

PROPOSED RULES

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

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

TITLE 16. ECONOMIC REGULATION

PART 3. TEXAS ALCOHOLIC BEVERAGE COMMISSION

CHAPTER 33. LICENSING

SUBCHAPTER E. EVENTS AT A TEMPORARY LOCATION

16 TAC §33.73

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes an amendment to rule §33.73, related to General Provisions for events at temporary locations.

Background and Summary

An amendment to §33.73(i) is necessary to remove references to statutes that have been repealed by the Texas Legislature.

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed amended rule will be in effect, it is not expected to have a significant fiscal impact upon the agency. There are no foreseeable economic implications anticipated for other units of state or local government due to the amended rule. The amended rule does not impact fees or fines that can be collected by another state or local government, nor does it impose additional regulatory obligations on other units of government.

Rural Communities Impact Assessment

The proposed amended rule will not have any material adverse fiscal or regulatory impacts on rural communities. Likewise, the proposed amended rule will not adversely affect a local economy in a material way. The amended rule will apply statewide and not impact rural communities in any manner different from urban ones or any local economy in a manner different from other local economies or the state's economy.

Small Business and Micro-Business Assessment/Flexibility Analysis

No material fiscal implications are anticipated for small or micro-businesses due to the proposed amended rule. Therefore, no Small Business and Micro-Business Assessment/Flexibility Analysis is required.

Takings Impact Assessment

The proposed amended rule does not affect a taking of private real property, as described by Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The rulemaking would impose no burdens on private real property because it

neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the amended rule would be in effect, the public would benefit from accurate references to the Alcoholic Beverage Code within the rule. There is no increase in costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed amended rule. The analysis addresses the first five years the proposed amended rule would be in effect. The proposed amended rule neither creates nor eliminates a government program. It does not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed amended rule requires neither an increase nor a decrease in future legislative appropriations to the commission.

Comments on the proposed amended rule may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by email to rules@tabc.texas.gov. Written comments will be accepted for 30 days following publication in the *Texas Register*. The commission does not anticipate the need to hold a public hearing on this proposed amendment.

The amended rule is proposed pursuant to the agency's authority under §5.31 of the Alcoholic Beverage Code by which the commission may prescribe and publish rules necessary to carry out the provisions of the code.

The proposed amended rule does not otherwise impact any other current rules or statutes.

§33.73. General Provisions.

(a) All wine sold or possessed with the intention to sell at an event held in an area where the sale of that type of alcohol has not been authorized by a local option election must comply with the terms of §16.011 of the Alcoholic Beverage Code.

(b) A copy of the File and Use Notification form that was filed with the commission, Nonprofit Entity Temporary Event Permit, or Temporary Event Approval and diagram must be displayed in a conspicuous place at the location of the event at all times during the event.

(c) The commission may deny authorization under this subchapter if:

(1) the information required to be submitted is incomplete or inaccurate;

(2) the person requesting the authorization does not qualify for the authorization;

(3) the event does not qualify for the authorization; or

(4) there is reason to believe that granting the authorization will:

(A) result in a violation of the Alcoholic Beverage Code or the rules of the commission; or

(B) be otherwise detrimental to the public.

(d) The grounds for denying a Nonprofit Entity Temporary Event Permit or Temporary Event Approval shall be communicated in writing to the applicant as soon as is reasonably practical.

(e) If an authorization under this subchapter is granted in error, the commission may rescind the authorization at any time.

(f) No person authorized under this subchapter shall use that authority to provide alcoholic beverages at any licensed premises during any time that a permit or license for that location is suspended.

(g) A Temporary Event Approval or Nonprofit Entity Temporary Event Permit may be used to provide alcoholic beverages for on-premises consumption at a location that has been designated as the licensed premises in a pending application only if:

(1) the commission has received an application for the proposed location and payment of all state fees and securities, if applicable, have been submitted;

(2) there is no pending protest of the application;

(3) the commission has performed an initial review for qualification; and

(4) there is no notice sign (60-day sign) pursuant to Alcoholic Beverage Code §§11.391 or 61.381 posted at the event location.

(h) The completion of a responsibilities course provided by the commission may be required before a Temporary Event Approval request is granted.

(i) The signage requirements for a Temporary Event Approval are the same as those for a primary license or permit and may include signs required by §§5.53, [11.041], 11.042, [61.11] and 61.111 of the Alcoholic Beverage Code and §31.4 of this title.

(j) All alcoholic beverages being transported shall be accompanied by invoices.

(k) The holder of a primary license or permit may return remaining alcoholic beverage products to the primary licensed location. The holder of an event authorized under this subchapter may distribute remaining product as authorized under Alcoholic Beverage Code §109.54.

(l) An applicant is not entitled to a refund or proration of fees paid for authorization under this subchapter, including any late filing 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.

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Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3451



16 TAC §33.78

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes an amendment to rule §33.78, related to the Nonprofit Events at a Temporary Location.

Background and Summary

The proposed amendment to §33.78 is necessary to add back in a provision that was inadvertently omitted during recent comprehensive revisions of rules for events at temporary locations. This amendment represents the long-standing practice of the agency and is not a policy change to those who stage such events. Placing it in this rule increases transparency into this long-standing practice.

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed amended rule will be in effect, it is not expected to have a significant fiscal impact upon the agency. This amendment represents the long-standing practice of the agency using existing agency resources. The amended rule does not impact fees or fines that can be collected by another state or local government, nor does it impose additional regulatory obligations on other units of government.

Rural Communities Impact Assessment

The proposed amended rule will not have any material adverse fiscal or regulatory impacts on rural communities. Likewise, the proposed amended rule will not adversely affect a local economy in a material way. The amended rule will apply statewide and not impact rural communities in any manner different from urban ones or any local economy in a manner different from other local economies or the state's economy.

Small Business and Micro-Business Assessment/Flexibility Analysis

No material fiscal implications are anticipated for small or micro-businesses due to the proposed amended rule. This amendment represents the long-standing practice of the agency and does not represent a policy change to businesses who stage such events. Therefore, no Small Business and Micro-Business Assessment/Flexibility Analysis is required.

Takings Impact Assessment

The proposed amended rule does not affect a taking of private real property, as described by Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The rulemaking would impose no burdens on private real property because it neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the amended rule would be in effect, the public would benefit increased transparency regarding the

agency's rules for non-profit auction events. There is no increase in costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed amended rule. The analysis addresses the first five years the proposed amended rule would be in effect. This amendment represents the long-standing practice of the agency and will continue to be implemented using existing agency staff and other resources. The proposed amended rule neither creates nor eliminates a government program. It does not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed amended rule requires neither an increase nor a decrease in future legislative appropriations to the commission.

Comments on the proposed amended rule may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by email to rules@tabc.texas.gov. Written comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed rules on August 22, 2022, at 10:00 a.m. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. **DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY.** Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 206-3451.

The amended rule is proposed pursuant to the agency's authority under §5.31 of the Alcoholic Beverage Code by which the commission may prescribe and publish rules necessary to carry out the provisions of the code.

The proposed amended rule does not otherwise impact any other current rules or statutes.

§33.78. Nonprofit Entity Temporary Events.

(a) A Nonprofit Entity Temporary Event Permit shall only be issued to a nonprofit entity as defined by Alcoholic Beverage Code §30.01.

(b) An application for a Nonprofit Entity Temporary Event Permit shall be made on forms provided by the commission and shall be signed and sworn to by the applicant.

(c) The requestor shall e-mail the completed Nonprofit Entity Temporary Event Permit application forms to the Events email address for the TABC Region in which the event will be held.

(d) The applicant shall remit payment of fees at the time the application is filed. The fee for a Nonprofit Entity Temporary Event Permit is \$50 per day.

(e) In addition to the application forms, other documents related to the event that may be required include a letter from the property owner, sponsorship agreements, promoter agreements, concession agreements, management agreements, diagrams, site maps, local governmental authorization, and any other documents needed to determine qualification under the Alcoholic Beverage Code.

(f) If the event is approved, the commission shall issue to the applicant a Nonprofit Entity Temporary Event Permit showing on its face the effective dates of the permit.

(g) Permit holders may sell any alcoholic beverage authorized by law to be sold where the event is to be held.

(h) Permit holders must purchase distilled spirits for Nonprofit Entity Temporary Events from a local distributor permit holder.

(i) A nonprofit entity is not limited in the number of events it may hold under this section in a calendar year, except for certain events in dry areas as provided by Alcoholic Beverage Code §30.09.

(j) Events in dry counties must comply with Alcoholic Beverage Code §30.09.

(k) Auction-only Events.

(1) Subsections (d) - (h) of this section do not apply to a Nonprofit Temporary Event at which alcoholic beverages are auctioned but not otherwise sold or served to a consumer.

(2) Events under this subsection do not require prior approval and are not subject to late fees.

(3) The holder of a Nonprofit Entity Temporary Event Permit may conduct an auction on the licensed premises of another only if:

(A) all alcohol auctioned is stored separately from other alcohol stored, sold, or served by the permittee; and

(B) all alcohol auctioned, whether sold or unsold, is removed from the licensed premises immediately following the event.

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

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16 TAC §33.81

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes new rule §33.81, related to Purchase of Alcoholic Beverages for a Temporary Event.

Background and Summary

After recent legislative changes to the commission's statutory menu of licenses and permits, members of the regulated industry expressed some confusion as to where a Mixed Beverage or Private Club permit holder can purchase wine and malt beverages for an event held at a temporary location that is not in the same county as the permit holder's primary licensed premises. Under Tex. Alco. Bev. Code §30.05, distilled spirits must be purchased from the holder of a local distributor's permit, but the Code and rules are silent on sourcing of wine and malt beverages for such events. The commission proposes new §33.81 to fill that gap by expanding the current standard for distilled spirits to include all alcoholic beverages.

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed new rule will be in effect, it is not expected to have a significant fiscal impact upon the

agency. There are no foreseeable economic implications anticipated for other units of state or local government due to the proposed new rule. The proposed rule does not impact fees or fines that can be collected by another state or local government, nor does it impose additional regulatory obligations on other units of government.

Rural Communities Impact Assessment

The proposed rule will not have any material adverse fiscal or regulatory impacts on rural communities. Likewise, the proposed rules will not adversely affect a local economy in a material way. The new rule applies statewide and does not impact rural communities in any manner different from urban ones or any local economy in a manner different from other local economies or the state's economy because it allows purchase in the county of the event without respect to whether the county is urban or rural. Additionally, because few events will be subject to this rule, it will not result in economic impacts at the local or state level.

Small Business and Micro-Business Assessment/Flexibility Analysis

The proposed rule expands alcohol sourcing options for all businesses subject to the rule, including small and micro-businesses. This will be of particular benefit to those small and micro-businesses that do not have the vehicles or other resources necessary to transport alcoholic beverages over long distances. No material fiscal implications are anticipated for small or micro-businesses due to the proposed rule. Therefore, no Small Business and Micro-Business Assessment/Flexibility Analysis is required.

Takings Impact Assessment

The proposed rule does not affect a taking of private real property, as described by Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The rulemaking would impose no burdens on private real property because it neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the new rule would be in effect, the public would benefit from access to a variety of products at events at temporary locations, including widely distributed products and those local to the area of the event. There is no increase in costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed new rule. The analysis addresses the first five years the proposed rule would be in effect. The proposed rule neither creates nor eliminates a government program. It does not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed rule requires neither an increase nor a decrease in future legislative appropriations to the commission.

Comments on the proposed rule may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by email to rules@tabc.texas.gov. Written comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed rule on August 22, 2022, at 10:00 a.m. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. **DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY.** Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 206-3451.

The rule is proposed pursuant to the agency's authority under §5.31 of the Alcoholic Beverage Code by which it may prescribe and publish rules necessary to carry out the provisions of the code.

The proposed new rule does not impact any other current rules or statutes.

§33.81. Purchase of Alcoholic Beverages for a Temporary Event.

(a) This section applies to holders of Mixed Beverage Permits or Private Club Registration Permits when selling alcoholic beverages at an event authorized by a Temporary Event Approval or under a File and Use Notification.

(b) Except as provided by subsection (c) of this rule, a Mixed Beverage Permit or a Private Club Registration Permit holder purchasing alcoholic beverages for an event at a temporary location in a county other than the county in which the premises covered by its primary permit is located must:

(1) purchase the alcoholic beverages from a distributor or wholesaler authorized under this code to sell the alcoholic beverages in the county in which the permit holder sells the alcoholic beverages under this section; and

(2) keep a record of the amount of alcoholic beverages purchased and sold under this section, by type, for no less than two years following the last day of the event.

(c) If the temporary event is held in a county that includes more than one territory, as that term is defined by Code §102.71(5), a Mixed Beverage Permit or a Private Club Registration Permit holder must purchase malt beverages from the distributor holding the territorial agreement covering the temporary event location.

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

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Shana Horton

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For further information, please call: (512) 206-3451



SUBCHAPTER F. LICENSE AND PERMIT ACTION

16 TAC §33.94

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes amendments to rule §33.94, relating to Reporting License or Permit Changes.

Background and Summary

The proposed amendments result from review of chapter 41 of the commission's rules pursuant to the regular four-year review cycle prescribed by Government Code §2001.039. During that review, agency staff noted that current commission rule §41.48, Changes in Control, had become largely obsolete due to revised reporting requirements under the agency's new online portal system. Also, rule §41.48 and rule §33.94 have significant areas of overlap, causing confusion as to which rule applies in each circumstance.

The commission proposes to repeal §41.48 in a separate, contemporaneous rulemaking. The proposed amendments to §33.94 would ensure that even without §41.48, the commission retains the ability to request any information it needs to determine whether a reportable change has occurred; update language to accommodate use of the agency's new online portal for reporting changes; and use the active voice in sections requiring license or permit holder compliance to support enforcement of them.

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed amended rule will be in effect, it is not expected to have a significant fiscal impact upon the agency because it reflects the current information collecting practices employed by existing commission staff. The resources necessary to provide for reporting changes through the agency's online portal system were previously appropriated to the commission by the Texas Legislature (H.B. 1545, 78th Tex. Leg., R.S. 2019). The amended rule does not impact fees or fines that can be collected by another state or local government, nor does it impose additional regulatory obligations on other units of government.

Rural Communities Impact Assessment

The proposed amended rule will not have any material adverse fiscal or regulatory impacts on rural communities. Likewise, the proposed amended rule will not adversely affect a local economy in a material way. The amended rule will apply statewide and not impact rural communities in any manner different from urban ones or any local economy in a manner different from other local economies or the state's economy.

Small Business and Micro-Business Assessment/Flexibility Analysis

No material fiscal implications are anticipated for small or micro-businesses due to the proposed amended rule. The amendments, coupled with the proposed repeal of §41.48, actually decrease the level of information a license or permit applicant is required to provide to the agency up front, easing the burden of reporting requirements. Therefore, no Small Business and Micro-Business Assessment/Flexibility Analysis is required.

Takings Impact Assessment

The proposed amended rule does not affect a taking of private real property, as described by Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The rulemaking would impose no burdens on private real property because it neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the amended rule would be in effect, the public would benefit from regulated businesses' understanding of and compliance with commission reporting requirements, some of which are designed to ensure maintenance of legal relationships between members of industry. The public also benefits from the savings of TABC employee time and effort due to the streamlining of data reporting requirements and procedures, which are supported by this rule change. There is no increase in costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed amended rule. The analysis addresses the first five years the proposed amended rule would be in effect. The proposed amended rule neither creates nor eliminates a government program. It does not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed amended rule requires neither an increase nor a decrease in future legislative appropriations to the commission.

Comments on the proposed amended rule may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by email to rules@tabc.texas.gov. Written comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed rules on August 22, 2022, at 10:00 a.m. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY. Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 206-3451.

The amended rule is proposed as part of the regular four-year review cycle prescribed by Government Code §2001.039 and pursuant to the agency's authority under §5.31 of the Alcoholic Beverage Code by which the commission may prescribe and publish rules necessary to carry out the provisions of the code.

The proposed amended rule does not otherwise impact any other current rules or statutes.

§33.94. Reporting Permit or License Changes.

(a) All changes subject to this section must be reported in the manner prescribed by the commission. [~~In order to process renewal applications efficiently and to assure that permittees and licensees are qualified throughout the term of their permits or licenses, the commission prescribes the following reporting timelines for changes to information that was provided in connection with an original application or for changes to the most recent information that has been reported to the commission. For the reasons recited above, the commission finds that the timelines are necessary to accomplish the purposes of the Alcoholic Beverage Code pursuant to Alcoholic Beverage Code §5.32.~~]

(b) Nothing in this section limits the commission's authority to request information from a license or permit holder at any time to determine if a change required to be reported has occurred.

(c) [(b)] The license or permit holder must report to the commission the following changes [~~Any of the information described in this subsection that changes from the information provided in the original application, or that was provided in the most recent reported change to~~

the commission, must be reported to the commission] within 30 days following the date the change occurred:

(1) the addition or removal of a person whose name was included on the original application or whose name would be required if a new [original] application for an original license or permit was being submitted[, regardless of the title, position or ownership held];

(2) a change to a person's criminal history that affects their qualifications to hold a license or permit [a change to the type of business];

[(3) a change to a phone number or email address;]

[(4) a change to a person's criminal history that affects their qualifications to hold a permit or license;]

(3) [(5)] a change of the owner of the premises, a sublessor, a management company, or a concession company, or to the terms of any agreements with any such persons; or

(4) [(6)] a change of organization as that term is defined in Business Organizations Code §1.002(62), other than a change of business entity described in Alcoholic Beverage Code §§11.12 or 61.14 [which is subject to the requirements of subsection (d) of this section].

(d) [(e)] The license or permit holder must report [Any of] the following [information described in this subsection that] changes from the information provided in the [original] application for an original license or permit[;] or [that was provided in] the most recent reported change to the commission[, must be reported to the commission] prior to the date the change will occur:

(1) a change in corporate control pursuant to Alcoholic Beverage Code §28.04; or

(2) a change of tradename.

(e) [(d)] The license or permit holder must report a [A] change of business entity described in Alcoholic Beverage Code §§11.12 or 61.14 no less than ten days before [must be reported not later than the 11th day preceding] the date the change will occur.

(f) [(e)] This section does not apply to:

(1) a change of mailing address or other contact information, which are [is] subject to the requirements of §33.93 of this title (relating to Notification Requirements); or

(2) a change in the licensed or permitted location pursuant to Alcoholic Beverage Code §§11.08 or 61.09, which is subject to the requirements of §33.3 of this title (relating to Process to Apply for License or Permit).

[(f) All changes subject to this section must be reported on forms prescribed by the commission.]

[(g) Nothing in this section limits the commission's authority to request information from a permittee or licensee at any time to determine if a change has occurred.]

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

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Shana Horton

Rules Attorney

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3451



CHAPTER 35. ENFORCEMENT

16 TAC §35.1

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes new rule §35.1, related to Reporting a Breach of the Peace.

Background and Summary

The new rule results from review of Chapters 35 and 36 of the commission's rules pursuant to the regular four-year review cycle prescribed by Government Code §2001.039. Proposed §35.1 is based upon current §35.32 (proposed to be repealed in a separate, simultaneous rulemaking), which requires some license and permit holders to report certain breaches of the peace to the TABC.

The proposed new rule clarifies that the holder any of the following permits must report to the TABC certain breaches of the peace occurring on property under their direct or indirect control: package store, wine only package store, wine and malt beverage retailer's on- or off-premises, mixed beverage, private club registration, and retail dealer's on- or off-premises permits. It clarifies this existing requirement by adding references to the underlying statutory authority for each license or permit type affected and adding a reference to the definition of "premises" from §11.49 of the Code into the rule subsection containing the reporting requirement, in addition to its current location within the rule's applicable definitions section (current §35.32(g)(3)). Specifically identifying the license and permit holders subject to the requirement and elevating the visibility of the applicable definition of "premises" is intended to increase regulated business's compliance with the rule.

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed new rule will be in effect, is not expected to have a significant fiscal impact upon the agency. Implementation will be performed using existing agency resources. There are no foreseeable economic implications anticipated for other units of state or local government due to the proposed new rule. The proposed rule does not impact fees or fines that can be collected by another state or local government, nor does it impose additional regulatory obligations on other units of government.

Rural Communities Impact Assessment

The proposed rule will not have any material adverse fiscal or regulatory impacts on rural communities. Likewise, the proposed rule will not adversely affect a local economy in a material way. The new rule applies statewide and does not impact rural communities in any manner different from urban ones or any local economy in a manner different from other local economies or the state's economy.

Small Business and Micro-Business Assessment/Flexibility Analysis

A small or micro-business that is a license or permit holder can report a breach of the peace quickly and easily by in person, by e-mail, by phone, or online at no cost. No material fiscal implications are anticipated for small or micro-businesses due to the proposed rule. Therefore, no Small Business and Micro-Business Assessment/Flexibility Analysis is required.

Takings Impact Assessment

The proposed rule does not affect a taking of private real property, as described by Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The rulemaking would impose no burdens on private real property because it neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the rule would be in effect, the public would benefit from the public safety benefits of increased compliance with reporting requirements related to breaches of the peace on premises under the control of certain permit holders. These reports will assist TABC agents in investigating those breaches of the peace and tracking their frequency of occurrence at different sites. There is no increase in costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed new rule. The analysis addresses the first five years the proposed rule would be in effect. The proposed rule neither creates nor eliminates a government program. It does not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed rule requires neither an increase nor a decrease in future legislative appropriations to the commission.

Comments on the proposed rule may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by email to rules@tabc.texas.gov. Written comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed rules on August 22, 2022, at 10:00 a.m. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. **DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY.** Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 206-3451.

The rule is proposed pursuant to the agency's authority under §5.31 of the Alcoholic Beverage Code by which it may prescribe and publish rules necessary to carry out the provisions of the code and Government Code §2001.039, which requires review of each commission rule at least every four years.

Current §35.32 is proposed to be repealed simultaneously with the publication of this proposed new rule. The proposed new rule does not otherwise impact any other current rules or statutes.

