously provided by MAXIMUS Higher Education, Inc., 900 Skokie Blvd., Suite 265, Northbrook, Illinois 60062, and that SHSU intends to award the contract for the solicited consulting services to MAXIMUS Higher Education, Inc., unless an offer of better value is received.

Selection criteria will be based on the best value which will be determined by the University, and cover such areas as procedural approach to scope of work, experience with the preparation, submission, and negotiation of similar proposals, qualifications of consultants, references from other institutions of Higher Education, and how well the proposer followed the RFQ instructions.

Sam Houston State University, in accordance with applicable federal and state law (including Title VII) and institutional values, prohibits discrimination or harassment on the basis of race, creed, ancestry, marital status, citizenship, color, national origin, sex, religion, age, disability, veteran's status, sexual orientation, or gender identity. All personnel actions, including recruitment, employment, training, upgrading, promotion, demotion, termination, and salary administration are reviewed to ensure Equal Employment Opportunity (EEO) compliance.

The closing date for receipt of offers is October 17, 2022. The date of award is anticipated to be on or before October 21, 2022.

SHSU contact for inquires is:

William H. Tidwell

Director of Procurement

P.O. Box 2028

Huntsville, Texas 77341-2028

Phone: 936-294-1904

Email: pur_wht@shsu.edu

TRD-202203487
Susan Hurley
Research Administration Manager
Sam Houston State University
Filed: September 2, 2022

♦ ♦ ♦

Supreme Court of Texas

Order Amending Texas Plan for Recognition and Regulation of Specialization in the Law and Adopting Standards for Attorney Certification in Aviation Law

Supreme Court of Texas

Misc. Docket No. 22-9070

Order Amending Texas Plan for Recognition and Regulation of Specialization in the Law and Adopting Standards for Attorney Certification in Aviation Law

ORDERED that:

1. Section XII of the Texas Plan for Recognition and Regulation of Specialization in the Law is amended as follows, effective immediately.

2. The Standards for Attorney Certification in Aviation Law are adopted as follows, effective immediately.

3. The Clerk is directed to:

   a. file a copy of this Order with the Secretary of State;

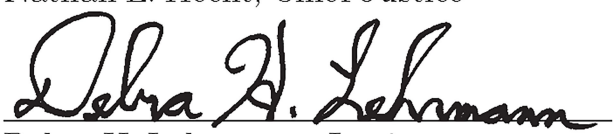
   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this Order to each elected member of the Legislature; and

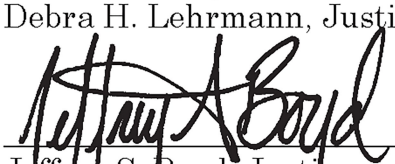
   d. submit a copy of this Order for publication in the *Texas Register*.

Dated: August 29, 2022.

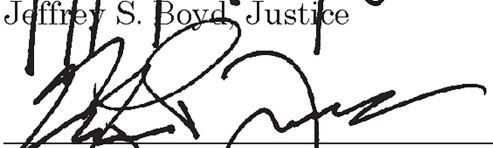
Nathan L. Hecht, Chief Justice



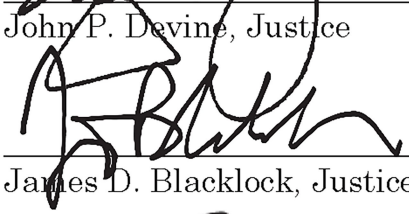
Debra H. Lehrmann, Justice



Jeffrey S. Boyd, Justice

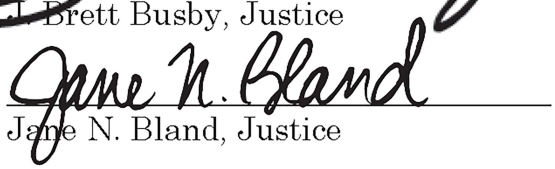


John P. Devine, Justice



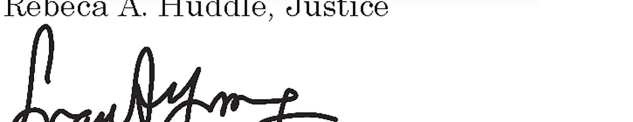
James D. Blacklock, Justice

J. Brett Busby, Justice



Jane N. Bland, Justice

Rebeca A. Huddle, Justice



Evan A. Young, Justice

TEXAS PLAN FOR RECOGNITION AND REGULATION OF SPECIALIZATION IN THE LAW

***

SECTION XII
RETAINED JURISDICTION OF SUPREME COURT

The jurisdiction of the TBLS shall be limited to twenty-~~one~~two areas of law: Criminal Law; Labor and Employment Law; Family Law; Estate Planning and Probate Law; Civil Trial Law; Personal Injury Trial Law; Immigration and Nationality Law; Real Estate Law; Tax Law; Bankruptcy Law; Oil, Gas and Mineral Law; Civil Appellate Law; Administrative Law; Consumer and Commercial Law; Juvenile Law; Health Law; Workers' Compensation Law; Criminal Appellate Law; Construction Law; Child Welfare Law; ~~and~~ Legislative and Campaign Law; and Aviation Law; and to the development and operation of the program in the recognition and regulation of specialization in the law, provided, however, that the number and type of areas included in the program and the jurisdiction of the TBLS may be enlarged, altered, or terminated from time to time by the Supreme Court of Texas.

***

TEXAS BOARD OF LEGAL SPECIALIZATION

STANDARDS FOR ATTORNEY CERTIFICATION

PART II
SPECIFIC AREA REQUIREMENTS

These are specific requirements that apply to the specialty area listed below. The specific requirements include the definitions, substantial involvement, reference, and other certification and recertification requirements for the specialty area. You will also need to refer to the Standards for Attorney Certification, Part I – General Requirements for requirements that apply to all specialty areas.

SECTION XXII

AVIATION LAW
(Area ID: AV / Year Started: 2022)

A. **DEFINITION.** Aviation law is the practice of law dealing with issues affecting aircraft and airport operations, aircraft ownership, aircraft navigation and maintenance, air traffic control safety, pilot licensing and certification requirements, spacecraft, and outer space.

B. **SUBSTANTIAL INVOLVEMENT.** To demonstrate substantial involvement and special competence in aviation law, Applicant must meet the following minimum requirements.

1. **Certification.**

   a. Percentage of Practice Requirement. Applicant must have devoted a minimum of 30% of Applicant's time practicing aviation law during each of the three years immediately preceding application.

   b. Task Requirements. Applicant must show that he or she has engaged directly and substantially in a broad practice of aviation law within the three years immediately preceding application. Applicant must provide information as required by TBLS concerning specific tasks Applicant has performed in aviation law. In evaluating experience, TBLS may take into consideration the nature, complexity, and duration of the tasks handled by Applicant.

(1) Applicant must show specific and substantial involvement in at least two of the following areas within the three years immediately preceding application:

(a) representing parties in transactions that are governed by, or otherwise directly affected by, aviation law, such as aircraft purchase or sale agreements, aircraft lease agreements, and other similar agreements;

(b) providing legal counsel with respect to various tax or regulatory matters that are governed by, or otherwise directly affected by, aviation law, such as:

i. structuring ownership or use of airports or aircraft in compliance with applicable federal aviation regulations;

ii. international, federal, state, or local taxes that might be assessed due to such transactions, ownership, or use;

iii. international treaties that might be involved in such matters;

iv. best practices for all aspects of airport or aircraft transactions, ownership, or use; and

v. Unmanned Aircraft Systems (UAS) or the commercial space industry;

(c) serving as legal counsel in civil aviation authority regulatory enforcement matters–such as pre-trial, trial, appellate, mediation, or administrative proceedings that involve disputes–or other legal regulatory actions concerning aviation law;

(d) providing legal counsel with respect to aviation-related insurance claims and conditions of coverage and insurance law applicable to the litigation of aviation-related claims and defenses;

(e) trying at least ten civil trials in a state or federal court of record in the United States that meet the following additional requirements:

i. at least five must involve an aviation law dispute with an amount in controversy exceeding $25,000 or significant nonmonetary claims;

ii. at least five must be jury trials that were conducted in a Texas or federal court of record by Applicant as lead counsel and submitted to the jury; and

iii. in at least three jury trials, Applicant must have played a significant role in conducting jury selection.