§35.1. Reporting a Breach of the Peace.

(a) This section relates to Alcoholic Beverage Code §§11.61(b)(21), 22.12, 24.11, 25.04(b), 26.03(b), 28.11, 32.24, 61.71(a)(30), 69.13, and 71.09.

(b) Except as provided in this subsection, a licensee or permittee shall report to the commission a breach of the peace on a licensed premises as defined by §11.49 of the Code. The licensee or permittee shall make the report as soon as possible, but not later than five calendar days after the incident. If the incident is a shooting, stabbing or murder, or an incident involving serious bodily injury, the licensee or permittee shall report the breach of the peace not later than 24 hours from the time of the incident.

(c) Unless the report is required to be made in a specific manner pursuant to subsection (d) of this section, the report required by this section shall be made:

- (1) in person at any commission office;
- (2) through the commission's website;
- (3) by e-mail to breachofpeace@tabc.texas.gov; or
- (4) through the commission's internet-based reporting system.

(d) The executive director or the executive director's designee may require, in writing, that a licensee or permittee make any reports required by this section in a specific manner as instructed, if the licensee or permittee has previously violated Alcoholic Beverage Code §11.61(b)(21) or §61.71(a)(30).

(e) At a minimum, the report required by this section shall include the information required in paragraphs (1) - (9) of this subsection, but may include other information the person making the report wishes to include:

- (1) the date and time of the report;
- (2) the date and time of the incident being reported;
- (3) the trade name of the licensed premises where the incident occurred;
- (4) the name and physical location of the licensed premises where the incident occurred, including the city (if applicable) and county;
- (5) the name of the person filing the report, that person's relationship to the holder of the license or permit, and contact information for that person;
- (6) if different from the information given in response to paragraph (5) of this subsection, the name of the person designated by the holder of the license or permit to answer questions from the commission about the incident, that person's relationship to the license or permit holder, and contact information for that person;
- (7) a brief description of the incident;
- (8) the name of all law enforcement agencies who were called or otherwise appeared in connection with the incident, and the names of the officers involved (if known); and
- (9) the names and contact information of any witnesses to the incident (if known).

(f) For purposes of subsection (b) of this section and subject to the provisions of subsection (g) of this section, a reportable "breach of the peace" occurs when law enforcement or emergency medical services personnel respond to the licensed premises or premises under the control of a license or permit holder, or when a disturbance is created by a person on the licensed premises or on premises under the control of a license or permit holder and the incident involves:

- (1) shooting, stabbing or murdering a person;
- (2) causing bodily injury to another person;

(3) threatening another person with a weapon;

(4) discharging a firearm on the licensed premises; or

(5) destroying the licensee's or permittee's property, if the incident is reported by the licensee or permittee to a law enforcement agency.

(g) For purposes of this section:

(1) conduct identified in subsection (f) of this section (other than a shooting, stabbing or murder, or an incident involving serious bodily injury) creates a "disturbance," and therefore is a reportable breach of the peace, when it:

(A) occurs at a time when the licensee or permittee, or any person allowed by the licensee or permittee, is on the licensed premises; and

(B) interferes with, interrupts, or intrudes upon the operation or management of the licensed premises;

(2) a shooting, stabbing or murder, or an incident involving serious bodily injury, on the licensed premises is always a "disturbance," and therefore is always a reportable breach of the peace;

(3) a "licensed premises" is as defined in Alcoholic Beverage Code §11.49;

(4) a "permittee" is as defined in Alcoholic Beverage Code §1.04(11); and

(5) a "licensee" is as defined in Alcoholic Beverage Code §1.04(16).

(h) A license or permit holder may not be held administratively liable for failing to file a report or failing to file a timely report under this section if it can demonstrate that it had no knowledge, nor in the exercise of reasonable care should have had knowledge, of the alleged breach of peace on the licensed premises.

(i) A license or permit holder may not be held administratively liable for failing to file a report or failing to file a timely report under this section if the alleged breach of the peace:

(1) did not occur on the license or permit holder's premises; and

(2) occurred at a time that the license or permit holder's licensed premises was closed to the public.

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 July 27, 2022.

TRD-202202814

Shana Horton

Rules Attorney

Texas Alcoholic Beverage Commission

Earliest possible date of adoption: September 11, 2022

For further information, please call: (512) 206-3451



CHAPTER 41. AUDITING

SUBCHAPTER D. SALES OF ALCOHOLIC BEVERAGES NOT IN REGULAR COURSE OF BUSINESS

16 TAC §41.48

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes the repeal of rule §41.48 as part of a consolidation of two of its rules.

Background and Summary of Basis for the Proposed Rule Repeal

The proposed repeal results from review of chapter 41 of the commission's rules pursuant to the regular four-year review cycle prescribed by Government Code §2001.039. During that review, agency staff noted that §41.48, Changes in Control, is largely obsolete due to revised reporting requirements under the agency's new online portal system. Also, §41.48 and §33.94 have significant areas of overlap, causing confusion as to which rule applies in each circumstance. The commission proposes to repeal §41.48 and revise §33.94 in a separate, simultaneous rulemaking to consolidate therein regulations assisting in its enforcement of the Alcoholic Beverage Code.

The repeal is proposed pursuant to the commission's general powers and duties under §5.31 of the Code and the required regular four-year review cycle prescribed by Government Code §2001.039.

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed repeal will be in effect, it is not expected to have a significant fiscal impact upon the agency. There are no foreseeable economic implications anticipated for other units of state or local government due to the proposed repeal. The proposed repeal will have no impact on agency resources and does not impact other units of state and local government.

Rural Communities Impact Assessment

The proposed repeal will not have any material adverse fiscal or regulatory impacts on rural communities. The repeal applies statewide and has the same effect in rural communities as in urban communities. Likewise, the proposed repeal will not adversely affect a local economy in a material way.

Small Business and Micro-Business Assessment/Flexibility Analysis

The repeal of §41.48 removes from the rules several reporting requirements that are more cumbersome than those required under current agency rule implementation. The proposed repeal of these requirements will not result in material fiscal implications for small or microbusinesses. Therefore, no Small Business and Micro-Business Assessment/Flexibility Analysis is required.

Takings Impact Assessment

The proposed repeal does not affect a taking of private real property, as described by Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The repeal would impose no burdens on private real property because it neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Ms. Horton has determined that for each year of the first five years that the proposed repeal would be in effect, the public would benefit from the consolidation of rules related to required reporting of certain business information in a single rule, clarify-

ing and thus increasing compliance with the rule requirements. The repeal is part of this consolidation. Members of the regulated industry will also benefit from greater certainty with respect to their reporting compliance. The public also benefits from the savings of TABC employee time and effort due to the streamlining of data reporting requirements and procedures, which are supported by this rule change. There is no increase in costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed repeal. The analysis addresses the first five years the proposed repeal would be in effect. The proposed repeal neither creates nor eliminates a government program. The proposed repeal does not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed repeal requires neither an increase nor a decrease in future legislative appropriations to the commission. The proposed repeal is not expected to result in a significant change in fees paid to the agency. The proposed repeal is not anticipated to have any material impact on the state's overall economy.

The proposed repeal does not create any new regulations. The proposed repeal has no impact on existing regulation. The proposed repeal has no impact on the number of individuals subject to the rule's applicability.

Comments on the proposed repeal may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, by facsimile transmission to (512) 206-3498, attention: Shana Horton, or by email to rules@tabc.texas.gov. Written comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed repeals on August 22, 2022, at 10:00 a.m. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY. Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 206-3451.

The repeal is proposed pursuant to the commission's general powers and duties under §5.31 of the Code and the required regular four-year review cycle prescribed by Government Code §2001.039.

The proposed repeal does not impact any other current rules or statutes.

§41.48. Changes Relating to Control.

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 July 27, 2022.

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Shana Horton

Rules Attorney

Texas Alcoholic Beverage Commission

Earliest possible date of adoption: September 11, 2022

For further information, please call: (512) 206-3451



CHAPTER 45. MARKETING PRACTICES SUBCHAPTER F. ADVERTISING AND PROMOTION

16 TAC §45.117

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes an amendment to rule §45.117, related to Gifts and Advertising Specialties.

Background and Summary

The amendment proposed would authorize holders of distiller's and rectifier's, winery, nonresident seller's and wholesaler's permits to furnish signs promoting their beverages to retailers without a specific dollar value limitation. This amendment would bring the rule relating to providing signs for liquor in line with the current rule for malt beverages (§45.113). Without the amendment, such signs are limited to a total value of \$125 per brand per year, a figure that is inadequate in the current economy.

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed amended rule will be in effect, it is not expected to have a significant fiscal impact upon the agency. There are no foreseeable economic implications anticipated for other units of state or local government due to the amended rule. The amended rule does not impact fees or fines that can be collected by another state or local government, nor does it impose additional regulatory obligations on other units of government.

Rural Communities Impact Assessment

The proposed amended rule will not have any material adverse fiscal or regulatory impacts on rural communities. Likewise, the proposed amended rule will not adversely affect a local economy in a material way. The amended rule will apply statewide and not impact rural communities in any manner different from urban ones or any local economy in a manner different from other local economies or the state's economy.

Small Business and Micro-Business Assessment/Flexibility Analysis

No material fiscal implications are anticipated for small or micro-businesses due to the proposed amended rule. The rule is permissive and does not require additional expenditures by any regulated business. Therefore, no Small Business and Micro-Business Assessment/Flexibility Analysis is required.

Takings Impact Assessment

The proposed amended rule does not affect a taking of private real property, as described by Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The rulemaking would impose no burdens on private real property because it neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the amended rule would be in effect, the public would benefit from clarity and consistency in the commission's rules related to signage provided to retailers, regardless of the type of alcoholic beverages advertised, and from greater knowledge of the products available at a retail outlet. There is no increase in costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed amended rule. The analysis addresses the first five years the proposed amended rule would be in effect. The proposed amended rule neither creates nor eliminates a government program. It does not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed amended rule requires neither an increase nor a decrease in future legislative appropriations to the commission.

Comments on the proposed amended rule may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, or by email to rules@tabc.texas.gov. Written comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed rules on August 22, 2022, at 10:00 a.m. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY. Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 206-3451.

The amended rule is proposed pursuant to the agency's authority under §5.31 of the Alcoholic Beverage Code, by which the commission may prescribe and publish rules necessary to carry out the provisions of the code.

The proposed amended rule does not otherwise impact any other current rules or statutes.

§45.117. Gifts and Advertising Specialties.

(a) General.

(1) This section is enacted pursuant to Alcoholic Beverage Code §§102.07(b), 102.07(d), 108.042 and 109.58.

(2) This section applies to buyers, sellers, and consumers of liquor.

(b) Gifts to consumers. Holders of distiller's and rectifier's, winery, nonresident seller's, and wholesaler's permits may furnish gifts to consumers.

(1) The gifts shall be offered consistently with the restrictions contained in Alcoholic Beverage Code §102.07(d).

(2) The items given may be novelty items of limited value. Such items shall be designed to promote a specific product or brand and may have a utilitarian function in addition to product promotion.

(3) Liquor may be purchased for consumers provided that such beverages are consumed on retail licensed premises in the presence of the purchaser. Such purchases shall not be excessive. All members of the manufacturing and wholesaler tiers participating in promo-

tions authorized by this paragraph must be an employee or agent of a member of the manufacturing tier, a distributor, or a promotional permit holder.

(4) Holders of distiller's and rectifier's, winery, nonresident seller's, and wholesaler's permits may, as a social courtesy, provide liquor or other things of value to unlicensed persons who are not employed or affiliated with the holder of a retail license or permit.

(c) Gifts to Retailers. Holders of distiller's and rectifier's, winery, nonresident seller's and wholesaler's permits may furnish advertising specialties to retailers.

(1) Advertising specialties are things designed to advertise or promote a specific product or brand. Such items may have a utilitarian function in addition to product promotion.

(2) The total cost of all advertising specialties furnished to a retailer shall not exceed \$125 per brand per calendar year. Dollar limitations may not be pooled to provide a retailer with advertising specialties in excess of the maximum permitted under this subsection.

(d) Signs provided to retailers.

(1) Wholesalers may furnish, give or sell interior signs to retailers.

(2) A sign is a thing whose primary purpose is the advertisement of a brand or product or the price thereof.

(3) A sign furnished by a wholesaler may not bear the name, logo or trademark of a specific retailer.

(4) No wholesaler may paint, improve, or remodel a retailer's buildings or parts of buildings, inside or out, or finance any improvements thereto.

(e) [(4)] Service provided to retailer.

(1) Holders of distiller's and rectifier's, winery, nonresident seller's and wholesaler's permits may service and repair items furnished to retailers under the provisions of this rule.

(2) Holders of distiller's and rectifier's, winery, nonresident seller's and wholesaler's permits may furnish meeting rooms to retailers for purposes of product promotions. In no event shall anything be furnished to retailers except samples of the permit holder's product or food provided as a courtesy in accompaniment to such samples.

(3) The holder of a wholesaler's permit, or the permit holder's employee or agent, may furnish and install shanks, washers, hose and hose connections, tap rods, tap markers, and coil cleaning service necessary for the proper delivery and dispensing of wine.

(f) [(e)] Gifts to Unlicensed Organizations. Holders of distiller's and rectifier's, winery, nonresident seller's and wholesaler's permits may donate money, liquor or other things of value to unlicensed civic, religious, or charitable organizations.

(1) Liquor may only be given for consumption in wet areas.

(2) Advertising of events sponsored by organizations receiving donations shall include promotion of the organization sponsor or cause in a manner at least equal to or greater than the advertising of the industry donor.

(3) "Unlicensed" means not having a permit or license authorizing the sale or service of alcoholic beverages.

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 July 27, 2022.

TRD-202202812

Shana Horton

Rules Attorney

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 206-3451



TITLE 22. EXAMINING BOARDS

PART 24. TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS

CHAPTER 571. LICENSING

SUBCHAPTER A. GENERAL

22 TAC §571.18

The Texas Board of Veterinary Medical Examiners (Board) proposes new rule §571.18, concerning Licensed Veterinary Technician Designation.

The purpose of the proposed new rule is to clarify and protect the title Licensed Veterinary Technician to be used by those individuals who have attended a recognized program institution and have been licensed.

Fiscal Note

John Hargis, General Counsel, has determined that for each year of the first five years that the rule is in effect, there are no anticipated increases or reductions in costs to the state and local governments as a result of enforcing or administering the rule.

Mr. Hargis has also determined that for each year of the first five years that the rule is in effect, there is no anticipated impact in revenue to state government as a result of enforcing or administering the rule.

Public Benefit and Cost Note

Mr. Hargis has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be to protect the public by establishing and maintaining a high standard of integrity, skills, and practice in the veterinary medicine profession.

Local Employment Impact Statement

Mr. Hargis has determined that the rule will have no impact on local employment or a local economy. Thus, the board is not required to prepare a local employment impact statement pursuant to §2001.022, Government Code.

Economic Impact Statement and Regulatory Flexibility Analysis

Mr. Hargis has determined that there are no anticipated adverse economic effects on small business, micro-businesses, or rural communities as a result of the rule. Thus, the Board is not required to prepare an economic impact statement or a regulatory flexibility analysis pursuant to §2006.002, Government Code.

Takings Impact Assessment

Mr. Hargis has determined that there are no private real property interests affected by the rule. Thus, the board is not required to prepare a takings impact assessment pursuant to §2007.043, Government Code.

Government Growth Impact Statement

For the first five years that the rule would be in effect, it is estimated that; the proposed rule would not create or eliminate a government program; implementation of the proposed rule would not require the creation of new employee positions or the elimination of existing employee positions; implementation of the proposed rule would not require an increase or decrease in future legislative appropriations to the agency; the proposed rule would not require an increase in the fees paid to the agency; the proposed rule would not create a new regulation; the proposed rule would not expand, limit, or repeal an existing regulation; the proposed rule would not increase or decrease the number of individuals subject to the rule's applicability; and the proposed rule would not positively or adversely affect the state's economy.

Request for Public Comments

The Texas Board of Veterinary Medical Examiners invites comments on the proposed new rule from any interested persons, including any member of the public. A written statement should be mailed or delivered to John Hargis, Texas Board of Veterinary Medical Examiners, 1801 Congress, Ste. 8.800, Austin, Texas 78701, or by e-mail to John.Hargis@veterinary.texas.gov. Comments will be accepted for 30 days following publication in the *Texas Register*. Comments must be received within 30 days after publication of this proposal in order to be considered.

Statutory Authority

The rule is proposed under the authority of §801.151(a), (b), and (c), Occupations Code, which states that the Board may adopt rules necessary to administer the chapter, that the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession, and that the Board may adopt rules to protect the public.

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

§571.18. Licensed Veterinary Technician Designation.

Pursuant to 801.002 and 801.265, only individuals who have received formal education at an accredited Veterinary Technician Institution and are licensed by the TBVME can hold the title of Licensed Veterinary Technician. All other employees of a veterinary medical establishment can hold the title of veterinary assistant.

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 1, 2022.

TRD-202202854

John Hargis

General Counsel

Texas Board of Veterinary Medical Examiners

Earliest possible date of adoption: September 11, 2022

For further information, please call: (512) 693-4500x3



CHAPTER 573. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §573.27

The Texas Board of Veterinary Medical Examiners (Board) proposes this amendment to §573.27, concerning Honesty, Integrity, and Fair Dealing.

The purpose of the proposed amendment in part to increase standards of veterinary medical practice in Texas and to protect the public. The amendment also clarifies the times in which the veterinarian must obtain consent prior to performing an examination or procedure.

Fiscal Note

John Hargis, General Counsel, has determined that for each year of the first five years that the rule is in effect, there are no anticipated increases or reductions in costs to the state and local governments as a result of enforcing or administering the rule.

John Hargis has also determined that for each year of the first five years that the rule is in effect, there is no anticipated impact in revenue to state government as a result of enforcing or administering the rule.

Public Benefit and Cost Note

John Hargis has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be to protect the public by establishing and maintaining a high standard of integrity, skills, and practice in the veterinary medicine profession.

Local Employment Impact Statement

John Hargis has determined that the rule will have no impact on local employment or a local economy. Thus, the board is not required to prepare a local employment impact statement pursuant to §2001.022, Government Code.

Economic Impact Statement and Regulatory Flexibility Analysis

John Hargis has determined that there are no anticipated adverse economic effects on small business, micro-businesses, or rural communities as a result of the rule. Thus, the Board is not required to prepare an economic impact statement or a regulatory flexibility analysis pursuant to §2006.002, Government Code.

Takings Impact Assessment

John Hargis has determined that there are no private real property interests affected by the rule. Thus, the board is not required to prepare a takings impact assessment pursuant to §2007.043, Government Code.

Government Growth Impact Statement

For the first five years that the rule would be in effect, it is estimated that; the proposed rule would not create or eliminate a government program; implementation of the proposed rule would not require the creation of new employee positions or the elimination of existing employee positions; implementation of the proposed rule would not require an increase or decrease in future legislative appropriations to the agency; the proposed rule would not require an increase in the fees paid to the agency; the proposed rule would not create a new regulation; the proposed rule would not expand, limit, or repeal an existing regulation; the proposed rule would not increase or decrease the number of individuals subject to the rule's applicability; and the proposed rule would not positively or adversely affect the state's economy.

Request for Public Comments

The Texas Board of Veterinary Medical Examiners invites comments on the proposed amendment to the rule from any interested persons, including any member of the public. A written statement should be mailed or delivered to Valerie Mitchell, Texas Board of Veterinary Medical Examiners, 1801 Congress, Ste. 8.800, Austin, Texas 78701, by e-mail to John.Hargis@veterinary.texas.gov. Comments will be accepted for 30 days following publication in the *Texas Register*. Comments must be received within 30 days after publication of this proposal in order to be considered.

Statutory Authority

The rule is proposed under the authority of §801.151(a), (b), and (c) Occupations Code, which states that the Board may adopt rules necessary to administer the chapter, that the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession, and that the Board may adopt rules to protect the public.

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

§573.27. Honesty, Integrity, and Fair Dealing.

Licenses shall conduct their practice with honesty, integrity, and fair dealing. Unless otherwise provided for in law, licensees shall obtain consent prior to performing an examination or procedure.

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 July 29, 2022.

TRD-202202850

John Hargis

General Counsel

Texas Board of Veterinary Medical Examiners

Earliest possible date of adoption: September 11, 2022

For further information, please call: (512) 693-4500x3



CHAPTER 575. PRACTICE AND PROCEDURE

22 TAC §575.29

The Texas Board of Veterinary Medical Examiners (Board) proposes this amendment to §575.29, concerning Informal Conference.

The purpose of the proposed amendment is to give veterinarians more clarification on what the Board expects from them going into informal conferences. The current rule is not specific enough.

Fiscal Note

John Hargis, General Counsel, has determined that for each year of the first five years that the rule is in effect, there are no anticipated increases or reductions in costs to the state and local governments as a result of enforcing or administering the rule.

Mr. Hargis has also determined that for each year of the first five years that the rule is in effect, there is no anticipated impact in revenue to state government as a result of enforcing or administering the rule.

Public Benefit and Cost Note

Mr. Hargis has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be to protect the public by establishing and maintaining a high standard of integrity, skills, and practice in the veterinary medicine profession.

Local Employment Impact Statement

Mr. Hargis has determined that the rule will have no impact on local employment or a local economy. Thus, the board is not required to prepare a local employment impact statement pursuant to §2001.022, Government Code.

Economic Impact Statement and Regulatory Flexibility Analysis

Mr. Hargis has determined that there are no anticipated adverse economic effects on small business, micro-businesses, or rural communities as a result of the rule. Thus, the Board is not required to prepare an economic impact statement or a regulatory flexibility analysis pursuant to §2006.002, Government Code.

Takings Impact Assessment

Mr. Hargis has determined that there are no private real property interests affected by the rule. Thus, the board is not required to prepare a takings impact assessment pursuant to §2007.043, Government Code.