(2) Applicant must show by detailed response that Applicant has engaged at a primary level of responsibility for a client or employer in, or has had active management and oversight of one or more attorneys directly involved in, each of the Section B, 1, b, (1), (a)-(d) areas Applicant submitted to satisfy the task requirements.

(3) Applicant may substitute the following types of proceedings for two of the five aviation law civil trials required by Section B, 1, b, (1), (e), i:

(a) no more than one arbitration involving an aviation law dispute conducted to a final decision by Applicant as lead counsel in which:

i. formal rules of evidence and procedure governed; and

ii. the amount in controversy exceeded $25,000 or the arbitration involved significant nonmonetary claims;

(b) no more than one contested administrative proceeding involving an aviation law dispute conducted by Applicant as lead counsel before the

National Transportation Safety Board ("NTSB") in which:

i. Applicant conducted direct and cross-examination of witnesses at a hearing on the merits;

ii. the NTSB issued a final order ; and

iii. the proceeding arose from an action seeking the suspension or revocation of a license or certificate issued by the Federal Aviation Administration or the imposition of a civil penalty against a non-certified person;

(c) no more than one temporary or preliminary injunction hearing involving an aviation law dispute conducted to a decision on the injunction request by Applicant as lead counsel in which:

i. Applicant presented an opening and closing statement and conducted direct and cross-examination of witnesses; and

ii. the amount in controversy exceeded $25,000 or the hearing involved significant nonmonetary claims.

(4) For any trials or Section B, 1, b, (3) proceedings submitted to satisfy the task requirements, Applicant must have devoted a total of at least 20 separate days in trial or in the Section B, 1, b, (3) proceedings, of which at least 10 days must have been devoted to jury trials.

2. **Recertification.** Applicant must have devoted a minimum of 30% of Applicant's time practicing aviation law during each year of the five-year period of certification unless Applicant meets the exception in Part I-General Requirements, Section VI, C, 1, (b).

C. **REFERENCE REQUIREMENTS.** Applicant must submit a minimum of five names and addresses of persons to be contacted as references to attest to Applicant's competence in aviation law. These persons must be substantially involved in aviation law and be familiar with Applicant's aviation law practice.

1. **Certification.** Applicant must submit names of persons with whom Applicant has had dealings involving aviation law matters within the three years immediately preceding application.

2. **Recertification.** Applicant must submit names of persons with whom he or she has had dealings involving aviation law matters since certification or the most recent recertification.

3. **Reference Types.** If Applicant submits trials under Section B, 1, b, (1), (e) to satisfy the task requirements, four of the references must be Texas attorneys and one of the references must be a judge of any Texas or federal court of record. If Applicant does not submit trials under Section B, 1, b, (1), (e) to satisfy the task requirements, the five references must be Texas attorneys.

TRD-202203460
Jaclyn Daumerie
Rules Attorney
Supreme Court of Texas
Filed: September 1, 2022

♦ ♦ ♦

Order Amending the Rules and Forms for a Judicial Bypass of Parental Notice and Consent Under Chapter 33 of the Family Code

Supreme Court of Texas

Misc. Docket No. 22-9077

Order Amending the Rules and Forms for a Judicial Bypass of Parental Notice and Consent Under Chapter 33 of the Family Code

ORDERED that:

1. The Court approves the following amendments to the Rules and Forms for a Judicial Bypass of Parental Notice and Consent Under Chapter 33 of the Family Code.

2. To effectuate the Act of May 29, 2021, 87th Leg., R.S., ch. 800 (H.B. 1280), the amendments are effective immediately. But the amendments may later be changed in response to public comments. The Court requests that comments be submitted in writing to rulescomments@txcourts.gov by December 1, 2022.