Government Growth Impact Statement

For the first five years that the rule would be in effect, it is estimated that; the proposed rule would not create or eliminate a government program; implementation of the proposed rule would not require the creation of new employee positions or the elimination of existing employee positions; implementation of the proposed rule would not require an increase or decrease in future legislative appropriations to the agency; the proposed rule would not require an increase in the fees paid to the agency; the proposed rule would not create a new regulation; the proposed rule would not expand, limit, or repeal an existing regulation; the proposed rule would not increase or decrease the number of individuals subject to the rule's applicability; and the proposed rule would not positively or adversely affect the state's economy.

Request for Public Comments

The Texas Board of Veterinary Medical Examiners invites comments on the proposed amendment to the rule from any interested persons, including any member of the public. A written statement should be mailed or delivered to John Hargis, Texas Board of Veterinary Medical Examiners, 1801 Congress, Ste. 8.800, Austin, Texas 78701, by e-mail to John.Hargis@veterinary.texas.gov. Comments will be accepted for 30 days following publication in the *Texas Register*. Comments must be received within 30 days after publication of this proposal in order to be considered.

Statutory Authority

The rule is proposed under the authority of §801.151(a), (b), and (c) Occupations Code, which states that the Board may adopt rules necessary to administer the chapter, that the Board may adopt rules of professional conduct appropriate to establish and maintain a high standard of integrity, skills, and practice in the veterinary medicine profession, and that the Board may adopt rules to protect the public.

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

§575.29 *Informal Conferences.*

(a) Informal conferences requiring medical expertise, shall be conducted to provide the opportunity to both complainant and respondent to be heard by a panel of two veterinarians and one public member of the TBVME, and may be represented by counsel. Informal conferences that do not require medical expertise will be conducted by one veterinarian, the board's general counsel, and one member of the staff or public member designated by the executive director [Reasonable written notice of the time, date, and location of an informal conference shall be provided to the respondent and complainant, if applicable. The notice shall include a statement of the alleged violation(s) to be considered by the informal conference panel].

(1) No additional evidence may be submitted into the record after the initial review process has been completed by the initial medical reviewer.

(2) The complainant and respondent and any legal counsel, will receive information regarding potential outcomes of an informal conference prior to the informal conference.

(b) Reasonable written notice of the time, date and location of the informal conference shall be provided to the complainant and respondent if applicable. The notice shall include a statement of the alleged violation(s) to be considered by the IC panel. Deliberations of the informal conference panel are confidential. [The respondent and complainant shall each be provided with an opportunity to be heard by the informal conference panel, and may be represented by counsel. Deliberations by the informal conference panel are confidential.]

(c) The general counsel of the TBVME or a representative from [of] the attorney general's [general] office shall be present during the informal conference to advise the informal conference panel.

~~[(d) Informal conferences regarding complaints requiring medical expertise shall be conducted by an informal conference panel comprised of two veterinarian Board members and one public Board member.]~~

~~[(e) Informal conferences regarding complaints not requiring medical expertise may be conducted by an informal conference panel comprised of Board Staff. The Executive Director may designate the members of this panel.]~~

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 July 29, 2022.

TRD-202202852

John Hargis

General Counsel

Texas Board of Veterinary Medical Examiners

Earliest possible date of adoption: September 11, 2022

For further information, please call: (512) 693-4500x3

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TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

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

SUBCHAPTER I. INDIVIDUALIZED SKILLS AND SOCIALIZATION

26 TAC §§260.501, 260.503, 260.505, 260.507, 260.509, 260.511, 260.513, 260.515, 260.517

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §260.501, concerning Definitions; §260.503, concerning Description of Individualized Skills and Socialization; §260.505, concerning Provision of Individualized Skills and Socialization; §260.507, concerning Staffing Ratios; §260.509, concerning Discontinuation of Day Habilitation; §260.511, concerning Including Individualized Skills and Socialization on an IPC; §260.513, concerning Service Provider Qualifications; §260.515, concerning Contracting to Provide Individualized Skills and Socialization; and §260.517, concerning Program Provider Reimbursement for Individualized Skills and Socialization, in new Chapter 260, Subchapter I, Individualized Skills and Socialization.

BACKGROUND AND PURPOSE

Title 42, Code of Federal Regulations (CFR), §441.301(c)(4)(i) - (v), require home and community-based settings in programs authorized by §1915(c) of the Social Security Act to have certain qualities, including being integrated in and supporting full access of individuals to the greater community. The Centers for Medicare & Medicaid Services is requiring that states be in compliance with these regulations by March 17, 2023.

The 2020-21 General Appropriations Act (GAA), House Bill 1, 86th Legislature, Regular Session, 2019 (Article II, Health and Human Services Commission, Rider 21) required HHSC to develop a plan to replace day habilitation in its Medicaid §1915(c) waiver programs for individuals with intellectual and developmental disabilities with more integrated services that maximize participation and integration of the individuals in the community.

In accordance with Rider 21, HHSC developed a plan to replace day habilitation provided in the Home and Community-Based Services (HCS), Texas Home Living (TxHmL), and Deaf Blind with Multiple Disabilities (DBMD) Programs with individualized skills and socialization. The plan included proposed ratios for service providers of individualized skills and socialization to individuals receiving individualized skills and socialization to help ensure that individuals receiving the service have adequate support to achieve their goals.

The 2022-2023 GAA, Senate Bill 1, 87th Legislature, Regular Session, 2021 (Article II, Health and Human Services Commission, Rider 23) authorized funding for the provision of individualized skills and socialization in the HCS, TxHmL, and DBMD Programs.

The proposed rules implement the plan required by Rider 21 to replace day habilitation with individualized skills and socialization in the DBMD Program and will ensure that HHSC is in compliance with 42 CFR §441.301(c)(4)(i) - (v) by March 17, 2023.

The proposed rules describe the two types of individualized skills and socialization, on-site individualized skills and socialization and off-site individualized skills and socialization and require that both types be provided by an individualized skills and socialization provider.

The rules requiring a provider of individualized skills and socialization to be licensed in accordance with Texas Human Resources Code Chapter 103 are being proposed in 26 TAC Chap-

ter 559 and published elsewhere in this issue of the *Texas Register*. The rules will require an individualized skills and socialization provider to be licensed as a day activity and health services facility with a special designation for individualized skills and socialization.

The proposed rules describe the requirements for an individualized skills and socialization provider including a requirement that both on-site and off-site individualized skills and socialization be made available to individuals and that staffing ratios are met.

The proposed rules also discontinue day habilitation effective March 1, 2023.

The rules implementing individualized skills and socialization in the HCS and TxHmL Programs are being proposed in Texas Administrative Code (TAC) Title 26, Chapter 263, Subchapter L and in 26 TAC Chapter 262, Subchapter J, and published elsewhere in this issue of the *Texas Register*.

SECTION-BY-SECTION SUMMARY

Proposed new §260.501, Definitions, defines the terms used in the new subchapter including "individualized skills and socialization provider" which is defined as a legal entity licensed in accordance with Texas Human Resources Code Chapter 103.

Proposed new §260.503, Description of Individualized Skills and Socialization, provides a description of on-site and off-site individualized skills and socialization, the two types of individualized skills and socialization. The proposed new rule requires individualized skills and socialization to be provided by an individualized skills and socialization provider and that such provider be the program provider or a contractor of the program provider. The proposed new rule also describes where on-site and off-site individualized skills and socialization are provided.

Proposed new §260.505, Provision of Individualized Skills and Socialization, describes requirements for providing individualized skills and socialization, including that an individualized skills and socialization provider make both on-site and off-site individualized skills and socialization available to an individual and that such provider allow an individual to receive off-site individualized skills and socialization without requiring the individual to take a skills test or meet other requirements to receive off-site individualized skills and socialization. The proposed new rule also requires an individualized skills and socialization provider to document an individual's or legally authorized representative's decision for the individual not to participate in an activity the individual scheduled for on-site or off-site individualized skills and socialization.

Proposed new §260.507, Staffing Ratios, describes the required ratios for on-site and off-site individualized skills and socialization of service providers to individuals in the DBMD Program and other persons receiving individualized skills and socialization or a similar service. The ratios in the proposed new rule include other persons receiving individualized skills and socialization in the HCS Program and the TxHmL Program, and other persons receiving a similar service, to ensure that the ratios of service providers to individuals in the DBMD Program receiving on-site and off-site individualized skills and socialization are maintained. If a ratio described in this section includes individuals enrolled in other waiver programs receiving individualized skills and socialization or persons receiving a similar service, the proposed new rule requires that the ratio be the ratio required by §260.507(a). The proposed new rule requires a service provider of individualized skills and socialization assigned to the individuals and other

persons described in a ratio to provide services only to the individuals and other persons represented in the ratio.

Proposed new §260.509, Discontinuation of Day Habilitation, provides that day habilitation is not a service in the DBMD Program effective March 1, 2023 to ensure HHSC's compliance with 42 CFR §441.301(c)(4) before the deadline established by the Centers for Medicare & Medicaid Services.

Proposed new §260.511, Including Individualized Skills and Socialization on an IPC, requires a program provider to ensure a case manager includes individualized skills and socialization on an individual plan of care (IPC) in accordance with the rules governing the DBMD Program. The proposed new rule requires a case manager to ensure that an enrollment IPC or renewal IPC effective on or after March 1, 2023 does not include day habilitation and that a revised IPC with an effective date during the period of March 1, 2023 and February 29, 2024 includes only the amount of day habilitation that the program provider provided to the individual before March 1, 2023. The proposed new rule also requires that if an individual or the individual's LAR wants the individual to receive on-site or off-site individualized skills and socialization, but not both, the case manager documents the decision in the individual's individual program plan.

Proposed new §260.513, Service Provider Qualifications, describes the qualifications for a service provider of individualized skills and socialization.

Proposed new §260.515, Contracting to Provide Individualized Skills and Socialization, requires a program provider to ensure that an individualized skills and socialization provider with which it contracts complies with certain sections of the subchapter.

Proposed new §260.517, Program Provider Reimbursement for Individualized Skills and Socialization, provides that HHSC pays a program provider for on-site and off-site individualized skills and socialization in accordance with the reimbursement rate. The proposed new rule prohibits a program provider from submitting a claim for individualized skills and socialization provided during the time an individual's services are suspended or after services are terminated, except that the program provider may submit a claim for the first day of the individual's suspension or termination. The proposed new rule describes the circumstances under which HHSC does not pay or recoups payment from a program provider for individualized skills and socialization. The proposed new rule provides that HHSC does not pay or recoups payment from a program provider for day habilitation provided on or after March 1, 2023. The proposed new rule provides that HHSC conducts contracts and fiscal monitoring in accordance with rules governing the DBMD Program to determine whether a program provider is in compliance with the new subchapter.

FISCAL NOTE

Trey Wood, HHSC Chief Financial Officer, has determined that the cost to state government to adopt and implement the rules is \$13,300 General Revenue (GR) funds, \$119,700 Federal Funds (FF), and \$133,000 All Funds (AF) for the State Fiscal Year (SFY) 2023 and \$0 GR, \$0 FF, and \$0 AF for SFYs 2024 - 2027.

During the years the rules will be in effect enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of 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 HHS system employee positions;
- (3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to HHSC;
- (5) the proposed rules will create new rules;
- (6) the proposed rules will expand existing rules;
- (7) the proposed rules will not change the number of individuals subject to the rules; and
- (8) the proposed rules will not affect the state's economy.

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

Trey Wood has also determined that the rules could have an adverse economic effect on small businesses and micro-businesses due to the cost to comply. No rural communities contract with HHSC to provide services in the DBMD Program so they will not experience an adverse effect.

HHSC does not have the data to estimate the number of small businesses or micro-businesses subject to the rules; however, as of December 19, 2021, there are 25 DBMD program providers.

HHSC did not consider alternative methods to achieve the purpose of the proposed rules for small businesses or micro-businesses because implementing the new rules is necessary for the state's economic health, to comply with the federal regulations for home and community-based settings in 42 CFR §441.301(c)(4)(i) - (v).

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 and 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 in the DBMD Program will have the opportunity to receive individualized skills and socialization, a new service that provides increased community integration, additional opportunities and supports to be competitively employed, and choice of the settings in which individualized skills and socialization is provided.

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 DBMD program providers will need to update their policies and provide staff training to implement the new rules. However, HHSC lacks sufficient data to determine 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 the proposal will be held virtually on September 7, 2022 from 8:00 a.m. - 12:00 p.m. via GoToWebinar. Participants may register for the public hearing at: <https://register.gotowebinar.com/register/927810115195515152>.

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 22R036" 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.

§260.501. 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) Calendar day--Any day, including weekends and holidays.
- (3) Case manager--A service provider of case management.
- (4) CFC--Community First Choice. A state plan option governed by Code of Federal Regulations, Title 42, Chapter 441, Subpart K, regarding Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice).

(5) Community setting--A setting accessible to the general public within an individual's community.

(6) Day habilitation--A DBMD Program service.

(7) DBMD Program--The Deaf Blind with Multiple Disabilities Program.

(8) DFPS--Texas Department of Family and Protective Services.

(9) 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.

(10) HHSC--The Texas Health and Human Services Commission.

(11) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. An HHSC form HHSC uses to determine the LOC for an individual.

(12) Individual--A person seeking to enroll or who is enrolled in the DBMD Program.

(13) Individualized skills and socialization--A DBMD Program service described in this subchapter. The two types of individualized skills and socialization are on-site individualized skills and socialization and off-site individualized skills and socialization.

(14) Individualized skills and socialization provider--A legal entity licensed in accordance with Texas Human Resources Code, Chapter 103.

(15) 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;

(ii) if an individual will receive CFC support management; and

(B) is authorized by HHSC.

(16) 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 the rules governing the DBMD Program, 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 the rules governing the DBMD Program.

(17) IPP--Individual Program Plan. A written plan developed in accordance with the rules governing the DBMD Program and documented on an HHSC Individual Program Plan form.

(18) 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.

(19) 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.

(20) 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.

(21) 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.

(22) Program provider--A person that has a contract with HHSC to provide DBMD Program services, excluding a financial management services agency.

(23) Service provider--A person who directly provides a DBMD Program service or a CFC service to an individual.

(24) 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.

(25) 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.

(26) 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.

§260.503. Description of Individualized Skills and Socialization.

(a) The two types of individualized skills and socialization are on-site individualized skills and socialization and off-site individualized skills and socialization.

(b) A program provider must ensure that individualized skills and socialization is provided by an individualized skills and socialization provider. An individualized skills and socialization provider must be the program provider or a contractor of the program provider.

(c) An individualized skills and socialization provider must ensure that individualized skills and socialization:

(1) provides person-centered activities related to:

(A) acquiring, retaining, or improving self-help skills and adaptive skills necessary to live successfully in the community and participate in home and community life; and

(B) gaining or maintaining independence, socialization, community participation, current or future volunteer goals, or employment goals consistent with achieving the outcomes identified in an individual's IPP;

(2) supports the individual's pursuit and achievement of employment through school, vocational rehabilitation, the DBMD Program service of employment assistance, or the DBMD Program service of supported employment;

(3) provides personal assistance for an individual who cannot manage personal care needs during an individualized skills and socialization activity;

(4) as determined by an assessment conducted by a registered nurse, provides assistance with medications and the performance of tasks delegated by a registered nurse in accordance with state law and rules, unless a physician has delegated the task as a medical act under Texas Occupations Code, Chapter 157, as documented by the physician; and

(5) does not include activities in which an individual:

(A) produces marketable goods; and

(B) is paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act.

(d) An individualized skills and socialization provider must ensure that on-site individualized skills and socialization:

(1) is provided in a building or a portion of a building that is owned or leased by an individualized skills and socialization provider;

(2) includes transportation of an individual from one on-site individualized skills and socialization location to another on-site individualized skills and socialization location;

(3) promotes an individual's development of skills and behavior that support independence and personal choice; and

(4) is not provided in:

(A) a setting in which an individual must not reside, as set forth in the rules governing the DBMD Program, unless provided in an event open to the public; or

(B) the residence of an individual or another person.

(e) An individualized skills and socialization provider must ensure that off-site individualized skills and socialization:

(1) provides activities that:

(A) integrate an individual into the community; and

(B) promote the individual's development of skills and behavior that support independence and personal choice;

(2) is provided in a community setting chosen by the individual from among available community setting options;

(3) includes transportation of an individual from an on-site individualized skills and socialization location to an off-site individualized skills and socialization location and between off-site individualized skills and socialization locations; and

(4) is not provided in:

(A) a building in which on-site individualized skills and socialization is provided;

(B) a setting in which an individual must not reside, as set forth in the rules governing the DBMD Program, unless provided in an event open to the public; or

(C) the residence of an individual or another person.

§260.505. Provision of Individualized Skills and Socialization.

(a) An individualized skills and socialization provider must make both on-site individualized skills and socialization and off-site individualized skills and socialization available to an individual.

(b) An individualized skills and socialization provider must provide on-site individualized skills and socialization and off-site individualized skills and socialization in accordance with an individual's IPC and IPP.

(c) An individualized skills and socialization provider must not require an individual to take a skills test or meet other requirements to receive off-site individualized skills and socialization.

(d) If an individual does not want to participate in an activity the individual scheduled for on-site individualized skills and socialization or off-site individualized skills and socialization, or the LAR does not want the individual to participate in such activity, the individualized skills and socialization provider must document the decision not to participate in the individual's record.

§260.507. Staffing Ratios.

(a) The ratio of service providers of individualized skills and socialization to persons receiving services:

(1) on-site must be no higher than one service provider of individualized skills and socialization to three individuals and other persons receiving individualized skills and socialization or a similar service (1:3); and

(2) off-site must be no higher than one service provider of individualized skills and socialization to two individuals and other persons receiving individualized skills and socialization or a similar service (1:2).

(b) A ratio described in subsection (a) of this section may include persons enrolled in other waiver programs receiving individualized skills and socialization or persons receiving a similar service; however, the ratio must be the ratio required by subsection (a) of this section.

(c) A service provider of individualized skills and socialization assigned to the individuals represented in a ratio described in subsection (a) of this section must provide services only to the individuals and other persons represented in the ratio.

§260.509. Discontinuation of Day Habilitation.

Notwithstanding other rules governing the DBMD Program, effective March 1, 2023, day habilitation is not a service in the DBMD Program.

§260.511. Including Individualized Skills and Socialization on an IPC.

A program provider must ensure that:

(1) a case manager includes individualized skills and socialization on an individual's enrollment IPC in accordance with the rules governing the DBMD Program;

(2) a case manager renews or revises an IPC to include individualized skills and socialization in accordance with the rules governing the DBMD Program;

(3) a case manager ensures that:

(A) an enrollment IPC or renewal IPC with an effective date on or after March 1, 2023 does not include day habilitation; and

(B) an IPC that is revised during the period of March 1, 2023 through February 29, 2024 includes only the amount of day habilitation that the program provider provided to the individual before March 1, 2023; and

(4) if an individual or the individual's LAR wants the individual to receive on-site or off-site individualized skills and socialization but not both, the case manager documents the decision in the individual's IPP.

§260.513. Service Provider Qualifications.

(a) An individualized skills and socialization provider must ensure that a service provider of individualized skills and socialization is at least 18 years of age and:

(1) has a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma; or

(2) has documentation of a proficiency evaluation of experience and competence to perform the job tasks that includes:

(A) a written competency-based assessment of the ability to document service delivery and observations of the individuals to be served; and

(B) at least three written personal references from persons not related by blood that indicate the ability to provide a safe, healthy environment for the individuals being served.

(b) An individualized skills and socialization provider must ensure that a service provider of individualized skills and socialization who provides transportation:

(1) has a valid driver's license; and

(2) transports individuals in a vehicle insured in accordance with state law.

(c) An individualized skills and socialization provider must ensure that a service provider of individualized skills and socialization completes the following training in accordance with rules governing the DBMD Program:

(1) general orientation training;

(2) abuse, neglect, and exploitation training;

(3) cardiopulmonary resuscitation, first aid, and choking prevention training;

(4) DBMD Program Service Provider Training;

(5) training on needs of an individual to whom the service provider is providing individualized skills and socialization; and

(6) training on delegated tasks, if the service provider is performing delegated tasks for an individual receiving individualized skills and socialization.

§260.515. Contracting to Provide Individualized Skills and Socialization.

If a program provider contracts with an individualized skills and socialization provider to provide individualized skills and socialization to an individual, the program provider must:

(1) comply with 40 TAC §49.308 (relating to Subcontractors); and

(2) ensure the individualized skills and socialization provider complies with:

(A) §260.503(c) - (e) of this subchapter (relating to Description of Individualized Skills and Socialization);

(B) §260.505 of this subchapter (relating to Provision of Individualized Skills and Socialization): and

(C) §260.513 of this subchapter (relating to Service Provider Qualifications).

§260.517. Program Provider Reimbursement for Individualized Skills and Socialization.

(a) HHSC pays a program provider for on-site individualized skills and socialization and off-site individualized skills and socialization in accordance with the reimbursement rates.

(b) If an individual's DBMD Program services and CFC services are suspended or terminated, a program provider must not submit a claim for on-site individualized skills and socialization or off-site individualized skills and socialization provided during the period of the individual's suspension or after the termination, except the program provider may submit a claim for the first calendar day of the individual's suspension or termination.

(c) A program provider must not bill for and HHSC does not pay a program provider for on-site individualized skills and socialization or off-site individualized skills and socialization, or recoups any payments made to the program provider for on-site individualized skills and socialization or off-site individualized skills and socialization:

(1) if individualized skills and socialization is not provided in accordance with this subchapter;

(2) if the individual receiving individualized skills and socialization is, at the time individualized skills and socialization was provided, ineligible for the DBMD Program;

(3) if individualized skills and socialization is provided during a period of time for which there is not a signed and dated ID/RC Assessment for the individual;

(4) if individualized skills and socialization is provided during a period of time for which the individual did not have an LOC determination;

(5) if individualized skills and socialization is not provided in accordance with the individual's IPP;

(6) if the program provider does not comply with 40 TAC §49.305 (relating to Records);

(7) if the claim for the service does not meet the requirements in 40 TAC §49.311 (relating to Claims Payment);

(8) if individualized skills and socialization is provided by a service provider who does not meet the qualifications to provide individualized skills and socialization as described in §260.513 (relating to Service Provider Qualifications);

(9) if the program provider does not comply with the DBMD Program Manual;

(10) if HHSC determines that individualized skills and socialization would have been paid for by a source other than the DBMD

Program if the program provider had submitted to the other source a proper, complete, and timely request for payment for individualized skills and socialization;

(11) if individualized skills and socialization was not provided; or

(12) if individualized skills and socialization is provided during a period of time that the individual produced marketable goods and was paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act.