3. The Clerk is directed to:

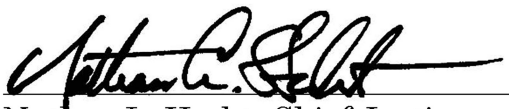
   a. file a copy of this Order with the Secretary of State;

   b. cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

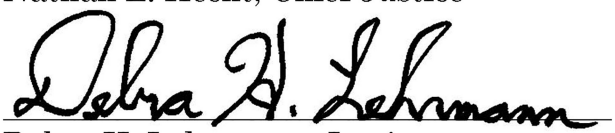
   c. send a copy of this Order to each elected member of the Legislature; and

   d. submit a copy of this Order for publication in the *Texas Register*.

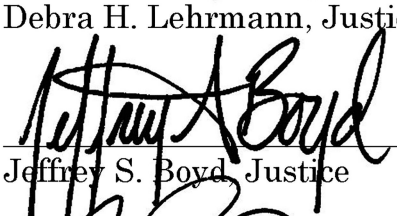
Dated: September 6, 2022.



Nathan L. Hecht, Chief Justice

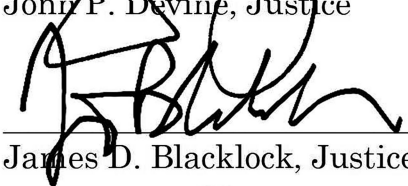


Debra H. Lehrmann, Justice

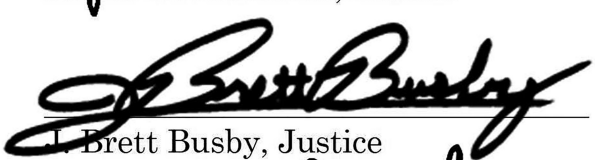


Jeffrey S. Boyd, Justice

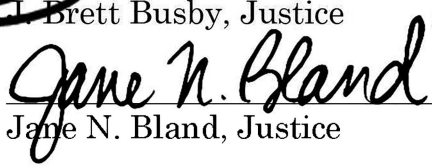
John P. Devine, Justice



James D. Blacklock, Justice

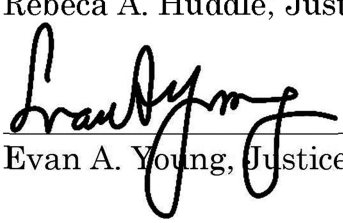


J. Brett Busby, Justice



Jane N. Bland, Justice

Rebeca A. Huddle, Justice



Evan A. Young, Justice

Rules and Forms for a Judicial Bypass of Parental Notice and Consent Under Chapter 33 of the Family Code (Redline Version)

Explanatory Statement

Chapter 33 of the Texas Family Code provides for judicial authorization of an unemancipated minor to consent to an abortion in Texas without notice to, or the consent of, a parent, managing conservator, or guardian. Sections 33.003 and 33.004, which govern proceedings in the trial and appellate courts, authorize the Court to make rules to ensure that judicial bypass applications are decided confidentially and promptly. *See* TEX. FAM. CODE §§ 33.003(l), 33.004(c). The statute also directs the Court to make forms for use in judicial bypass proceedings. *Id.* §§ 33.003(m), 33.004(d).

The Court approved the first set of rules and forms in 1999, following the enactment of Chapter 33. *See* Misc. Docket No. 99-9247 (Dec. 22, 1999); Act of May 25, 1999, 76th Leg., R.S., ch. 395, 1999 Tex. Gen. Laws 2466 (S.B. 30) (codified at TEX. FAM. CODE § 33.001 *et seq.*). In 2015, the Court amended ~~T~~the rules and forms ~~have been amended~~ to reflect the 2015 amendments to Chapter 33. *See* Misc. Docket No. 15-9246 (Dec. 29, 2015); Act of June 1, 2015, 84th Leg., R.S., ch. 436 (H.B. 3994). The 2022 amendments to the rules and forms ~~track the statutory requirements~~reflect the enactment of Chapter 170A of the Texas Health and Safety Code. *See* Act of May 29, 2021, 87th Leg., R.S., ch. 800 (H.B. 1280) (codified at TEX. HEALTH & SAFETY CODE § 170A.001 *et seq.*).