(d) HHSC does not pay a program provider for day habilitation or recoups any payments made to the program provider for day habilitation provided on or after March 1, 2023, even if an individual's IPC includes day habilitation on or after March 1, 2023.

(e) HHSC conducts contract and fiscal monitoring in accordance with rules governing the DBMD Program to determine whether a program provider is in compliance with this subchapter.

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 July 28, 2022.

TRD-202202834

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: September 11, 2022

For further information, please call: (512) 256-8490



CHAPTER 262. TEXAS HOME LIVING (TxHmL) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)

SUBCHAPTER J. INDIVIDUALIZED SKILLS AND SOCIALIZATION

**26 TAC §§262.901, 262.903, 262.905, 262.907, 262.909,
262.911, 262.913, 262.915, 262.917, 262.919, 262.921,
262.923, 262.925, 262.927**

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §262.901, concerning Definitions; §262.903, concerning Types of Individualized Skills and Socialization; §262.905, concerning Description of On-Site and Off-Site Individualized Skills and Socialization; §262.907, concerning Description of and Criteria for an Individual to Receive In-Home Individualized Skills and Socialization; §262.909, concerning Exceptions to Certain Requirements During Declaration of Disaster; §262.911, concerning Provision of On-Site and Off-Site Individualized Skills and Socialization; §262.913, concerning Provision of In-Home Individualized Skills and Socialization; §262.915, concerning Service Limit for On-Site, Off-Site, and In-Home Individualized Skills and Socialization; §262.917, concerning Staffing Ratios for Off-Site Individualized Skills and Socialization; §262.919, concerning Discontinuation of Day Habilitation; §262.921, concerning Including On-Site, Off-Site, and In-Home Individualized Skills and Socialization on an IPC; §262.923, concerning Service Provider Qualifications for On-Site, Off-Site, and In-Home Individualized Skills and Socialization; §262.925, concerning

Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization; and §262.927, concerning Enhanced Staffing Rate, in Texas Administrative Code (TAC), new Chapter 262, Subchapter J, Individualized Skills and Socialization.

BACKGROUND AND PURPOSE

Title 42, Code of Federal Regulations (CFR), §441.301(c)(4)(i) - (v), require home and community based settings in programs authorized by §1915(c) of the Social Security Act to have certain qualities, including being integrated in and supporting full access of individuals to the greater community. The Centers for Medicare and Medicaid Services is requiring that states be in compliance with these regulations by March 17, 2023.

The 2020-21 General Appropriations Act (GAA), House Bill 1, 86th Legislature, Regular Session, 2019 (Article II, Health and Human Services Commission, Rider 21) required HHSC to develop a plan to replace day habilitation in its Medicaid §1915(c) waiver programs for individuals with intellectual and developmental disabilities with more integrated services that maximize participation and integration of the individuals in the community.

In accordance with Rider 21, HHSC developed a plan to replace day habilitation provided in the Home and Community-Based Services (HCS), Texas Home Living (TxHmL), and Deaf Blind with Multiple Disabilities (DBMD) Programs with individualized skills and socialization. The plan included the use of staffing ratios while providing off-site individualized skills and socialization to individuals to ensure that the individuals receive more personalized attention and more easily meet their personal goals and to ensure the health and safety of the individuals.

The 2022-2023 GAA, Senate Bill 1, 87th Legislature, Regular Session, 2021 (Article II, Health and Human Services Commission, Rider 23) authorized funding for the provision of individualized skills and socialization in the HCS, TxHmL, and DBMD Programs.

The proposed rules implement the plan required by Rider 21 to replace day habilitation with individualized skills and socialization in the TxHmL Program and will ensure that HHSC is in compliance with 42 CFR §441.301(c)(4)(i) - (v) by March 17, 2023.

The proposed rules describe the three types of individualized skills and socialization, on-site individualized skills and socialization, off-site individualized skills and socialization, and in-home individualized skills and socialization. The proposed rules require that on-site and off-site individualized skills and socialization be provided by an individualized skills and socialization provider.

The rules requiring a provider of individualized skills and socialization to be licensed in accordance with Texas Human Resources Code Chapter 103 are being proposed in 26 TAC Chapter 559 and published elsewhere in this issue of the *Texas Register*. The rules will require an individualized skills and socialization provider to be licensed as a day activity and health services facility with a special designation for individualized skills and socialization.

The proposed rules include requirements for an individualized skills and socialization provider to make available both on-site and off-site individualized skills and socialization to individuals and meet staffing ratios based on levels of need for off-site individualized skills and socialization.

The proposed rules also include requirements for the provision of in-home individualized skills and socialization including criteria that must be met for an individual to receive the service and that the service must be provided in the residence of the individual receiving the service.

The proposed rules provide 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.

The proposed rules discontinue day habilitation which includes in-home day habilitation effective March 1, 2023.

The rules implementing individualized skills and socialization in the HCS and DBMD Programs are being proposed in 26 TAC Chapter 263, Subchapter L and in 26 TAC Chapter 260, Subchapter I, and published elsewhere in this issue of the *Texas Register*.

SECTION-BY-SECTION SUMMARY

Proposed new §262.901, Definitions, defines the terms used in the new subchapter including "individualized skills and socialization provider" which is defined as a legal entity licensed in accordance with Texas Human Resources Code Chapter 103.

Proposed new §262.903, Types of Individualize Skills and Socialization, identifies the three types of individualized skills and socialization.

Proposed new §262.905, Description of On-Site and Off-Site Individualized Skills and Socialization, provides a general description of on-site and off-site individualized skills and socialization. The proposed new rule also describes where on-site and off-site individualized skills and socialization are provided.

Proposed new §262.907, Description of and Criteria for an Individual to Receive In-Home Individualized Skills and Socialization, provides a general description of in-home individualized skills and socialization. The proposed new rule also describes the criteria that must be met for an individual to receive in-home individualized skills and socialization.

Proposed new §262.909, 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 local intellectual and developmental disability authorities if it allows an exception to be used and defines "disaster area."

Proposed new §262.911, Provision of On-Site and Off-Site Individualized Skills and Socialization, describes requirements for providing on-site and off-site individualized skills and socialization, including that an individualized skills and socialization provider make both on-site and off-site individualized skills and socialization available to an individual and that such provider allow an individual to receive off-site individualized skills and socialization without requiring the individual to take a skills test or meet other requirements. The proposed new rule requires individualized skills and socialization to be provided by an individualized skills and socialization provider and that such provider be the program provider or a contractor of the program provider.

The proposed new rule also requires an individualized skills and socialization provider to document an individual's or legally authorized representative's decision for the individual not to participate in an activity the individual scheduled for on-site or off-site individualized skills and socialization.

Proposed new §262.913, Provision of In-Home Individualized Skills and Socialization, describes requirements for providing in-home individualized skills and socialization. The proposed new rule also describes documentation that a program provider must obtain before providing in-home individualized skills and socialization to an individual.

Proposed new §262.915, Service Limit for On-Site, Off-Site, and In-Home Individualized Skills and Socialization, establishes a combined service limit for on-site, off-site, and in-home individualized skills and socialization.

Proposed new §262.917, Staffing Ratios for Off-Site Individualized Skills and Socialization, describes the required ratios for off-site individualized skills and socialization of service providers to individuals in the TxHmL Program and other persons receiving off-site individualized skills and socialization or a similar service. The ratios in the proposed new rule include other persons receiving individualized skills and socialization in the DBMD Program and the HCS Program, and other persons receiving a similar service, to ensure that the ratios of service providers to individuals in the TxHmL Program receiving off-site individualized skills and socialization are maintained. If a ratio described in this section includes individuals with different LONs or other persons receiving off-site individualized skills and socialization or a similar service, the proposed new rule requires that the ratio be the lowest staff ratio required by §262.917 or other waiver program rules. The proposed new rule requires a service provider of off-site individualized skills and socialization assigned to the individuals and other persons described in a ratio to provide services only to the individuals and other persons represented in the ratio.

Proposed new §262.919, Discontinuation of Day Habilitation, provides that day habilitation, which includes in-home day habilitation, is not a service in the TxHmL Program effective March 1, 2023, to ensure HHSC's compliance with 42 CFR §441.301(c)(4) before the deadline established by the Centers for Medicare & Medicaid Services.

Proposed new §262.921, Including On-Site, Off-Site, and In-Home Individualized Skills and Socialization on an IPC, describes requirements for service coordinators and program providers if an applicant wants to receive on-site, off-site, or in-home individualized skills and socialization, such as including the service on the applicant's person-directed plan and initial individual plan of care (IPC) and developing an implementation plan for the service. The proposed new rule requires a service coordinator to ensure that an initial IPC effective on or after March 1, 2023 does not include day habilitation and requires a service coordinator to ensure that a renewal IPC effective on or after March 1, 2023, does not include day habilitation. The proposed new rule also requires a program provider or service coordinator to ensure that a revised IPC with an effective date during the period of March 1, 2023, and February 29, 2024 includes only the amount of day habilitation that the program provider provided to the individual before March 1, 2023.

Proposed new §262.923, Service Provider Qualifications for On-Site, Off-Site, and In-Home Individualized Skills and Socialization, describes the qualifications for a service provider of

on-site, off-site, or in-home individualized skills and socialization.

Proposed new §262.925, Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization, provides that HHSC pays for on-site, off-site, and in-home individualized skills and socialization in accordance with the reimbursement rates for on-site, off-site, and in-home individualized skills and socialization regardless of the individual's level of need. The proposed new rule provides that HHSC pays an approved enhanced staffing rate for off-site individualized skills and socialization for an individual. The proposed new rule prohibits a program provider from submitting a claim for on-site, off-site, or in-home individualized skills and socialization provided during the time an individual's services are suspended or after services are terminated, except that the program provider may submit a claim for the first day of the individual's suspension or termination. The proposed new rule describes the circumstances under which HHSC does not pay or recoups payment from a program provider for on-site, off-site, or in-home individualized skills and socialization. The proposed new rule provides that HHSC does not pay or recoups payment from a program provider for day habilitation provided on or after March 1, 2023. The proposed new rule provides that HHSC conducts provider fiscal compliance reviews to determine whether a program provider is in compliance with the new subchapter.

Proposed new §262.927, Enhanced Staffing Rate, allows a program provider to request the enhanced staffing rate for off-site individualized skills and socialization for an individual. The proposed rule requires a service coordinator to request the enhanced staffing rate for off-site individualized skills and socialization for an individual who receives off-site individualized skills and socialization through the consumer directed services (CDS) option if the CDS employer asks the service coordinator to request the enhanced staffing rate. The proposed rule also describes how a program provider and service coordinator make such a request. The proposed new rule provides that HHSC approves a request for the enhanced staffing rate if the documentation submitted to HHSC demonstrates that to participate in off-site individualized skills and socialization, the individual requires more service provider support than the individual would typically receive. The proposed new rule provides that HHSC may review an approved enhanced staffing rate at any time to determine if it is appropriate and notifies a program provider or service coordinator through the HHSC data system when an enhanced staffing rate is approved or denied. The proposed new rule requires a service coordinator to notify the CDS employer and financial management services agency of HHSC's approval or denial of the enhanced staffing rate. The proposed new rule provides that a program provider may request an administrative hearing if HHSC denies a request for the enhanced staffing rate.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that the cost to state government to pay for the automation changes needed in the Texas Medicaid and Healthcare Partnership (TMHP) automated system to add new service codes to allow program providers to submit claims for individualized skills and socialization is \$13,300 General Revenue (GR) funds, (\$119,700 Federal Funds (FF)), \$133,000 All Funds (AF) for the State Fiscal Year (SFY) 2023 and \$0 GR, (\$0 FF, 0 AF) for SFYs 2024 - 2027.

During the years the rules will be in effect enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

Trey Wood has also determined that 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 as of January 24, 2022, there are 311 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 alternative methods to achieve the purpose of the proposed rules for small businesses or micro-businesses because implementing the new rules is necessary to comply with the federal regulations for home and community-based settings in 42 CFR §441.301(c)(4)(i) - (v).

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 in the TxHmL Program will have the opportunity to receive individualized skills and socialization, a new service that provides increased community integration, additional opportunities and supports to be competitively employed, and choice of the settings in which individualized skills and socialization is provided.

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 may incur costs to update their policies and provide staff training to implement the new rules. However, HHSC lacks sufficient data to determine 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 7, 2022 from 8:00 a.m. to 12:00 p.m. (central time). The link to register for the GoToWebinar meeting is <https://register.gotowebinar.com/register/927810115195515152>.

The meeting date and time will be posted on the HHSC website at <https://www.hhs.texas.gov/providers/long-term-care-providers/home-community-based-services-hcs> or <https://www.hhs.texas.gov/providers/long-term-care-providers/texas-home-living-txhtml>.

Persons requiring further information, special assistance, or accommodations should contact McKenzie Sanchez at TxHmLPolicy@hhs.texas.gov.

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 22R037" 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.

§262.901. 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) Applicant--A Texas resident seeking services in the Texas Home Living Program (TxHmL).

(3) Calendar day--Any day, including weekends and holidays.

(4) CDS employer--Consumer directed services employer. This term has the same meaning as the term "employer" set forth in 40 TAC §41.103 (relating to Definitions).

(5) CDS option--Consumer directed services option. This term has the meaning set forth in 40 TAC §41.103.

(6) CFC--Community First Choice. A state plan option governed by Code of Federal Regulations, Title 42, Chapter 441, Subpart K, regarding Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice).

(7) CFC PAS/HAB--CFC personal assistance services/habilitation.

(8) 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.

(9) Community setting--A setting accessible to the general public within an individual's community.

(10) Day habilitation--A TxHmL Program service that provides assistance with acquiring, retaining, or improving self-help, socialization, and adaptive skills provided in a location other than the residence of an individual.

(11) DFPS--The Department of Family and Protective Services.

(12) 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.

(13) FMSA--Financial management services agency. This term has the meaning set forth in 40 TAC §41.103.

(14) HHSC--The Texas Health and Human Services Commission.

(15) ICAP--Inventory for Client and Agency Planning.

(16) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. A form used by HHSC for level of care determination and level of need assignment.

(17) 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 individual plan of care (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, and the program provider.

(18) Individual--A person enrolled in the TxHmL Program.

(19) Individualized skills and socialization provider--A legal entity licensed in accordance with Texas Human Resources Code Chapter 103.

(20) Initial IPC--The first IPC for an individual developed before the individual's enrollment into the TxHmL Program.

(21) 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.

(22) 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.

(23) 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.

(24) 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.

(25) 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.

(26) 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.

(27) PDP--Person-directed plan. A plan developed 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.

(28) 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.

(29) 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 a financial management services agency.

(30) Renewal IPC--An IPC required to be developed for an individual at least 30 but not more than 90 calendar days before the expiration of the individual's IPC in accordance with rules governing the TxHmL Program.

(31) Revised IPC--An initial IPC or renewal IPC that is revised during the IPC year in accordance with rules governing the TxHmL Program to add a new TxHmL Program service or CFC service or change the amount of an existing service.

(32) Service coordinator--An employee of a local intellectual and developmental disability authority who provides service coordination to an individual.

(33) Service provider--A person who directly provides a TxHmL Program service or CFC service to an individual.

(34) 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.

(35) 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.

(36) TxHmL Program--The Texas Home Living Program.

(37) 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.

§262.903. Types of Individualized Skills and Socialization.

The following are the three types of individualized skills and socialization:

(1) on-site individualized skills and socialization;

(2) off-site individualized skills and socialization; and

(3) in-home individualized skills and socialization.

§262.905. Description of On-Site and Off-Site Individualized Skills and Socialization.

(a) Individualized skills and socialization is a TxHmL Program service described in this section and in Appendix C of the TxHmL Program waiver application approved by CMS.

(b) On-site and off-site individualized skills and socialization:

(1) provide person-centered activities related to:

(A) acquiring, retaining, or improving self-help skills and adaptive skills necessary to live successfully in the community and participate in home and community life; and

(B) gaining or maintaining independence, socialization, community participation, current or future volunteer goals, or employment goals consistent with achieving the outcomes identified in an individual's PDP;

(2) support the individual's pursuit and achievement of employment through school, vocational rehabilitation, the TxHmL Program service of employment assistance, or the TxHmL Program service of supported employment;

(3) provide personal assistance for an individual who cannot manage personal care needs during an individualized skills and socialization activity;

(4) as determined by an assessment conducted by a registered nurse, provide assistance with medications and the performance of tasks delegated by a registered nurse in accordance with state law and rules, unless a physician has delegated the task as a medical act under Texas Occupations Code Chapter 157, as documented by the physician; and

(5) do not include activities in which an individual:

(A) produces marketable goods; and

(B) is paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act.

(c) On-site individualized skills and socialization:

(1) is provided in a building or a portion of a building that is owned or leased by an individualized skills and socialization provider;

(2) includes transportation of an individual from one on-site individualized skills and socialization location to another on-site individualized skills and socialization location;

(3) promotes an individual's development of skills and behavior that support independence and personal choice; and

(4) is not provided in:

(A) a setting in which an individual must not reside, as set forth in the rules governing the TxHmL Program, unless provided in an event open to the public; or

(B) the residence of an individual or another person.

(d) Off-site individualized skills and socialization:

(1) provides activities that:

(A) integrate an individual into the community; and

(B) promote the individual's development of skills and behavior that support independence and personal choice;

(2) is provided in a community setting chosen by the individual from among available community setting options;

(3) includes transportation of an individual from an on-site individualized skills and socialization location to an off-site individualized skills and socialization location and between off-site individualized skills and socialization locations; and

(4) is not provided in:

(A) a building in which on-site individualized skills and socialization is provided;

(B) a setting in which an individual must not reside, as set forth in the rules governing the TxHmL Program, unless provided in an event open to the public; or

(C) the residence of an individual or another person.

§262.907. Description of and Criteria for an Individual to Receive In-Home Individualized Skills and Socialization.

(a) In-home individualized skills and socialization is:

(1) assistance with acquiring, retaining, and improving self-help, socialization, and adaptive skills necessary to reside and participate successfully in the community;

(2) the provision of age-appropriate activities that enhance self-esteem and maximize functional level;

(3) reinforcement of skills or lessons taught:

(A) in school or other settings; or

(B) during the provision of any TxHmL Program service or non-waiver service;

(4) the provision of personal assistance for an individual who cannot manage personal care needs during the provision of in-home individualized skills and socialization; and

(5) as determined by an assessment conducted by a registered nurse, assistance with medications and the performance of tasks delegated by a registered nurse in accordance with state law and rules, unless a physician has delegated the task as a medical act under Texas Occupations Code Chapter 157, as documented by the physician.

(b) One of the following criteria must be met for an individual to receive in-home individualized skills and socialization:

(1) a physician must document that the individual's medical condition justifies the provision of in-home individualized skills and socialization;

(2) a licensed professional or behavioral supports service provider must document that the individual's behavioral issues justify the provision of in-home individualized skills and socialization; or

(3) the individual must be 55 years of age or older and request to receive in-home individualized skills and socialization.

§262.909. Exceptions to Certain Requirements During Declaration of Disaster.

(a) HHSC may allow program providers to use one or both of the exceptions in subsections (c) and (d) 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 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 §262.907 of this subchapter (relating to Description of and Criteria for an Individual to Receive In-Home Individualized Skills and Socialization), an individual who resides in the disaster area is not required to meet any of the criteria described in §262.907(b) of this subchapter to receive in-home individualized skills and socialization.

(d) Notwithstanding §262.913 of this subchapter (relating to Provision of In-Home Individualized Skills and Socialization), if an individual who resides in the disaster area does not meet any of the criteria described in §262.907(b) of this subchapter to receive in-home individualized skills and socialization, a program provider is not required to obtain the documentation described in §262.913(b) of this subchapter.

§262.911. Provision of On-Site and Off-Site Individualized Skills and Socialization.

(a) On-site and off-site individualized skills and socialization must be provided by an individualized skills and socialization provider. An individualized skills and socialization provider must be the program provider or a contractor of the program provider.

(b) An individualized skills and socialization provider must make both on-site individualized skills and socialization and off-site individualized skills and socialization available to an individual.

(c) An individualized skills and socialization provider must provide on-site individualized skills and socialization and off-site individualized skills and socialization in accordance with an individual's PDP, IPC, and implementation plan.

(d) An individualized skills and socialization provider must not require an individual to take a skills test or meet other requirements to receive off-site individualized skills and socialization.

(e) If an individual does not want to participate in an activity the individual scheduled for on-site individualized skills and socialization or off-site individualized skills and socialization, or the LAR does not want the individual to participate in such activity, the individualized skills and socialization provider must document the decision not to participate in the individual's record.

§262.913. Provision of In-Home Individualized Skills and Socialization.

(a) A program provider must ensure that in-home individualized skills and socialization is provided in the residence of the individual receiving the service.

(b) In-home individualized skills and socialization is not required to be provided by an individualized skills and socialization provider.

(c) Before providing in-home individualized skills and socialization to an individual, a program provider must obtain documentation:

(1) from a physician that the individual's medical condition justifies the provision of in-home individualized skills and socialization;

(2) from a licensed professional or behavioral supports service provider that the individual's behavioral issues justify the provision of in-home individualized skills and socialization; or

(3) that the individual is 55 years of age or older and requests to receive in-home individualized skills and socialization.

§262.915. Service Limit for On-Site, Off-Site, and In-Home Individualized Skills and Socialization.

The service limit for the combined total of on-site, off-site, and in-home individualized skills and socialization is:

(1) 1,560 hours during an IPC year;

(2) six hours per calendar day; and

(3) five days per calendar week.