The~~y~~ rules and forms do not reflect any judgment by the Court that Chapter 33, or any part of it, is constitutional. Constitutional questions should be resolved in an adversarial proceeding with full briefing and argument. Nor do the rules imply that abortion is—or is not—permitted in any specific situation. *See, e.g.*, ~~*Roe v. Wade*, 410 U.S. 113 (1973);~~ TEX. HEALTH & SAFETY CODE § 170A.002 (restrictions on ~~third trimester~~ abortions ~~of viable fetuses~~).

The notes and comments appended to the rules are intended to inform their construction and application by courts and practitioners.

Rule 1. General Provisions

1.1 Applicability of These Rules. These rules govern proceedings for obtaining a court order authorizing a minor to consent to an abortion without notice to, or the consent of, a parent, managing conservator, or guardian under Chapter 33, Family Code. All references in these rules to "minor" refer to the minor applicant. Other Texas court rules—including the Rules of Civil Procedure, Rules of Evidence, Rules of Appellate Procedure, Rules of Judicial Administration, and local rules approved by the Supreme Court—also apply, but when the application of another rule would be inconsistent with the

general framework or policy of Chapter 33, Family Code, or these rules, these rules control.

Proceedings under these rules are not intended to create—and an order issued under these rules should not be construed as—a judicial determination that the minor has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the minor at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced. *See* TEX. HEALTH & SAFETY CODE § 170A.002.

***

Instructions for Applying to the Court for a Waiver of Parental Notification and Consent (Form 1A)

Your situation and the law

An abortion in Texas is available only if a doctor, in the exercise of reasonable medical judgment, determines that you have a life-threatening physical condition aggravated by, caused by, or arising from your pregnancy that places you at risk of death or poses a serious risk of substantial impairment of one of your major bodily functions unless the abortion is performed or induced.

If you are younger than 18 and have not been legally "emancipated," you are "unemancipated," which means that you are legally under the custody or control of your parents (or one of your parents), a managing conservator, or a guardian. (A "managing conservator" is an adult or agency appointed by a court to have custody or control of you.)

If you are pregnant, unemancipated, and younger than 18, you cannot get an abortion in Texas unless:

- your doctor informs one of your parents or your managing conservator or guardian at least 48 hours before the abortion and obtains the consent of your parent, managing conservator, or guardian; *or*

- a judge issues an order that "waives" or removes the requirement that you must let a parent or your managing conservator or guardian know about your planned abortion and obtain his or her consent to it.

***

Rules and Forms for a Judicial Bypass of Parental Notice and Consent Under Chapter 33 of the Family Code (Clean Version)

Explanatory Statement

Chapter 33 of the Texas Family Code provides for judicial authorization of an unemancipated minor to consent to an abortion in Texas without notice to, or the consent of, a parent, managing conservator, or guardian. Sections 33.003 and 33.004, which govern proceedings in the trial and appellate courts, authorize the Court to make rules to ensure that judicial bypass applications are decided confidentially and promptly. *See* TEX. FAM. CODE §§ 33.003(l), 33.004(c). The statute also directs the Court to make forms for use in judicial bypass proceedings. *Id.* §§ 33.003(m), 33.004(d).

The Court approved the first set of rules and forms in 1999, following the enactment of Chapter 33. *See* Misc. Docket No. 99-9247 (Dec. 22, 1999); Act of May 25, 1999, 76th Leg., R.S., ch. 395, 1999 Tex. Gen. Laws 2466 (S.B. 30) (codified at TEX. FAM. CODE § 33.001 *et seq.*). In 2015, the Court amended the rules and forms to reflect the 2015 amendments to Chapter 33. *See* Misc. Docket No. 15-9246 (Dec. 29, 2015); Act of June 1, 2015, 84th Leg., R.S., ch. 436 (H.B. 3994). The 2022 amendments to the rules and forms reflect the enactment of Chapter 170A of the Texas Health and Safety Code. *See* Act of May 29, 2021, 87th Leg., R.S., ch. 800 (H.B. 1280) (codified at TEX. HEALTH & SAFETY CODE § 170A.001 *et seq.*).

The rules and forms do not reflect any judgment by the Court that Chapter 33, or any part of it, is constitutional. Constitutional questions should be resolved in an adversarial proceeding with full briefing and argument. Nor do the rules imply that abortion is—or is not—permitted in any specific situation. *See, e.g.*, TEX. HEALTH & SAFETY CODE § 170A.002 (restrictions on abortions).

The notes and comments appended to the rules are intended to inform their construction and application by courts and practitioners.

Rule 1. General Provisions

1.1 Applicability of These Rules. These rules govern proceedings for obtaining a court order authorizing a minor to consent to an abortion without notice to, or the consent of, a parent, managing conservator, or guardian under Chapter 33, Family Code. All references in these rules to "minor" refer to the minor applicant. Other Texas court rules—including the Rules of Civil Procedure, Rules of Evidence, Rules of Appellate Procedure, Rules of Judicial Administration, and local rules approved by the Supreme Court—also apply, but when the application of another rule would be inconsistent with the general framework or policy of Chapter 33, Family Code, or these rules, these rules control.

Proceedings under these rules are not intended to create—and an order issued under these rules should not be construed as—a judicial determination that the minor has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the minor at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced. *See* TEX. HEALTH & SAFETY CODE § 170A.002.

***

Instructions for Applying to the Court for a Waiver of Parental Notification and Consent (Form 1A)

Your situation and the law

An abortion in Texas is available only if a doctor, in the exercise of reasonable medical judgment, determines that you have a life-threatening physical condition aggravated by, caused by, or arising from your pregnancy that places you at risk of death or poses a serious risk of substantial impairment of one of your major bodily functions unless the abortion is performed or induced.

If you are younger than 18 and have not been legally "emancipated," you are "unemancipated," which means that you are legally under the custody or control of your parents (or one of your parents), a managing conservator, or a guardian. (A "managing conservator" is an adult or agency appointed by a court to have custody or control of you.)

If you are pregnant, unemancipated, and younger than 18, you cannot get an abortion in Texas unless:

- your doctor informs one of your parents or your managing conservator or guardian at least 48 hours before the abortion and obtains the consent of your parent, managing conservator, or guardian; *or*

- a judge issues an order that "waives" or removes the requirement that you must let a parent or your managing conservator or guardian know about your planned abortion and obtain his or her consent to it.

***

TRD-202203512

Jaclyn Daumerie
Rules Attorney
Supreme Court of Texas
Filed: September 6, 2022

♦ ♦ ♦

Preliminary Approval of a Form Sworn Application and Petition to Stop Cyberbullying

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," this order is not included in the print version of the Texas Register. The order is available in the on-line version of the September 16, 2022, issue of the Texas Register.)

TRD-202203495
Jaclyn Daumerie
Rules Attorney
Supreme Court of Texas
Filed: September 2, 2022

♦ ♦ ♦

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
https://www.sos.texas.gov/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 512-463-5561. Or request a copy by email: register@sos.texas.gov

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://texasattorneygeneral.gov/og/open-government

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.texas.gov

...

Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

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 47 (2022) is cited as follows: 47 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 "47 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 47 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)*

SALES AND CUSTOMER SUPPORT

Sales - To purchase subscriptions or back issues, you may contact LexisNexis Sales at 1-800-223-1940 from 7 a.m. to 7 p.m., Central Time, Monday through Friday. Subscription cost is $502 annually for first-class mail delivery and $340 annually for second-class mail delivery.

Customer Support - For questions concerning your subscription or account information, you may contact LexisNexis Matthew Bender Customer Support from 7 a.m. to 7 p.m., Central Time, Monday through Friday.

Phone: (800) 833-9844
Fax: (518) 487-3584
E-mail: customer.support@lexisnexis.com
Website: www.lexisnexis.com/printcdsc

LexisNexis