§262.917. Staffing Ratios for Off-Site Individualized Skills and Socialization.

(a) The ratio of service providers of off-site individualized skills and socialization to persons receiving services off-site must be:

(1) no higher than one service provider of off-site individualized skills and socialization to four individuals without an enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:4); and

(2) no higher than one service provider of off-site individualized skills and socialization to two individuals with the enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:2).

(b) A ratio described in subsection (a)(1) and (2) of this section may include individuals with different LONs and other persons receiving off-site individualized skills and socialization or a similar service. If the ratio includes individuals with different LONs or other persons receiving off-site individualized skills and socialization or a similar service, the ratio must be one of the following, whichever is the lowest staffing ratio:

(1) the staffing ratio required by subsection (a) of this section;

(2) the staffing ratio required by §263.2017(a) of this title (relating to Staffing Ratios for Off-Site Individualized Skills and Socialization), if a person in the HCS Program is one of the persons represented in the ratio; or

(3) the staffing ratio required by §260.507 of this title (relating to Staffing Ratios), if a person in the DBMD Program is one of the persons represented in the ratio.

(c) A service provider of off-site individualized skills and socialization assigned to the individuals represented in the staffing ratio required by subsection (a) of this section must provide services only to the individuals and other persons represented in the ratio.

§262.919. Discontinuation of Day Habilitation.

Notwithstanding other rules governing the TxHmL Program, effective March 1, 2023, day habilitation, which includes in-home day habilitation, is not a service in the TxHmL Program.

§262.921. Including On-Site, Off-Site, and In-Home Individualized Skills and Socialization on an IPC.

(a) If an applicant wants to receive on-site or off-site individualized skills and socialization, or wants to receive and meets the criteria for in-home individualized skills and socialization:

(1) a service coordinator must include the type of individualized skills and socialization on the applicant's PDP and the type and amount of individualized skills and socialization on the initial IPC in accordance with the rules governing the TxHmL Program; and

(2) a program provider must develop an implementation plan for on-site, off-site, and in-home individualized skills and socialization.

(b) To renew or revise an IPC to include on-site, off-site, or in-home individualized skills and socialization, a service coordinator and program provider must comply with rules governing the TxHmL Program, which include developing an implementation plan that describes on-site, off-site, and in-home individualized skills and socialization.

(c) If an individual or the individual's LAR wants the individual to receive on-site or off-site individualized skills and socialization but not both, the service coordinator must document the decision in the individual's PDP.

(d) A service coordinator must ensure that an initial IPC that is effective on or after March 1, 2023, does not include day habilitation.

(e) A service coordinator must ensure that a renewal IPC that is effective on or after March 1, 2023, does not include day habilitation.

(f) A program provider or service coordinator must ensure that a revised IPC with an effective date that is during the period of March 1, 2023, through February 29, 2024, includes only the amount of day habilitation that the program provider provided to the individual before March 1, 2023.

§262.923. Service Provider Qualifications for On-Site, Off-Site, and In-Home Individualized Skills and Socialization.

(a) A service provider of on-site, off-site, or in-home individualized skills and socialization must be at least 18 years of age and:

(1) have a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma; or

(2) have documentation of a proficiency evaluation of experience and competence to perform the job tasks that includes:

(A) a written competency-based assessment of the ability to document service delivery and observations of the individuals to be served; and

(B) at least three written personal references from persons not related by blood that indicate the ability to provide a safe, healthy environment for the individuals being served.

(b) A service provider of on-site or off-site individualized skills and socialization who provides transportation must:

(1) have a valid driver's license; and

(2) transport individuals in a vehicle insured in accordance with state law.

(c) A service provider of on-site, off-site, or in-home individualized skills and socialization must complete training as required by the rules governing the TxHmL Program.

§262.925. Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization.

(a) Except as provided in subsection (b) of this section, HHSC pays for on-site, off-site, and in-home individualized skills and socialization provided to an individual at the reimbursement rates for on-site,

off-site and in-home individualized skills and socialization regardless of the individual's LON.

(b) If approved in accordance with §262.927 of this subchapter (relating to Enhanced Staffing Rate) HHSC pays an enhanced staffing rate for off-site individualized skills and socialization for an individual.

(c) If an individual's TxHmL Program services and CFC services are suspended or terminated, a program provider must not submit a claim for on-site, off-site, or in-home individualized skills and socialization 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.

(d) HHSC does not pay a program provider for on-site, off-site, or in-home individualized skills and socialization, or recoups any payments made to the program provider for on-site, off-site, or in-home individualized skills and socialization if:

(1) the individual receiving on-site, off-site, or in-home individualized skills and socialization was, at the time on-site, off-site, or in-home individualized skills and socialization was provided, ineligible for the TxHmL Program;

(2) on-site, off-site, or in-home individualized skills and socialization is provided to an individual during a period of time for which there is not a signed, dated, and authorized IPC for the individual;

(3) on-site, off-site, or in-home individualized skills and socialization is provided during a period of time for which there is not a signed and dated ID/RC Assessment for the individual;

(4) on-site, off-site, or in-home individualized skills and socialization is provided during a period of time for which the individual did not have an LOC determination;

(5) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with a signed, dated, and authorized IPC that includes on-site, off-site, or in-home individualized skills and socialization;

(6) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with the individual's PDP or implementation plan;

(7) on-site, off-site, or in-home individualized skills and socialization is provided before the individual's enrollment date into the TxHmL Program;

(8) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with this subchapter;

(9) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with the TxHmL Program Billing Requirements;

(10) on-site, off-site, or in-home individualized skills and socialization is not documented in accordance with the TxHmL Program Billing Requirements;

(11) the program provider does not comply with 40 TAC §49.305 (relating to Records);

(12) the claim for on-site, off-site, or in-home individualized skills and socialization does not meet the requirements in 40 TAC §49.311 (relating to Claims Payment) or the TxHmL Program Billing Requirements;

(13) HHSC determines that on-site, off-site, or in-home individualized skills and socialization would have been paid for by a source other than the TxHmL Program if the program provider had

submitted to the other source a proper, complete, and timely request for payment for on-site, off-site, or in-home individualized skills and socialization;

(14) on-site, off-site, or in-home individualized skills and socialization is provided by a service provider who does not meet the qualifications to provide on-site, off-site, or in-home individualized skills and socialization as described in §262.923 of this subchapter (relating to Service Provider Qualifications for On-Site, Off-Site, and In-Home Individualized Skills and Socialization) and in the TxHmL Program Billing Requirements;

(15) on-site, off-site, or in-home individualized skills and socialization was not provided;

(16) on-site or off-site individualized skills and socialization is provided during a period of time that the individual produced marketable goods and was paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act;

(17) in-home individualized skills and socialization is not provided in the residence of the individual as required by §262.913(a) of this subchapter (relating to Provision of In-Home Individualized Skills and Socialization); or

(18) in-home individualized skills and socialization is provided to an individual without the documentation required by §262.913(c) of this subchapter.

(e) HHSC does not pay a program provider for day habilitation, or recoups any payments made to the program provider for day habilitation, if day habilitation is provided on or after March 1, 2023, even if an individual's IPC includes day habilitation on or after March 1, 2023.

(f) HHSC conducts provider fiscal compliance reviews, also known as billing and payment reviews, in accordance with rules governing the TxHmL Program and the TxHmL Program Billing Requirements to determine whether a program provider is in compliance with this subchapter.

§262.927. *Enhanced Staffing Rate.*

(a) A program provider may request the enhanced staffing rate for off-site individualized skills and socialization described in §262.925(b) of this subchapter (relating to Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization) for an individual who receives off-site individualized skills and socialization from the program provider.

(b) A service coordinator must request the enhanced staffing rate for off-site individualized skills and socialization described in §262.925(b) of this subchapter for an individual who receives off-site individualized skills and socialization through the CDS option if the CDS employer asks the service coordinator to request the enhanced staffing rate.

(c) A program provider or service coordinator makes the request described in subsection (a) or (b) of this section by submitting the following documentation to HHSC:

- Form;
- (1) a completed HHSC Enhanced Staffing Rate Request
 - (2) the most recent ICAP scoring booklet;
 - (3) the most recent ID/RC Assessment;
 - (4) the most recent PDP;
 - (5) the most recent implementation plan for individualized skills and socialization; and

(6) other documentation that supports the individual's request for an enhanced staffing rate, which may include:

(A) the behavior support plan;

(B) a physician's order;

(C) an assessment completed by a service provider of a professional therapy;

(D) the nursing assessment; and

(E) the CFC PAS/HAB assessment.

(d) HHSC approves a request made in accordance with subsections (a) - (c) of this section if the documentation submitted to HHSC demonstrates that to participate in off-site individualized skills and socialization, the individual requires more service provider support than the individual typically receives. The requirement for additional support may be because of the individual's mobility, medical, or behavioral needs.

(e) HHSC may review an approved enhanced staffing rate at any time to determine if it is appropriate. If HHSC reviews an enhanced staffing rate, a program provider or service coordinator must submit documentation supporting the enhanced staffing rate to HHSC in accordance with HHSC's request.

(f) HHSC notifies a program provider or service coordinator that an enhanced staffing rate is approved or denied through the HHSC data system.

(g) A service coordinator must notify the CDS employer and FMSA of HHSC's approval or denial described in subsection (d) of this section.

(h) A program provider may request an administrative hearing in accordance with 1 TAC §357.484 (relating to Request for a Hearing) if HHSC:

(1) denies a request made in accordance with subsection (a) of this section; or

(2) denies an enhanced staffing rate based on a review described in subsection (c) 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 July 28, 2022.

TRD-202202839

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: September 11, 2022

For further information, please call: (512) 438-4639



CHAPTER 263. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)
SUBCHAPTER L. INDIVIDUALIZED SKILLS AND SOCIALIZATION

26 TAC §§263.2001, 263.2003, 263.2005, 263.2007, 263.2009, 263.2011, 263.2013, 263.2015, 263.2017, 263.2019, 263.2021, 263.2023, 263.2025, 263.2027

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §263.2001, concerning Definitions; §263.2003, concerning Types of Individualized Skills and Socialization; §263.2005, concerning Description of On-Site and Off-Site Individualized Skills and Socialization; §263.2007, concerning Description of and Criteria for an Individual to Receive In-Home Individualized Skills and Socialization; §263.2009, concerning Exceptions to Certain Requirements During Declaration of Disaster; §263.2011, concerning Provision of On-Site and Off-Site Individualized Skills and Socialization; §263.2013, concerning Provision of In-Home Individualized Skills and Socialization; §263.2015, concerning Service Limit for On-Site, Off-Site, and In-Home Individualized Skills and Socialization; §263.2017, concerning Staffing Ratios for Off-Site Individualized Skills and Socialization; §263.2019, concerning Discontinuation of Day Habilitation; §263.2021, concerning Including On-Site, Off-Site, and In-Home Individualized Skills and Socialization on an IPC; §263.2023, concerning Service Provider Qualifications for On-Site, Off-Site, and In-Home Individualized Skills and Socialization; §263.2025, concerning Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization; and §263.2027, concerning Enhanced Staffing Rate, in Texas Administrative Code (TAC), new Chapter 263, Subchapter L, Individualized Skills and Socialization.

BACKGROUND AND PURPOSE

Title 42, Code of Federal Regulations (CFR), §441.301(c)(4)(i) - (v), require home and community based settings in programs authorized by §1915(c) of the Social Security Act to have certain qualities, including being integrated in and supporting full access of individuals to the greater community. The Centers for Medicare and Medicaid Services is requiring that states be in compliance with these regulations by March 17, 2023.

The 2020-21 General Appropriations Act (GAA), House Bill 1, 86th Legislature, Regular Session, 2019 (Article II, Health and Human Services Commission, Rider 21) required HHSC to develop a plan to replace day habilitation in its Medicaid §1915(c) waiver programs for individuals with intellectual and developmental disabilities with more integrated services that maximize participation and integration of the individuals in the community.

In accordance with Rider 21, HHSC developed a plan to replace day habilitation provided in the Home and Community-Based Services (HCS), Texas Home Living (TxHmL), and Deaf Blind with Multiple Disabilities (DBMD) Programs with individualized skills and socialization. The plan included the use of staffing ratios while providing off-site individualized skills and socialization to individuals to ensure that the individuals receive more personalized attention and more easily meet their personal goals and to ensure the health and safety of the individuals.

The 2022-2023 GAA, Senate Bill 1, 87th Legislature, Regular Session, 2021 (Article II, Health and Human Services Commission, Rider 23) authorized funding for the provision of individualized skills and socialization in the HCS, TxHmL, and DBMD Programs.

The proposed rules implement the plan required by Rider 21 to replace day habilitation with individualized skills and socializa-

tion in the HCS Program and will ensure that HHSC is in compliance with 42 CFR §441.301(c)(4)(i) - (v) by March 17, 2023.

The proposed rules describe the three types of individualized skills and socialization, on-site individualized skills and socialization, off-site individualized skills and socialization, and in-home individualized skills and socialization. The proposed rules require that on-site and off-site individualized skills and socialization be provided by an individualized skills and socialization provider.

The rules requiring a provider of individualized skills and socialization to be licensed in accordance with Texas Human Resources Code Chapter 103, are being proposed in 26 TAC Chapter 559 and published elsewhere in this issue of the *Texas Register*. The rules in Chapter 559 will require an individualized skills and socialization provider to be licensed as a day activity and health services facility with a special designation for individualized skills and socialization.

The proposed rules include requirements for an individualized skills and socialization provider to make available both on-site and off-site individualized skills and socialization to individuals and meet staffing ratios based on levels of need for off-site individualized skills and socialization.

The proposed rules also include requirements for the provision of in-home individualized skills and socialization including criteria that must be met for an individual to receive the service and that the service must be provided in the residence of the individual receiving the service.

The proposed rules discontinue day habilitation which includes in-home day habilitation effective March 1, 2023.

The proposed rules provide 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.

The rules implementing individualized skills and socialization in the TxHmL and DBMD Programs are being proposed in 26 TAC Chapter 262 Subchapter J and in 26 TAC Chapter 260, Subchapter I and published elsewhere in this issue of the *Texas Register*.

SECTION-BY-SECTION SUMMARY

Proposed new §263.2001, Definitions, defines the terms used in the new subchapter including "individualized skills and socialization provider" which is defined as a legal entity licensed in accordance with Texas Human Resources Code Chapter 103.

Proposed new §263.2003, Types of Individualized Skills and Socialization, identifies the three types of individualized skills and socialization.

Proposed new §263.2005, Description of On-Site and Off-Site Individualized Skills and Socialization, provides a general description of on-site and off-site individualized skills and socialization. The proposed new rule also describes where on-site and off-site individualized skills and socialization are provided.

Proposed new §263.2007, Description of and Criteria for an Individual to Receive In-Home Individualized Skills and Socialization, provides a general description of in-home individualized skills and socialization. The proposed new rule also describes the criteria that must be met for an individual to receive in-home individualized skills and socialization.

Proposed new §263.2009, 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 local intellectual and developmental disability authorities if it allows an exception to be used and defines "disaster area."

Proposed new §263.2011, Provision of On-Site and Off-Site Individualized Skills and Socialization, describes requirements for providing on-site and off-site individualized skills and socialization, including that an individualized skills and socialization provider make both on-site and off-site individualized skills and socialization available to an individual and that such provider allow an individual to receive off-site individualized skills and socialization without requiring the individual to take a skills test or meet other requirements to receive off-site individualized skills and socialization. The proposed new rule requires individualized skills and socialization to be provided by an individualized skills and socialization provider and that such provider be the program provider or a contractor of the program provider. The proposed new rule also requires an individualized skills and socialization provider to document an individual's or legally authorized representative's decision for the individual not to participate in an activity the individual scheduled for on-site or off-site individualized skills and socialization.

Proposed new §263.2013, Provision of In-Home Individualized Skills and Socialization, describes requirements for providing in-home individualized skills and socialization. The proposed new rule also describes documentation that a program provider must obtain before providing in-home individualized skills and socialization to an individual.

Proposed new §263.2015, Service Limit for On-Site, Off-Site, and In-Home Individualized Skills and Socialization, establishes a combined service limit for on-site, off-site, and in-home individualized skills and socialization.

Proposed new §263.2017, Staffing Ratios for Off-Site Individualized Skills and Socialization, describes the required ratios for off-site individualized skills and socialization of service providers to individuals in the HCS Program and other persons receiving off-site individualized skills and socialization or a similar service. The ratios in the proposed new rule include other persons receiving individualized skills and socialization in the DBMD Program and the TxHmL Program, and other persons receiving a similar service, to ensure that the ratios of service providers to individuals in the HCS Program receiving off-site individualized skills and socialization are maintained. If a ratio described in this section includes individuals with different levels of need (LONs) and other persons receiving off-site individualized skills and socialization or a similar service, the proposed new rule requires that the ratio be the lowest staff ratio required by §263.2017 or other waiver program rules. The proposed new rule requires a service provider of off-site individualized skills and socialization assigned to the individuals and other persons described in a ratio to provide services only to the individuals and other persons represented in the ratio.

Proposed new §263.2019, Discontinuation of Day Habilitation, provides that day habilitation, which includes in-home day habilitation, is not a service in the HCS Program effective March 1, 2023, to ensure HHSC's compliance with 42 CFR §441.301(c)(4).

before the deadline established by the Centers for Medicare & Medicaid Services.

Proposed new §263.2021, Including On-Site, Off-Site, and In-Home Individualized Skills and Socialization on an IPC, describes requirements for service coordinators and program providers if an applicant wants to receive on-site, off-site, or in-home individualized skills and socialization, such as including the service on the applicant's person-directed plan and initial individual plan of care (IPC) and developing an implementation plan for the service. The proposed new rule requires a service coordinator to ensure that an initial IPC effective on or after March 1, 2023, does not include day habilitation and requires a program provider to ensure that a renewal IPC effective on or after March 1, 2023, does not include day habilitation. The proposed new rule also requires a program provider or service coordinator to ensure that a revised IPC with an effective date during the period of March 1, 2023, and February 29, 2024 includes only the amount of day habilitation that the program provider provided to the individual before March 1, 2023.

Proposed new §263.2023, Service Provider Qualifications for On-Site, Off-Site, and In-Home Individualized Skills and Socialization, describes the qualifications for a service provider of on-site, off-site, or in-home individualized skills and socialization.

Proposed new §263.2025, Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization, provides that HHSC pays for on-site, off-site, and in-home individualized skills and socialization in accordance with an individual's LON and the reimbursement rates for on-site, off-site, and in-home individualized skills and socialization. The proposed new rule provides that HHSC pays an approved enhanced staffing rate for off-site individualized skills and socialization for an individual with a LON 1 or LON 5. The proposed new rule prohibits a program provider from submitting a claim for on-site, off-site, or in-home individualized skills and socialization provided during the time an individual's services are suspended or after services are terminated, except that the program provider may submit a claim for the first day of the individual's suspension or termination. The proposed new rule describes the circumstances under which HHSC does not pay or recoups payment from a program provider for on-site, off-site, or in-home individualized skills and socialization. The proposed new rule provides that HHSC does not pay or recoups payment from a program provider for day habilitation provided on or after March 1, 2023. The proposed new rule provides that HHSC conducts provider fiscal compliance reviews to determine whether a program provider is in compliance with the new subchapter.

Proposed new §263.2027, Enhanced Staffing Rate, provides that a program provider may request the enhanced staffing rate for off-site individualized skills and socialization for an individual with a LON 1 or LON 5 and describes how the request must be made. The proposed new rule provides that HHSC approves a request for the enhanced staffing rate if the documentation submitted to HHSC demonstrates that to participate in off-site individualized skills and socialization, the individual requires more service provider support than the individual would receive with the individual's assigned LON. The proposed new rule provides that HHSC may review an approved enhanced staffing rate at any time to determine if it is appropriate and notifies a program provider through the HHSC data system when an enhanced staffing rate is approved or denied. The proposed new rule provides that a program provider may request an ad-

ministrative hearing if HHSC denies a request for the enhanced staffing rate.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that the cost to state government to pay for the automation changes needed in the Texas Medicaid and Healthcare Partnership (TMHP) automated system to add new service codes to allow program providers to submit claims for individualized skills and socialization is \$13,300 General Revenue (GR) funds (\$119,700 Federal Funds (FF)), \$133,000 All Funds (AF)) for the State Fiscal Year (SFY) 2023 and \$0 GR, (\$0 FF, 0 AF) for SFYs 2024 - 2027.

During the years the rules will be in effect enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

Trey Wood has also determined that 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 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 alternative methods to achieve the purpose of the proposed rules for small businesses or micro-businesses because implementing the new rules is necessary to comply with the federal regulations for home and community-based settings in 42 CFR §441.301(c)(4)(i) - (v).

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 in the HCS Program will have the opportunity to receive individualized skills and socialization, a new service that provides increased community integration, additional opportunities and supports to be competitively employed, and choice of the settings in which individualized skills and socialization is provided.

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 may incur costs to update their policies and provide staff training to implement the new rules. However, HHSC lacks sufficient data to determine 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 7, 2022 from 8:00 a.m. to 12:00 p.m. (central time). The link to register for the GoToWebinar meeting is <https://register.gotowebinar.com/register/927810115195515152>.

The meeting date and time will be posted on the HHSC website at <https://www.hhs.texas.gov/providers/long-term-care-providers/home-community-based-services-hcs> or <https://www.hhs.texas.gov/providers/long-term-care-providers/texas-home-living-txhtml>.

Persons requiring further information, special assistance, or accommodations should contact McKenzie Sanchez at TxHmLPolicy@hhs.texas.gov.

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 22R037" 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 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.

§263.2001. 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) Applicant--A Texas resident seeking services in the Home and Community-based Services (HCS) Program.

(3) Calendar day--Any day, including weekends and holidays.

(4) CFC--Community First Choice. A state plan option governed by Code of Federal Regulations, Title 42, Chapter 441, Subpart K, regarding Home and Community-Based Attendant Services and Supports State Plan Option (Community First Choice).

(5) CFC PAS/HAB--CFC personal assistance services/habilitation.

(6) 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.

(7) Community setting--A setting accessible to the general public within an individual's community.

(8) Day habilitation--An HCS Program service that provides assistance with acquiring, retaining, or improving self-help, socialization, and adaptive skills provided in a location other than the residence of an individual.

(9) DFPS--The Department of Family and Protective Services.

(10) 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.

(11) HCS Program--The Home and Community-based Services Program.

(12) HHSC--The Texas Health and Human Services Commission.

(13) ICAP--Inventory for Client and Agency Planning.

(14) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. A form used by HHSC for level of care determination and level of need assignment.

(15) 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 individual plan of care (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:

and (i) observable, measurable, and outcome-oriented;

(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, legally authorized representative, and the program provider.

(16) Individual--A person enrolled in the HCS Program.

(17) Individualized skills and socialization provider--A legal entity licensed in accordance with Texas Human Resources Code Chapter 103.

(18) Initial IPC--The first IPC for an individual developed before the individual's enrollment into the HCS Program.

(19) 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.

(20) 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.

(21) 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.

(22) 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.

(23) LON--Level of need. An assignment given by HHSC to an individual upon which reimbursement for certain services is based.

(24) Neglect--A negligent act or omission that caused physical or emotional injury or death to an individual or placed an individual at risk of physical or emotional injury or death.

(25) PDP--Person-directed plan. A plan developed 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.

(26) 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.

(27) 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 a financial management services agency.

(28) Renewal IPC--An IPC developed for an individual in accordance with the rules governing the HCS Program.

(29) Revised IPC--An initial IPC or a renewal IPC that is revised during an IPC year in accordance with the rules governing the HCS Program to add a new HCS Program service or CFC service or change the amount of an existing service.

(30) Service coordinator--An employee of a local intellectual and developmental disability authority who provides service coordination to an individual.

(31) Service provider--A person who directly provides an HCS Program service or CFC service to an individual.

(32) 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.

(33) 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.

(34) 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.

§263.2003. Types of Individualized Skills and Socialization.

The following are the three types of individualized skills and socialization:

- (1) on-site individualized skills and socialization;
- (2) off-site individualized skills and socialization; and
- (3) in-home individualized skills and socialization.

§263.2005. Description of On-Site and Off-Site Individualized Skills and Socialization.

(a) Individualized skills and socialization is an HCS Program service described in this section and in Appendix C of the HCS Program waiver application approved by CMS.

(b) On-site and off-site individualized skills and socialization:

(1) provide person-centered activities related to:

(A) acquiring, retaining, or improving self-help skills and adaptive skills necessary to live successfully in the community and participate in home and community life; and

(B) gaining or maintaining independence, socialization, community participation, current or future volunteer goals, or employment goals consistent with achieving the outcomes identified in an individual's PDP;

(2) supports the individual's pursuit and achievement of employment through school, vocational rehabilitation, the HCS Program service of employment assistance, or the HCS Program service of supported employment;

(3) provides personal assistance for an individual who cannot manage personal care needs during an individualized skills and socialization activity;

(4) as determined by an assessment conducted by a registered nurse, provides assistance with medications and the performance of tasks delegated by a registered nurse in accordance with state law and rules, unless a physician has delegated the task as a medical act under Texas Occupations Code Chapter 157, as documented by the physician; and

(5) does not include activities in which an individual:

(A) produces marketable goods; and

(B) is paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act.

(c) On-site individualized skills and socialization:

(1) is provided in a building or a portion of a building that is owned or leased by an individualized skills and socialization provider;

(2) includes transportation of an individual from one on-site individualized skills and socialization location to another on-site individualized skills and socialization location;

(3) promotes an individual's development of skills and behavior that support independence and personal choice; and

(4) is not provided in:

(A) a setting in which an individual must not reside, as set forth in the rules governing the HCS Program, unless provided in an event open to the public; or

(B) the residence of an individual or another person.

(d) Off-site individualized skills and socialization:

(1) provides activities that:

(A) integrate an individual into the community; and

(B) promote the individual's development of skills and behavior that support independence and personal choice;

(2) is provided in a community setting chosen by the individual from among available community setting options;

(3) includes transportation of an individual from an on-site individualized skills and socialization location to an off-site individualized skills and socialization location and between off-site individualized skills and socialization locations; and

(4) is not provided in:

(A) a building in which on-site individualized skills and socialization is provided;

(B) a setting in which an individual must not reside, as set forth in the rules governing the HCS Program, unless provided in an event open to the public; or

(C) the residence of an individual or another person.

§263.2007. Description of and Criteria for an Individual to Receive In-Home Individualized Skills and Socialization.

(a) In-home individualized skills and socialization is:

(1) assistance with acquiring, retaining, and improving self-help, socialization, and adaptive skills necessary to reside and participate successfully in the community;

(2) the provision of age-appropriate activities that enhance self-esteem and maximize functional level;

(3) reinforcement of skills or lessons taught:

(A) in school or other settings; or

(B) during the provision of any HCS Program service or non-waiver service;

(4) the provision of personal assistance for an individual who cannot manage personal care needs during the provision of in-home individualized skills and socialization; and

(5) as determined by an assessment conducted by a registered nurse, assistance with medications and the performance of tasks delegated by a registered nurse in accordance with state law and rules, unless a physician has delegated the task as a medical act under Texas Occupations Code Chapter 157, as documented by the physician.

(b) One of the following criteria must be met for an individual to receive in-home individualized skills and socialization:

(1) a physician must document that the individual's medical condition justifies the provision of in-home individualized skills and socialization;

(2) a licensed professional or behavioral supports service provider must document that the individual's behavioral issues justify the provision of in-home individualized skills and socialization; or

(3) the individual must be 55 years of age or older and request to receive in-home individualized skills and socialization.

§263.2009. Exceptions to Certain Requirements During Declaration of Disaster.

(a) HHSC may allow program providers to use one or both of the exceptions in subsections (c) and (d) 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 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 §263.2007 of this chapter (relating to Description of and Criteria for an Individual to Receive In-Home Individualized Skills and Socialization), an individual who resides in the disaster area is not required to meet any of the criteria described in §263.2007(b) of this chapter to receive in-home individualized skills and socialization.

(d) Notwithstanding §263.2013 of this chapter (relating to Provision of In-Home Individualized Skills and Socialization), if an individual who resides in the disaster area does not meet any of the criteria described in §263.2007(b) of this chapter to receive in-home individualized skills and socialization, a program provider is not required to obtain the documentation described in §263.2013(b) of this chapter.

§263.2011. Provision of On-Site and Off-Site Individualized Skills and Socialization.

(a) On-site and off-site individualized skills and socialization must be provided by an individualized skills and socialization provider. An individualized skills and socialization provider must be the program provider or a contractor of the program provider.

(b) An individualized skills and socialization provider must make both on-site individualized skills and socialization and off-site individualized skills and socialization available to an individual.

(c) An individualized skills and socialization provider must provide on-site individualized skills and socialization and off-site individualized skills and socialization in accordance with an individual's PDP, IPC, and implementation plan.

(d) An individualized skills and socialization provider must not require an individual to take a skills test or meet other requirements to receive off-site individualized skills and socialization.

(e) If an individual does not want to participate in an activity the individual scheduled for on-site individualized skills and socialization or off-site individualized skills and socialization, or the LAR does not want the individual to participate in such activity, the individualized skills and socialization provider must document the decision not to participate in the individual's record.

§263.2013. Provision of In-Home Individualized Skills and Socialization.

(a) A program provider must ensure that in-home individualized skills and socialization is provided in the residence of the individual receiving the service.

(b) In-home individualized skills and socialization is not required to be provided by an individualized skills and socialization provider.

(c) Before providing in-home individualized skills and socialization to an individual, a program provider must obtain documentation:

(1) from a physician that the individual's medical condition justifies the provision of in-home individualized skills and socialization;

(2) from a licensed professional or behavioral supports service provider that the individual's behavioral issues justify the provision of in-home individualized skills and socialization; or

(3) that the individual is 55 years of age or older and requests to receive in-home individualized skills and socialization.

§263.2015. Service Limit for On-Site, Off-Site, and In-Home Individualized Skills and Socialization.

The service limit for the combined total of on-site, off-site, and in-home individualized skills and socialization is:

(1) 1560 hours during an IPC year;

(2) six hours per calendar day; and

(3) five days per calendar week.

§263.2017. Staffing Ratios for Off-Site Individualized Skills and Socialization.

(a) The ratio of service providers of off-site individualized skills and socialization to persons receiving services off-site must be:

(1) no higher than one service provider of off-site individualized skills and socialization to six individuals with an LON 1 without an enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:6);

(2) no higher than one service provider of off-site individualized skills and socialization to four individuals with an LON 5 without an enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:4);

(3) no higher than one service provider of off-site individualized skills and socialization to two individuals with an LON 8 or an LON 6 and other persons receiving off-site individualized skills and socialization or a similar service (1:2);

(4) no higher than one service provider of individualized skills and socialization to two individuals with an LON 1 with the enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:2);

(5) no higher than one service provider of off-site individualized skills and socialization to two individuals with an LON 5 with the enhanced staffing rate and other persons receiving off-site individualized skills and socialization or a similar service (1:2); and

(6) no higher than one service provider of off-site individualized skills and socialization to one individual with an LON 9 and other persons receiving off-site individualized skills and socialization or a similar service (1:1).

(b) A ratio described in subsection (a)(1)-(6) of this section may include individuals with different LONs and other persons receiving off-site individualized skills and socialization or a similar service. If the ratio includes individuals with different LONs or other persons receiving off-site individualized skills and socialization or a similar service, the ratio must be one of the following, whichever is the lowest staffing ratio:

(1) the staffing ratio for the individual with highest level of need;

(2) the staffing ratio required by §262.917(a) of this title (relating to Staffing Ratios for Off-Site Individualized Skills and Socialization), if a person in the TxHmL Program is one of the persons represented in the ratio; or

(3) the staffing ratio required by §260.507(a) of this title (relating to Staffing Ratios), if a person in the DBMD Program is one of the persons represented in the ratio.

(c) A service provider of off-site individualized skills and socialization assigned to the individuals represented in a ratio in subsection (a) of this section must provide services only to the individuals and other persons represented in the ratio.

§263.2019. Discontinuation of Day Habilitation.

Notwithstanding other rules governing the HCS Program, effective March 1, 2023, day habilitation, which includes in-home day habilitation, is not a service in the HCS Program.

§263.2021. Including On-Site, Off-Site, and In-Home Individualized Skills and Socialization on an IPC.

(a) If an applicant wants to receive on-site or off-site individualized skills and socialization, or wants to receive and meets the criteria for in-home individualized skills and socialization:

(1) a service coordinator must include the type of individualized skills and socialization on the applicant's PDP and the type and amount of individualized skills and socialization on the initial IPC in accordance with the rules governing the HCS Program; and

(2) a program provider must develop an implementation plan for on-site, off-site, and in-home individualized skills and socialization.

(b) To renew or revise an IPC to include on-site, off-site, or in-home individualized skills and socialization, a service coordinator and program provider must comply with rules governing the HCS Program, which include developing an implementation plan that describes on-site, off-site, and in-home individualized skills and socialization.

(c) If an individual or the individual's LAR wants the individual to receive on-site or off-site individualized skills and socialization, but not both, the service coordinator must document the decision in the individual's PDP.

(d) A service coordinator must ensure that an initial IPC that is effective on or after March 1, 2023, does not include day habilitation.

(e) A program provider must ensure that a renewal IPC that is effective on or after March 1, 2023, does not include day habilitation.

(f) A program provider or service coordinator must ensure that a revised IPC with an effective date that is during the period of March 1, 2023, through February 29, 2024, includes only the amount of day habilitation that the program provider provided to the individual before March 1, 2023.

§263.2023. Service Provider Qualifications for On-Site, Off-Site, and In-Home Individualized Skills and Socialization.

(a) A service provider of on-site, off-site, or in-home individualized skills and socialization must be at least 18 years of age and:

(1) have a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma; or

(2) have documentation of a proficiency evaluation of experience and competence to perform the job tasks that includes:

(A) a written competency-based assessment of the ability to document service delivery and observations of the individuals to be served; and

(B) at least three written personal references from persons not related by blood that indicate the ability to provide a safe, healthy environment for the individuals being served.

(b) A service provider of on-site or off-site individualized skills and socialization who provides transportation must:

(1) have a valid driver's license; and

(2) transport individuals in a vehicle insured in accordance with state law.

(c) A service provider of on-site, off-site, or in-home individualized skills and socialization must complete training as required by the rules governing the HCS Program.

§263.2025. Program Provider Reimbursement for On-Site, Off-Site, and In-Home Individualized Skills and Socialization.

(a) Except as provided in subsection (b) of this section, HHSC pays for on-site, off-site, and in-home individualized skills and socialization provided to an individual in accordance with an individual's LON and the reimbursement rates for on-site, off-site, and in-home individualized skills and socialization.

(b) If approved in accordance with §263.2027 of this subchapter (relating to Enhanced Staffing Rate) HHSC pays an enhanced staffing rate for off-site individualized skills and socialization for an individual with a LON 1 or LON 5.

(c) If an individual's HCS Program services and CFC services are suspended or terminated, a program provider must not submit a claim for on-site, off-site, or in-home individualized skills and socialization 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.

(d) HHSC does not pay a program provider for on-site, off-site, or in-home individualized skills and socialization, or recoups any payments made to the program provider for on-site, off-site, or in-home individualized skills and socialization, if:

(1) the individual receiving on-site, off-site, or in-home individualized skills and socialization was, at the time on-site, off-site, or in-home individualized skills and socialization was provided, ineligible for the HCS Program;

(2) on-site, off-site, or in-home individualized skills and socialization is provided to an individual during a period of time for which there is not a signed, dated, and authorized IPC for the individual;

(3) on-site, off-site, or in-home individualized skills and socialization is provided during a period of time for which there is not a signed and dated ID/RC Assessment for the individual;

(4) on-site, off-site, or in-home individualized skills and socialization is provided during a period of time for which the individual did not have an LOC determination;

(5) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with a signed, dated, and authorized IPC that includes on-site, off-site, or in-home individualized skills and socialization;

(6) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with the individual's PDP or implementation plan;

(7) on-site, off-site, or in-home individualized skills and socialization is provided before the individual's enrollment date into the HCS Program;

(8) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with this subchapter;

(9) on-site, off-site, or in-home individualized skills and socialization is not provided in accordance with the HCS Program Billing Requirements;

(10) on-site, off-site, or in-home individualized skills and socialization is not documented in accordance with the HCS Program Billing Requirements;

(11) the program provider does not comply with 40 TAC §49.305 (relating to Records);

(12) the claim for on-site, off-site, or in-home individualized skills and socialization does not meet the requirements in 40 TAC §49.311 (relating to Claims Payment) or the HCS Program Billing Requirements;

(13) HHSC determines that on-site, off-site, or in-home individualized skills and socialization 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 on-site, off-site, or in-home individualized skills and socialization;

(14) on-site, off-site, or in-home individualized skills and socialization is provided by a service provider who does not meet the qualifications to provide on-site, off-site, or in-home individualized skills and socialization as described in §263.2023 of this subchapter (relating to Service Provider Qualifications for On-Site, Off-Site, and In-Home Individualized Skills and Socialization) and in the HCS Program Billing Requirements;

(15) on-site, off-site, or in-home individualized skills and socialization 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;

(16) on-site, off-site, or in-home individualized skills and socialization was not provided;

(17) on-site or off-site individualized skills and socialization is provided during a period of time that the individual produced marketable goods and was paid below minimum wage for producing the goods in accordance with Section 14(c) of the Fair Labor Standards Act;

(18) in-home individualized skills and socialization is not provided in the residence of the individual as required by §263.2013(a) of this subchapter (relating to Provision of In-Home Individualized Skills and Socialization); or

(19) in-home individualized skills and socialization is provided to an individual without the documentation required by §263.2013(c) of this subchapter.

(e) HHSC does not pay a program provider for day habilitation, or recoups any payments made to the program provider for day habilitation, if day habilitation is provided on or after March 1, 2023, even if an individual's IPC includes day habilitation on or after March 1, 2023.

(f) HHSC conducts provider fiscal compliance reviews, also known as billing and payment reviews, in accordance with rules governing the HCS Program and the HCS Program Billing Requirements to determine whether a program provider is in compliance with this subchapter.

§263.2027. Enhanced Staffing Rate.

(a) A program provider may request the enhanced staffing rate for off-site individualized skills and socialization described in §263.2025(b) of this subchapter (relating to Program Provider Reimbursement for Individualized Skills and Socialization) for an individual with a LON 1 or LON 5 by submitting the following documentation to HHSC:

(1) a completed HHSC Enhanced Staffing Rate Request Form;

(2) the most recent ICAP scoring booklet;

(3) the most recent ID/RC Assessment;

(4) the most recent PDP;

(5) the most recent implementation plan for individualized skills and socialization; and

(6) other documentation that supports the individual's request for an enhanced staffing rate, which may include:

(A) the behavior support plan;

(B) a physician's order;

(C) an assessment completed by a service provider of a professional therapy;

(D) the nursing assessment; and

(E) the CFC PAS/HAB assessment.

(b) HHSC approves a request made in accordance with subsection (a) of this section if the documentation submitted to HHSC demonstrates that to participate in off-site individualized skills and socialization, the individual requires more service provider support than the individual would receive with the individual's assigned LON. The requirement for additional support may be because of the individual's mobility, medical, or behavioral needs.

(c) HHSC may review an approved enhanced staffing rate at any time to determine if it is appropriate. If HHSC reviews an enhanced staffing rate, a program provider must submit documentation supporting the enhanced staffing rate to HHSC in accordance with HHSC's request.

(d) HHSC notifies a program provider that an enhanced staffing rate is approved or denied through the HHSC data system.

(e) A program provider may request an administrative hearing in accordance with 1 TAC §357.484 (relating to Request for a Hearing) if HHSC:

(1) denies a request made in accordance with subsection (a) of this section; or

(2) denies an enhanced staffing rate based on a review described in subsection (c) 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 July 28, 2022.

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Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: September 11, 2022

For further information, please call: (512) 438-4639



CHAPTER 559. DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §§559.201, 559.203, 559.205, 559.207, 559.209, 559.211, 559.213, 559.215, 559.217, 559.219, 559.221, 559.223, 559.225, 559.227, 559.229, 559.231, 559.233, 559.235, 559.237, 559.239, 559.241, 559.243, 559.245, 559.247, 559.249, and 559.251, in new Subchapter H, Individualized Skills and Socialization Provider Requirements.

BACKGROUND AND PURPOSE

In 2014, the Centers for Medicare & Medicaid Services issued regulations governing the settings in which Medicaid home and community based services are provided. To comply with the regulations, HHSC will replace existing day habilitation services in the Deaf Blind with Multiple Disabilities, Home and Community-based Services, and Texas Home Living Medicaid waiver programs with a new service for individuals with intellectual and developmental disabilities. This new, more integrated service is called individualized skills and socialization.

The purpose of the proposal is to implement a new subcategory of day activity and health services (DAHS) licensure for individualized skills and socialization providers. This ensures individualized skills and socialization providers' compliance without the cost and operational complexity involved in creating a new licensure type.

The proposal is necessary to comply with the 2020-2021 General Appropriations Act, 86th Legislature, Regular Session, 2019 (Article II, Health and Human Services Commission, Rider 21), which requires HHSC to establish the individualized skills and socialization provider as a new provider type to replace traditional day habilitation providers. HHSC proposes licensing those new providers under the current DAHS statute (Chapter 103, Texas Human Resources Code) and establishing a new subchapter of rules specific to these providers within existing DAHS rules.

SECTION-BY-SECTION SUMMARY

Proposed §559.201, Purpose, outlines statutory authority, applicability, and specific exclusions from applicability of the subchapter for DAHS facilities.

Proposed §559.203, Definitions, establishes definitions of terms specific to this subchapter.

Proposed §559.205, Criteria for Licensing, describes the license application process and requirements for applicants.

Proposed §559.207, Increase in Capacity, establishes that a license holder must obtain approval from HHSC and apply for a new license to increase the license holder's capacity.

Proposed §559.209, Renewal Procedures and Qualifications, describes the license renewal process and what qualifies as a complete application.

Proposed §559.211, Change of Ownership and Notice of Changes, outlines the process for change of ownership and describes the actions the license holder and HHSC will take for this process.

Proposed §559.213, Time Periods for Processing Licensing Applications, outlines HHSC's time periods for processing applications for a license and explains exceptions for good cause.

Proposed §559.215, Criteria for Denying a License or Renewal of a License, explains the criteria HHSC will follow regarding the denial of a license and establishes the applicant's right to due process regarding the denial.

Proposed §559.217, Opportunity to Show Compliance, describes the process a license holder may take to show compliance prior to the revocation or suspension of a license by HHSC.

Proposed §559.219, License Fees, establishes the fee for a one-, two-, or three-year license. It also describes the circumstances under which HHSC will charge a late fee, and the cost of the late fee.

Proposed §559.221, Relocation, establishes that a license holder must obtain approval from HHSC and submit a new license application to relocate the operation to a new location.

Proposed §559.223, Voluntary Closure, outlines the process a license holder must follow if they choose to permanently close their operation.

Proposed §559.225, General Requirements, describes the general requirements an individualized skills and socialization provider must follow, including pre-employment screening and rights protection.

Proposed §559.227, Program Requirements, describes the detailed requirements individualized skills and socialization providers must follow in the implementation of their program services. This rule describes the staff qualifications for a director and service providers, staffing requirements, staff responsibilities, requirements for on-site and off-site service provision, initial and ongoing training requirements, medication administration and storage, and accident, injury, and infection control requirements.

Proposed §559.229, Emergency Response Plan, requires individualized skills and socialization providers to develop and implement an emergency response plan that includes the eight core functions of emergency management. It also requires training on the plan and conducting fire and evacuation drills.

Proposed §559.231, Inspections, Surveys, and Visits, describes the process HHSC will follow for initial inspections and complaint investigations. This rule requires HHSC to inspect the individualized skills and socialization provider at least once every two years. This rule also requires the individualized skills and socialization provider to make its records available to HHSC upon request.

Proposed §559.233, Determinations and Actions Pursuant to Inspections, describes the process HHSC will follow after an inspection regarding potential violations and outlines the process the individualized skills and socialization provider will follow to submit a plan of correction or request an informal dispute resolution.

Proposed §559.235, Referrals to the Attorney General, establishes that HHSC may refer an individualized skills and socialization provider to the attorney general who may petition a district court for a temporary restraining order or injunction if HHSC believes that a violation creates an immediate threat to the health and safety of an individual.

Proposed §559.237, Procedures for Inspection of Public Records, describes the process for a requester and HHSC to follow regarding the inspection of public records in the custody of HHSC.

Proposed §559.239, Definitions of Abuse, Neglect, and Exploitation, establishes the definitions of abuse, neglect, and exploitation applicable to an individualized skills and socialization provider.

Proposed §559.241, Reporting Abuse, Neglect, Exploitation, or Critical Incidents, describes the requirements for reporting abuse, neglect, exploitation, or critical incidents to HHSC.

Proposed §559.243, Complaint Investigation, describes the process HHSC will follow regarding complaint investigations and investigations of abuse, neglect, or exploitation.

Proposed §559.245, Confidentiality, establishes that all reports, records, communications, and working papers used or developed by HHSC in an investigation are confidential and may be released only as provided in this section.

Proposed §559.247, Nonemergency Suspension, establishes that HHSC may suspend a license when a violation of the licensure rules threatens to jeopardize the health and safety of individuals. The rule outlines the process HHSC will follow and describes the individualized skills and socialization provider's due process.

Proposed §559.249, Revocation, establishes that HHSC may revoke a license under specific circumstances and outlines the individualized skills and socialization provider's due process.

Proposed §559.251, Emergency Suspension and Closing Order, establishes HHSC's ability to suspend a license or order an immediate closing of an operation under specific circumstances and outlines the individualized skills and socialization provider's due process.

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, there will be an estimated additional cost and an increase in revenue to state government as a result of enforcing and administering the rules as proposed.

The effect on state government for each year of the first five years the proposed rules are in effect is an estimated cost of \$1,700,000 in fiscal year (FY) 2023, \$1,700,000 in FY 2024, \$1,700,000 in FY 2025, \$1,700,000 in FY 2026, and \$1,700,000 in FY 2027, and an increase in revenue of \$60,000 in FY 2023, \$20,000 in FY 2024, \$20,000 in FY 2025, \$20,000 in FY 2026, and \$20,000 in FY 2027.

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 create new HHSC employee positions;
- (3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;
- (4) the proposed rules will require an increase in 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 increase the number of individuals subject to the rules; and

(8) HHSC has insufficient information to determine the proposed rules' effect on 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.

HHSC has no basis for an expectation of whether there will be an adverse economic effect on small businesses, micro-businesses, or rural communities. There are currently no individualized skills and socialization providers licensed.

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

Stephen Pahl, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rules are in effect, the public benefit will be improved oversight of day activity and community integration services for individuals with intellectual disabilities who receive Home and Community-based, Texas Home Living, and Deaf Blind and Multiple Disability waiver services. Another anticipated public benefit is reduced cost to implement the new service by using existing state resources such as existing licensing systems and new and existing rules, enforcement processes, and complaint intake and resolution systems to license individualized skills and socialization providers under the DAHS license.

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 the rules require the payment of \$75 for a three-year license fee, \$50 for a two-year license fee, or \$25 for a one-year license fee.

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 Long-term Care Regulation Policy and Rules, Mail Code E-370, 701 W. 51st Street, Austin, Texas 78751, or by email to HH-SCLTCRRules@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 22R050" in the subject line.

SUBCHAPTER H. INDIVIDUALIZED SKILLS AND SOCIALIZATION PROVIDER REQUIREMENTS

DIVISION 1. INTRODUCTION

26 TAC §559.201, §559.203

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 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; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; 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 setting standards for facilities licensed under Chapter 103.

The new sections affect Texas Government Code §§531.0055, 531.021, and 531.033, Texas Human Resources Code §32.021, and Texas Human Resources Code, Chapter 103.

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 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; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; 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 setting standards for facilities licensed under Chapter 103.

The new sections affect Texas Government Code §§531.0055, 531.021, and 531.033, Texas Human Resources Code §32.021, and Texas Human Resources Code, Chapter 103.

§559.201. Purpose.

(a) The purpose of this subchapter is to establish licensing procedures, standards, and requirements for an individualized skills and socialization provider licensed as a Day Activity and Health Services (DAHS) facility in accordance with Texas Human Resources Code Chapter 103.

(b) This subchapter applies to an individualized skills and socialization provider and the provision of on-site and off-site individualized skills and socialization services.

(c) This subchapter does not apply to:

(1) a DAHS facility providing services in the DAHS program; or

(2) the provision of in-home individualized skills and socialization in the Home and Community-based Services and Texas Home Living waiver programs.

§559.203. Definitions.

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

(1) Community setting--A setting accessible to the general public within an individual's community.

(2) Critical incident--An event reportable to the Texas Health and Human Services (HHSC) Complaint and Incident Intake section in accordance with this subchapter.

(3) Day Activity and Health Services (DAHS) directory--A public list generated and maintained by the HHSC, listing all DAHS providers, including individualized skills and socialization providers.

(4) Deaf Blind with Multiple Disabilities (DBMD) program--A waiver program operated by HHSC, as authorized by the Centers for Medicare & Medicaid Services (CMS) in accordance with §1915(c) of the Social Security Act.

(5) Home and Community-based Services (HCS) program--A waiver program operated by HHSC as authorized by CMS in accordance with §1915(c) of the Social Security Act.

(6) Implementation plan--In the HCS and TxHmL programs, a written document developed by a program provider outlining outcomes and objectives for each program service on the individual's IPC to be provided by the program provider.

(7) Individual--A person who applies for or is receiving services from an individualized skills and socialization provider.

(8) Individual plan of care (IPC)--A written plan authorized by HHSC that states the type and amount of each DBMD, TxHmL, or HCS program service to be provided to the individual during an IPC year.

(9) Individual program plan (IPP)--In the DBMD program, a written plan documented on an HHSC form and completed by an individual's case manager that describes the goals and outcomes for each DBMD program service and Community First Choice (CFC) service, other than CFC support management, included on the individual's IPC.

(10) Individualized skills and socialization--A DBMD, TxHmL, or HCS program service described in §260.503 of this title (relating to Description of Individualized Skills and Socialization), §262.905 of this title (relating to Description of On-Site and Off-Site Individualized Skills and Socialization), and §263.2005 of this title (relating to Description of On-Site and Off-Site Individualized Skills and Socialization). The two types of individualized skills and socialization are on-site individualized skills and socialization and off-site individualized skills and socialization.

(11) Individualized skills and socialization provider--A provider licensed as a DAHS provider by HHSC to provide individualized skills and socialization services. A provider of individualized skills and socialization services is considered an individualized skills and socialization provider once licensed.

(12) Legally authorized representative (LAR)--A person authorized by law to act on behalf of another 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.

(13) License holder--A person who holds a license as an individualized skills and socialization provider.

(14) On-site individualized skills and socialization location--The building or a portion of a building that is owned or leased by an individualized skills and socialization provider where on-site individualized skills and socialization is provided.

(15) Online licensure portal--The Texas Unified Licensure Information Portal (TULIP) system. TULIP is the online system for submitting long-term care licensure applications.

(16) Person-directed plan (PDP)--In the HCS and the TxHmL programs, a written plan, based on person-directed planning and developed with an applicant or individual using the HHSC person-directed plan form and discovery tool found on the HHSC website, that describes the supports and services necessary to achieve the desired outcomes identified by the applicant, individual, or LAR and ensures the applicant's or individual's health and safety.

(17) Program provider--A person, as defined in Texas Administrative Code, Title 40, §49.102 (relating to Definitions), that has a contract with HHSC to provide DBMD, TxHmL, or HCS program services, excluding a financial management services agency.

(18) Service provider--A person, who may be an employee or contractor of an individualized skills and socialization provider, who directly provides individualized skills and socialization services to an individual.

(19) Texas Home Living (TxHmL) program--A waiver program operated by HHSC and approved by CMS in accordance with §1915(c) of the Social Security Act.

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

Filed with the Office of the Secretary of State on July 28, 2022.

TRD-202202835

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: September 11, 2022

For further information, please call: (512) 438-3161



DIVISION 2. LICENSING

26 TAC §§559.205, 559.207, 559.209, 559.211, 559.213, 559.215, 559.217, 559.219, 559.221, 559.223

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; 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; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; 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 setting standards for facilities licensed under Chapter 103.

The new sections affect Texas Government Code §§531.0055, 531.021, and 531.033, Texas Human Resources Code §32.021, and Texas Human Resources Code, Chapter 103.

§559.205. Criteria for Licensure.

(a) An entity may not establish or provide individualized skills and socialization services in Texas without a license issued by the Texas Health and Human Services Commission (HHSC) in accordance with Texas Human Resources Code, Chapter 103, and this subchapter.

(b) An individualized skills and socialization provider must be listed on HHSC's Day Activity and Health Services (DAHS) directory as an individualized skills and socialization provider in order to provide individualized skills and socialization services.

(c) An applicant for a license must submit a complete application form, follow the application instructions, electronically upload required documentation, and submit the required license fee to HHSC through the online licensure portal.

(d) An applicant for a license must complete the HHSC required training to become an individualized skills and socialization provider and provide documentation that required training is complete through the application in the online licensure portal.

(e) An applicant for a license must submit to HHSC as part of the application the:

(1) name of the business entity to be licensed;

(2) tax identification number;

(3) name of the chief executive officer (CEO) or equivalent person;

(4) ownership information;

(5) address of on-site individualized skills and socialization location;

(6) name of program providers using this entity for individualized skills and socialization services, if any;

(7) maximum number of individuals who can receive individualized skills and socialization at this location, which will become the licensed capacity when approved;

(8) effective date the entity will be available to provide individualized skills and socialization services; and

(9) any other information required by the online application instructions.

(f) An applicant for a license must affirmatively demonstrate that the applicant meets the requirements for operation based on an on-site survey.

(g) HHSC may deny an application that remains incomplete after 120 days.

(h) Before issuing a license, HHSC considers the background and qualifications of:

(1) the applicant or license holder;

(2) a person with a disclosable interest;

- (3) an affiliate of the applicant or license holder;
- (4) a director;
- (5) a manager; and
- (6) any other person disclosed on the submitted application as defined by the application instructions.

(i) HHSC issues a license if it finds that the applicant or license holder, all persons described in subsection (h) of this section, and the on-site individualized skills and socialization location meet all requirements of this subchapter.

(j) An individualized skills and socialization provider must not provide services to more individuals than the number of individuals specified on its license.

(k) An individualized skills and socialization provider must prominently and conspicuously post its license for display in a public area of the on-site individualized skills and socialization location that is readily accessible to individuals, employees, and visitors. For an individualized skills and socialization provider that only provides off-site services, the license must be displayed in a conspicuous place in the designated place of business.

(l) If any information submitted through the application process changes following licensure, the license holder must submit an application through the online licensure portal to make the changes.

§559.207. Increase in Capacity.

(a) During the license term, a license holder may not increase capacity without approval from the Texas Health and Human Services Commission (HHSC). The license holder must submit to HHSC a complete application for increase in capacity through the online licensure portal.

(b) Upon approval of an increase in capacity, HHSC will issue a new license.

§559.209. Renewal Procedures and Qualifications.

(a) A license issued under this chapter:

- (1) must be renewed before the license expiration date; and
- (2) is not automatically renewed.

(b) The Texas Health and Human Services Commission (HHSC) will implement a system under which licenses issued under this subchapter expire on staggered dates. For the initial nine-month application period, applicants may receive:

- (1) a one-year license;
- (2) a two-year license; or
- (3) a three-year license.

(c) All licenses issued under this subchapter, after the initial nine-month application period, are valid for three years.

(d) The submission of a license fee alone does not constitute an application for renewal.

(e) To renew a license, a license holder must submit an application for renewal to HHSC through the online licensure portal no later than the 45th day before the expiration date of the current license. HHSC considers that an application for renewal has met the submission deadline if the license holder:

(1) submits a complete application to HHSC, and HHSC receives that complete application no later than the 45th day before the expiration date of the current license;

(2) submits an incomplete application to HHSC with a letter explaining the circumstances that prevented the inclusion of the missing information, and HHSC receives the incomplete application and letter no later than the 45th day before the expiration date of the current license; or

(3) submits a complete application or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information to HHSC, HHSC receives the application during the 45-day period ending on the date the current license expires, and the license holder pays a late fee in accordance with §559.219(c) of this subchapter (relating to License Fees) in addition to the license renewal fee.

(f) For purposes of Texas Government Code §2001.054, HHSC considers that a person has submitted a timely and sufficient application for the renewal of a license if the license holder's application has met the submission deadlines in subsection (e) of this section, including submission of the required fee. Failure to submit a timely and sufficient application will result in the expiration of the license on the expiration date listed on the license.

(g) An application for renewal submitted after the expiration date of the license is considered to be an application for an initial license and must comply with the requirements for an initial license in §559.205 of this subchapter (relating to Criteria for Licensing).

(h) The application for renewal must contain the same information required for an original application and the license fee as described in §559.219 of this subchapter.

(i) The renewal of a license may be denied for the same reasons an original application for a license may be denied as described in §559.215 of this subchapter (relating to Criteria for Denying a License or Renewal of a License).

§559.211. Change of Ownership and Notice of Changes.

(a) For the purposes of this section, a temporary change of ownership license is a temporary license issued to an applicant who proposes to become the license holder of a current individualized skills and socialization provider that exists on the date the application is submitted.

(b) A license holder may not transfer its license. The applicant (new license holder) must obtain a temporary change of ownership license followed by an initial three-year license in accordance with this section. When the Texas Health and Human Services Commission (HHSC) approves the change of ownership by issuing a temporary change of ownership license to the new license holder, the current license holder's license becomes invalid as of the effective date of the change of ownership indicated in the change of ownership application. Between the effective date of the change of ownership and the issuance of the temporary change of ownership license, the existing license holder remains responsible under its license; however, the applicant may operate as the individualized skills and socialization provider on behalf of the current license holder during such time period.

(c) The applicant must submit to HHSC through the online licensure portal:

(1) a complete application for a license in accordance with HHSC instructions and §559.205 of this subchapter (relating to Criteria for Licensing) or an incomplete application with a letter explaining the circumstances that prevented the inclusion of the missing information;

(2) the application fee, in accordance with §559.219 of this subchapter (relating to License Fees); and

(3) a signed and notarized Change of Ownership Transfer Affidavit HHSC Form 1092 from the applicant and the individual-

ized skills and socialization provider's current license holder of intent to transfer the individualized skills and socialization provider operation from the current license holder to the applicant, beginning on the change of ownership effective date specified on the change of ownership application.

(d) To avoid an individualized skills and socialization provider operating without a license, an applicant must submit all items required by subsection (c) of this section at least 30 days before the anticipated date of a change of ownership, unless the 30-day notice requirement is waived in accordance with subsection (e) of this section.

(e) HHSC may waive the 30-day notice required in subsection (d) of this section if HHSC determines that the applicant presents evidence showing that circumstances prevented the submission of the items in subsection (c) of this section at least 30 days before the anticipated change of ownership and that not waiving the 30-day requirement would create a threat to the health and safety of an individual.

(f) Upon HHSC approval of the items specified in subsection (c) of this section, HHSC issues a temporary change of ownership license to the applicant if HHSC finds that the applicant, all controlling persons, and all persons disclosed in the application satisfy all applicable requirements in §559.205 of this subchapter and §559.215 of this subchapter (relating to Criteria for Denying a License or Renewal of a License).

(1) The issuance of a temporary change of ownership license constitutes HHSC's official written notice to the individualized skills and socialization provider of the approval of the application for a change of ownership.

(2) The effective date of the temporary change of ownership license is the date requested in the application and cannot precede the date the application is received by HHSC through the online licensure portal.

(g) A temporary change of ownership license expires on the earlier of:

(1) 90 days after its effective date or the last day of any extension HHSC provides in accordance with subsection (h) of this section; or

(2) the date HHSC issues a three-year license in accordance with subsection (k) of this section.

(h) HHSC, in its sole discretion, may extend a temporary change of ownership license for a term of 90 days at a time based upon extenuating circumstances.

(i) HHSC conducts an on-site inspection to verify compliance with the licensure requirements after issuing a temporary change of ownership license. HHSC may conduct a desk review instead of an on-site inspection after issuing a temporary change of ownership if:

(1) less than 50 percent of the direct or indirect ownership interest of the former license holder changed, when compared to the new license holder; or

(2) every person with a disclosable interest in the new license holder had a disclosable interest in the former license holder.

(j) HHSC, in its sole discretion, may conduct an on-site inspection after issuing a temporary change of ownership license.

(k) If the applicant, all controlling persons, and all persons disclosed in the application satisfy all applicable requirements of §559.205 and §559.215 of this subchapter for a license, and the individualized skills and socialization provider passes the change of ownership inspection as described in subsection (i) of this section, HHSC issues a

three-year license. The effective date of the three-year license is the same date as the effective date of the change of ownership and cannot precede the date the application was received by HHSC through the online licensure portal.

(l) If a license holder adds an owner with a disclosable interest, but the license holder does not undergo a change of ownership, the license holder must notify HHSC of the addition no later than 30 days after the addition of the owner.

(m) If a license holder changes its name but does not undergo a change of ownership, the license holder must notify HHSC and submit documentation evidencing a legal name change by submitting an application through the online licensure portal. On receipt of the notice and documentation, HHSC reissues the current license in the license holder's new name.

§559.213. Time Periods for Processing Licensing Applications.

(a) The Texas Health and Human Services Commission (HHSC) will process only applications received within 60 days before the requested date of the issuance of the license.

(b) An application is complete when all requirements for licensing have been met, including compliance with standards and payment of the licensing fee. If an inspection for compliance is required, the application is not complete until the inspection has occurred, reports have been reviewed, and the applicant complies with the standards.

(c) HHSC will notify applicants within 30 days after receipt of the application if any of the following applications are incomplete:

- (1) initial application;
- (2) change of ownership;
- (3) renewal; and
- (4) increase in capacity.

(d) Except as provided in the following sentence, a license will be issued or denied within 30 days after the receipt of a complete application or within 30 days before the expiration date of the license. However, HHSC may delay an action on an application for renewal of a license for up to six months if the individualized skills and socialization provider is subject to a proposed or pending licensure termination action on or within 30 days before the expiration date of the license. The issuance of the license constitutes HHSC's official written notice to the individualized skills and socialization provider of the acceptance and filing of the application.

(e) In the event the application is not processed in the time periods stated in this section, the applicant has a right to request of HHSC full reimbursement of all filing fees paid in that particular application process. If HHSC does not agree that the established periods have been violated or finds that good cause existed for exceeding the established periods, the request will be denied.

(f) Good cause for HHSC exceeding the period established is considered to exist if:

- (1) the number of applications to be processed exceeds by 15 percent or more the number processed in the same calendar quarter of the preceding year;
- (2) another public or private entity used in the application process caused the delay; or
- (3) other conditions existed giving good cause for exceeding the established periods.

(g) If the request for full reimbursement is denied, the applicant may appeal to HHSC for resolution of the dispute. The applicant

must send a statement to HHSC describing the request for reimbursement and the reasons for it. HHSC makes a decision concerning the appeal and notifies the applicant of the decision.

§559.215. Criteria for Denying a License or Renewal of a License.

(a) The Texas Health and Human Services Commission (HHSC) may deny an initial license or renewal of a license if any person described in §559.205(h) of this subchapter (relating to Criteria for Licensing):

(1) is subject to denial or refusal as described in Chapter 560 of this title (relating to Denial or Refusal of License) during the time frames described in that chapter;

(2) substantially fails to comply with the requirements described in §559.225 of this subchapter (relating to General Requirements) and §559.227 of this subchapter (relating to Program Requirements), including:

(A) noncompliance that poses a serious threat to health and safety; or

(B) a failure to maintain compliance on a continuous basis;

(3) aids, abets, or permits a substantial violation described in paragraph (2) of this subsection about which the person had or should have had knowledge;

(4) fails to provide the required information, facts, or references;

(5) knowingly provides the following false or fraudulent information:

(A) submits false or intentionally misleading statements to HHSC;

(B) uses subterfuge or other evasive means of filing;

(C) engages in subterfuge or other evasive means of filing on behalf of another who is unqualified for licensure;

(D) knowingly conceals a material fact; or

(E) is responsible for fraud;

(6) fails to pay the following fees, taxes, and assessments when due:

(A) licensing fees as described in §559.219 of this subchapter (relating to License Fees); and

(B) franchise taxes, if applicable;

(7) has a history of any of the following actions during the five-year period preceding the date of the application:

(A) operation of a facility that has been decertified or had its contract canceled under the Medicare or Medicaid program in any state;

(B) federal or state Medicare or Medicaid sanctions or penalties;

(C) unsatisfied final judgments;

(D) eviction involving any property or space used as a facility in any state; or

(E) suspension of a license to operate a health facility, long-term care facility, or a similar facility in any state.

(b) Concerning subsection (a)(7) of this section, HHSC may consider exculpatory information provided by any person described in

§559.205(h) of this subchapter and grant a license if HHSC finds that person able to comply with the rules in this chapter.

(c) HHSC does not issue a license to an applicant if the applicant has a history of any of the following actions during the five-year period preceding the date of the application:

(1) revocation of a license to operate a health care facility, long-term care facility, or similar facility in any state;

(2) debarment or exclusion from the Medicare or Medicaid programs by the federal government or a state; or

(3) a court injunction prohibiting any person described in §559.205(h) of this subchapter from operating a facility.

(d) Only final actions are considered for purposes of subsections (a)(7) and (c) of this section. An action is final when routine administrative and judicial remedies are exhausted. All actions, whether pending or final, must be disclosed.

(e) If an applicant owns multiple facilities, the overall record of compliance in all facilities will be examined. An overall record poor enough to deny issuance of a new license will not preclude the renewal of licenses of individual facilities with satisfactory records.

(f) If HHSC denies a license or refuses to issue a renewal of a license, the applicant or license holder may request a hearing by following HHSC's rules in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act). An administrative hearing is conducted in accordance with Texas Government Code, Chapter 2001, and 1 TAC Chapter 357, Subchapter I.

§559.217. Opportunity to Show Compliance.

(a) Before the institution of proceedings to revoke or suspend a license or deny an application for the renewal of a license, the Texas Health and Human Services Commission (HHSC) gives the license holder:

(1) notice by personal service or by registered or certified mail of the facts or conduct alleged to warrant the proposed action; and

(2) an opportunity to show compliance with all requirements of law for the retention of the license by sending HHSC a written request for an opportunity to show compliance. The request must:

(A) be postmarked within 10 days after the date of HHSC's notice and be received by HHSC within 10 days after the date of the postmark; and

(B) contain specific documentation refuting HHSC's allegations.

(b) HHSC's review will be limited to a review of documentation submitted by the license holder and information used by HHSC as the basis for its proposed action and will not be conducted as an adversary hearing. HHSC will give the license holder a written affirmation or reversal of the proposed action.

§559.219. License Fees.

(a) The license fee is \$75 for a three-year license. The license fee for a license issued in accordance with §559.209(b) of this subchapter (relating to Renewal Procedures and Qualifications) is:

(1) \$25 for a one-year license;

(2) \$50 for a two-year license; and

(3) \$75 for a three-year license.

(b) The fee must be paid with each initial application, change of ownership application, and application for renewal of the license.

A license holder or applicant must pay fees as defined in the online licensure portal.

(c) An applicant for license renewal that submits an application during the 45-day period ending on the date the current license expires must pay a late fee of \$25 in addition to the license fee described in subsection (a) of this section.

§559.221. Relocation.

(a) A license holder must not relocate to another on-site individualized skills and socialization location without approval from the Texas Health and Human Services Commission (HHSC). The license holder must submit a complete application and the fee required under §559.219 of this subchapter (relating to License Fees) to HHSC before the relocation.

(b) The effective date of this license will be the date HHSC approves the relocation.

(c) The license holder must continue to maintain the license at the current on-site individualized skills and socialization location and must continue to meet all requirements for operation until the date of the relocation.

§559.223. Voluntary Closure.

An individualized skills and socialization provider must notify the Texas Health and Human Services Commission in writing within five days before the permanent closure of operation. The individualized skills and socialization provider must include in the written notice the date of permanent closure, reason for closing, location of individual records (active and inactive), and name and address of the individual record custodian.

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

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Health and Human Services Commission

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For further information, please call: (512) 438-3161



DIVISION 3. PROVIDER REQUIREMENTS

26 TAC §§559.225, 559.227, 559.229

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 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; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; 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 setting standards for facilities licensed under Chapter 103.

The new sections affect Texas Government Code §§531.0055, 531.021, and 531.033, Texas Human Resources Code §32.021, and Texas Human Resources Code, Chapter 103.

§559.225. General Requirements.

(a) An individualized skills and socialization provider must:

(1) comply with the provisions of Texas Health and Safety Code (HSC), Chapter 250 (relating to Nurse Aide Registry and Criminal History Checks of Employees and Applicants for Employment in Certain Facilities Serving the Elderly, Persons with Disabilities, or Persons with Terminal Illnesses);

(2) before offering employment, search the employee misconduct registry (EMR) established under HSC §253.007 and the Texas Health and Human Services Commission (HHSC) nurse aide registry (NAR) to determine if a person is designated in either registry as unemployable; both registries can be accessed on the HHSC website; and

(A) an individualized skills and socialization provider must not employ a person who is listed as unemployable in either registry;

(B) an individualized skills and socialization provider must provide information about the EMR to an employee in accordance with 26 TAC §561.3 (relating to Employment and Registry Information); and

(C) in addition to the initial search of the EMR and NAR, an individualized skills and socialization provider must:

(i) conduct a search of the NAR and EMR to determine if the employee is designated in either registry as unemployable at least every 12 months; and

(ii) keep a copy of the results of the initial and annual searches of the NAR and EMR in the employee's personnel file;

(3) comply with all relevant federal and state standards; and

(4) comply with all applicable provisions of the Texas Human Resource Code (HRC), Chapter 102 (relating to Rights of the Elderly).

(b) An individualized skills and socialization provider must:

(1) provide an individual who is 55 years of age and older with a written list of the individual's rights, as outlined under HRC §102.004; and

(2) protect and promote the rights of the individual.

(c) An individualized skills and socialization provider must:

(1) report abuse, neglect, exploitation, and critical incidents in accordance with §559.241 of this subchapter (relating to Reporting Abuse, Neglect, Exploitation, or Critical Incidents);

(2) maintain incident reports;

(3) ensure the confidentiality of individual records and other information related to individuals; and

(4) inform the individual orally and in writing of the individual's rights, responsibilities, and grievance procedures in a language the individual understands.

(d) An individualized skills and socialization provider must prominently and conspicuously post for display in a public area of the

on-site individualized skills and socialization location that is readily available to individuals, employees, and visitors:

- (1) the license issued under this chapter;
- (2) a sign prescribed by HHSC that describes complaint procedures and specifies how complaints may be filed with HHSC;
- (3) a notice in the form prescribed by HHSC stating that inspection and related reports are available at the on-site individualized skills and socialization location for public inspection and providing HHSC's toll-free telephone number that may be used to obtain information concerning the individualized skills and socialization provider;
- (4) a copy of the most recent inspection report relating to the individualized skills and socialization provider;
- (5) a brochure or letter that outlines the individualized skills and socialization provider's hours of operation, holidays, and a description of activities offered; and
- (6) emergency telephone numbers, including the abuse hot-line telephone number, near all telephones.

§559.227. Program Requirements.

(a) Staff qualifications.

(1) An individualized skills and socialization provider must:

- (A) employ a director;
- (B) ensure the director meets the requirements outlined in paragraph (2) of this subsection; and
- (C) have a policy regarding the delegation of responsibility in the director's absence.

(2) A service provider of individualized skills and socialization must be at least 18 years of age and:

- (A) have a high school diploma or a certificate recognized by a state as the equivalent of a high school diploma; or
- (B) have documentation of a proficiency evaluation of experience and competence to perform the job tasks that includes:
 - (i) a written competency-based assessment of the ability to document service delivery and observations of the individuals receiving services; and
 - (ii) at least three written personal references from persons not related by blood that indicate the ability to provide a safe, healthy environment for the individuals receiving services.

(3) A service provider of individualized skills and socialization who provides transportation must:

- (A) have a valid driver's license; and
- (B) transport individuals in a vehicle insured in accordance with state law.

(b) Staffing. An individualized skills and socialization provider must ensure that:

- (1) an individual whose needs cannot be met by the individualized skills and socialization provider is not admitted or retained;
- (2) the ratio of service providers to individuals is maintained in accordance with §260.507 of this title (relating to Staffing Ratios), §262.917 of this title (relating to Staffing Ratios for Off-Site Individualized Skills and Socialization), and §263.2017 of this title (re-

lating to Staffing Ratios for Off-Site Individualized Skills and Socialization), during the provision of off-site individualized skills and socialization, including during transportation; and

(3) sufficient staff are on duty at all times to ensure:

- (A) the health and safety of the individuals;
- (B) supervision is provided in accordance with the needs of an individual; and
- (C) individualized skills and socialization are provided in accordance with an individual's individual plan of care (IPC), individual program plan (IPP), person-directed plan (PDP), and implementation plan, as applicable.

(c) Staff responsibilities.

(1) The director:

- (A) manages the individualized skills and socialization services and the on-site individualized skills and socialization location;
- (B) trains and supervises staff; and
- (C) maintains all records.

(2) A service provider:

- (A) delivers individualized skills and socialization services;
- (B) assists with recreational activities; and
- (C) provides protective supervision through observation and monitoring.

(d) An individualized skills and socialization provider must make both on-site and off-site individualized skills and socialization available to an individual.

(e) An individualized skills and socialization provider must ensure that on-site individualized skills and socialization:

- (1) is provided in a building or a portion of a building that is owned or leased by an individualized skills and socialization provider; and
- (2) is not provided in:
 - (A) a prohibited residential setting for an individual, unless provided in an event open to the public; or
 - (B) the residence of an individual or another person.

(f) An individualized skills and socialization provider must ensure that off-site individualized skills and socialization:

- (1) are provided in a community setting chosen by the individual from among available community setting options;
- (2) includes transportation necessary for the individual's participation in off-site individualized skills and socialization; and
- (3) is not provided in:
 - (A) a building in which on-site individualized skills and socialization are provided;
 - (B) a prohibited residential setting for an individual, unless provided in an event open to the public; or
 - (C) the residence of an individual or another person.

(g) An individualized skills and socialization provider must provide individualized skills and socialization:

(1) in the Deaf Blind with Multiple Disabilities (DBMD) program, in accordance with an individual's individual plan of care (IPC) and individual program plan (IPP); and

(2) in the Texas Home Living (TxHmL) program and Home and Community-based Services (HCS) program, in accordance with an individual's person-directed plan (PDP), IPC, and implementation plan.

(h) An individualized skills and socialization provider must not require an individual to take a skills test or meet other requirements to receive off-site individualized skills and socialization.

(i) If an individual does not want to participate in an activity the individual scheduled for on-site individualized skills and socialization or off-site individualized skills and socialization, or the legally authorized representative (LAR) does not want the individual to participate in such activity, the individualized skills and socialization provider must document the decision not to participate in the individual's record.

(j) Training.

(1) Initial training.

(A) An individualized skills and socialization provider must:

(i) provide service providers with training on their responsibilities under the emergency response plan developed in accordance with §559.229 of this subchapter (relating to Emergency Response Plan) within three workdays after the start of employment and document the training in the individualized skills and socialization provider's records; and

(ii) provide service providers a minimum of eight hours of training during the first three months after the start of employment and document the training in the records of the individualized skills and socialization provider.

(B) The training provided in accordance with subparagraph (A)(ii) of this paragraph must include:

(i) any nationally or locally recognized adult CPR course or certification;

(ii) first aid;

(iii) orientation to health care delivery, including the following topics:

(I) safe body function and mechanics;

(II) personal care techniques and procedures;

and

(III) overview of the population served by the individualized skills and socialization provider; and

(iv) identification and reporting of abuse, neglect, or exploitation.

(2) Ongoing training.

(A) An individualized skills and socialization provider must:

(i) provide at least eight hours of ongoing training to service providers annually;

(ii) ensure that service providers maintain current certification in CPR.

(B) The training provided in accordance with subparagraph (A)(i) of this paragraph must include:

(i) training on responsibilities under the emergency response plan developed in accordance with §559.229;

(ii) training on infection control policies and procedures developed in accordance with subsection (m) of this section; and

(iii) identification and reporting of abuse, neglect, or exploitation.

(k) Medications.

(1) Administration.

(A) If an individual cannot or chooses not to self-administer his or her medications, an individualized skills and socialization provider must ensure the individual's medications are administered by a person who holds a current license under state law authorizing the licensee to do so.

(B) An individualized skills and socialization provider must record an individual's medications, including over-the-counter medications, on the individual's medication profile record. The recorded information must be obtained from the prescription label and must include the medication name, strength, dosage, doses received, directions for use, route of administration, prescription number, pharmacy name, and the date each medication was issued by the pharmacy.

(2) General.

(A) An individualized skills and socialization provider must immediately report to an individual's program provider any unusual reactions to a medication or treatment.

(B) When an individualized skills and socialization provider supervises or administers medications, the individualized skills and socialization provider must document in writing if an individual does not receive or take the medication and treatment as prescribed. The documentation must include the date and time the dose should have been taken, and the name and strength of medication missed.

(3) Storage.

(A) An individualized skills and socialization provider must provide a locked area for all medications, which may include:

(i) a central storage area; or

(ii) a medication cart.

(B) An individualized skills and socialization provider must store an individual's medication separately from other individuals' medications within the storage area.

(C) An individualized skills and socialization provider must store medication requiring refrigeration in a locked refrigerator that is used only for medication storage or in a separate, permanently attached, locked medication storage box in a refrigerator.

(D) An individualized skills and socialization provider must store poisonous substances and medications labeled for "external use only" separately within the locked area.

(E) An individualized skills and socialization provider must store drugs covered by Schedule II of the Controlled Substances Act of 1970 in a locked, permanently attached cabinet, box, or drawer that is separate from the locked storage area for other medications.

(l) Accident, injury, or acute illness.

(1) An individualized skills and socialization provider must stock and maintain in a single location in the on-site individualized skills and socialization location first aid supplies to treat burns, cuts, and poisoning. An individualized skills and socialization

provider that only delivers off-site individualized skills and socialization must ensure these first aid supplies are immediately available at all times during service provision.

(2) In the event of accident or injury to an individual requiring emergency care, or in the event of death of an individual, an individualized skills and socialization provider must:

(A) arrange for emergency care or transfer to an appropriate place for treatment, including:

(i) a physician's office;

(ii) a clinic; or

(iii) a hospital;

(B) immediately notify an individual's program provider with which the individualized skills and socialization provider contracts to provide services to the individual; and

(C) describe and document the accident, injury, or illness on a separate report containing a statement of final disposition and maintain the report on file.

(m) An individualized skills and socialization provider must create and enforce written policies and procedures for infection control, including spread of disease to ensure staff compliance with state law, the Occupational Safety and Health Administration, and the Centers for Disease Control and Prevention.

§559.229. Emergency Response Plan.

(a) Definitions. In this section:

(1) "emergency situation" means an impending or actual situation that:

(A) interferes with normal activities of an individualized skills and socialization provider or the individuals receiving services from the individualized skills and socialization provider;

(B) may:

(i) cause injury or death to an individual or staff member of the individualized skills and socialization provider; or

(ii) cause damage to property of the individualized skills and socialization provider;

(C) requires the individualized skills and socialization provider 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 an individual such as cardiac arrest, obstructed airway, cerebrovascular accident; and

(2) "plan" refers to an individualized skills and socialization provider's emergency response plan.

(b) Administration. An individualized skills and socialization provider 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) at least annually; and

(4) revise the plan within 30 days after information included in the plan changes.

(c) Emergency response plan. An individualized skills and socialization provider's plan must:

(1) include a risk assessment of all potential internal and external emergency situations relevant to the individualized skills and socialization provider's 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 services and assistance needed by the individuals in an emergency situation;

(3) include a section for each core function of emergency management, as described in subsection (d) of this section, that is based on an individualized skills and socialization provider's decision to either shelter-in-place or evacuate during an emergency; and

(4) for the on-site individualized skills and socialization location, include a fire safety plan that complies with subsection (e) of this section.

(d) Plan requirements regarding eight core functions of emergency management.

(1) Direction and control. An individualized skills and socialization provider'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 individualized skills and socialization provider's response to an emergency situation in accordance with the plan;

(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;

(C) documents the name and contact information for the local emergency management coordinator (EMC) for the area where the individualized skills and socialization provider 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. An individualized skills and socialization provider'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. An individualized skills and socialization provider's plan must contain a section for communication that:

(A) identifies the individualized skills and socialization provider's primary mode of communication and alternate mode of communication to be used in the event of power failure or the loss of the individualized skills and socialization provider's primary mode of communication in an emergency situation;

(B) includes procedures for maintaining a current list of telephone numbers for individuals and their program providers;

(C) includes procedures for maintaining a current list of telephone numbers for the individualized skills and socialization provider's staff that also identifies the EPC;

(D) identifies the location of the lists described in subparagraphs (B) and (C) of this paragraph where individualized skills and socialization provider staff can obtain the list quickly;

(E) includes procedures to notify:

(i) staff about an emergency situation;

(ii) a receiving facility, if applicable, about an impending or actual evacuation of individuals; and

(iii) individuals, LARs, and other persons about an emergency situation;

(F) describes how the individualized skills and socialization provider will provide, during an emergency situation, general information to the public, such as the change in location and hours, or that the individualized skills and socialization provider is closed due to the emergency situation;

(G) includes procedures for the individualized skills and socialization provider to maintain communication with:

(i) staff during an emergency situation;

(ii) a receiving facility, if applicable; and

(iii) staff who will transport individuals to a secure location during an evacuation in a vehicle;

(H) includes procedures for reporting to the Texas Health and Human Services Commission (HHSC) an emergency situation that caused the death or serious injury of an individual as follows:

(i) by telephone, at 1-800-458-9858, within 24 hours after the death or serious injury; and

(ii) within five working days after making a report described by clause (i) of this subparagraph, the individualized skills and socialization provider must ensure an investigation of the incident is conducted and send a written investigation report on Form 3613-A, Provider Investigation Report, or a form containing, at a minimum, the information required by Form 3613-A, to HHSC's Complaint and Incident Intake.

(4) Sheltering-in-place. An individualized skills and socialization provider that provides on-site services must include in the plan a section that includes procedures to shelter individuals in place during an emergency situation.

(5) Evacuation. An individualized skills and socialization provider that provides on-site services must include in the plan a section for evacuation that:

(A) requires posting building evacuation routes prominently throughout the on-site individualized skills and socialization location, except in small, one-story buildings where all exits are obvious;

(B) includes procedures for evacuating individuals to a pre-arranged location in an emergency situation, if applicable;

(C) includes a mutual aid agreement with a receiving facility that must specify the arrangements for receiving individuals 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 staff accompany evacuating individuals;

(ii) ensuring that all persons present in the building have been evacuated;

(iii) accounting for individuals and staff after they have been evacuated;

(iv) accounting for individuals who are absent from the individualized skills and socialization provider 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 building, if required by the local EMC guidelines;

(G) includes procedures for notifying HHSC by telephone, at 1-800-458-9858, within 24 hours after an evacuation that individuals have been evacuated;

(H) includes procedures for notifying the HHSC Regulatory Services regional office for the area in which the individualized skills and socialization provider is located, by telephone, as soon as safely possible after a decision to evacuate is made; and

(I) includes procedures for notifying the HHSC regional office for the area in which the individualized skills and socialization provider is located, by telephone, that individuals have returned to the building after an evacuation, within 48 hours after their return.

(6) Transportation. An individualized skills and socialization provider that provides on-site services must include in the plan a section with procedures for transportation that will ensure:

(A) safe transport of records, food, water, equipment, and supplies needed during an evacuation; and

(B) that the records, food, water, equipment, and supplies, described in subparagraph (A) of this paragraph, arrive at the receiving facility at the same time as the individuals.

(7) Health and Medical Needs. An individualized skills and socialization provider's plan must contain a section for health and special needs that:

(A) identifies all the individualized skills and socialization provider's individuals with special needs including individuals with conditions requiring assistance during an evacuation; and

(B) ensures the needs of those individuals are met during an emergency.

(8) Resource Management. An individualized skills and socialization provider'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 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. An individualized skills and socialization provider must:

(1) train all staff when hired on their responsibilities under the plan in accordance with §559.227(j) of this subchapter (relating to Program Requirements); and

(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.

(f) An individualized skills and socialization provider offering on-site services must:

(1) conduct unannounced drills with staff for severe weather and other emergency situations identified by the individualized skills and socialization provider as likely to occur, based on the results of the risk assessment required by subsection (c)(1) of this section; and

(2) establish procedures to:

(A) perform a fire drill at least once every 90 days with all occupants of the building at expected and unexpected times and under varying conditions;

(B) relocate, during the 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 Fire Drill Report Form for each required fire drill;

(D) conduct a monthly fire prevention inspection performed by a trained and senior staff member and document the inspection results;

(E) maintain copies of the fire prevention inspection report, described in subparagraph (D) of this paragraph, that were prepared by the individualized skills and socialization provider 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 on-site individualized skills and socialization location.

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

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Health and Human Services Commission

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DIVISION 4. SURVEYS, INVESTIGATIONS, AND ENFORCEMENT

26 TAC §§559.231, 559.233, 559.235, 559.237, 559.239, 559.241, 559.243, 559.245, 559.247, 559.249, 559.251

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 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; Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; 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 setting standards for facilities licensed under Chapter 103.

The new sections affect Texas Government Code §§531.0055, 531.021, and 531.033, Texas Human Resources Code §32.021, and Texas Human Resources Code, Chapter 103.

§559.231. Inspections, Surveys, and Visits.

(a) The Texas Health and Human Services Commission (HHSC) may enter the premises of an individualized skills and socialization provider at reasonable times and make an inspection necessary to issue a license or renew a license. HHSC inspection and survey personnel will perform inspections and surveys, follow-up visits, complaint investigations, investigations of abuse or neglect, and other contact visits as required for carrying out the responsibilities of licensing.

(b) Generally, all inspections, surveys, complaint investigations, and other visits, whether routine or nonroutine, made for the purpose of determining the appropriateness of care of individuals and day-to-day operations of an individualized skills and socialization provider will be unannounced. Any exceptions must be justified.

(c) HHSC may conduct any inspection, investigation, or survey as a desk review, if appropriate, and at the discretion of HHSC, except for the on-site components of:

(1) an initial inspection; and

(2) a complaint investigation.

(d) Any person may request an inspection of an individualized skills and socialization provider by notifying HHSC in writing of an alleged violation of a licensing requirement. The complaint must be as detailed as possible and signed by the complainant. HHSC performs an on-site inspection as soon as feasible but no later than 30 days after receiving the complaint, unless after an investigation the complaint is found to be frivolous. HHSC will respond to the complainant in writing.

(e) HHSC will receive and investigate anonymous complaints.

(f) The individualized skills and socialization provider must provide all its books, records, and other documents maintained by or on behalf of an individualized skills and socialization provider to HHSC upon request.

(1) HHSC is authorized to photocopy documents, photograph individuals, and use any other available recording devices to preserve all relevant evidence of conditions found during an inspection, survey, or investigation that HHSC reasonably believes threatens the health and safety of an individual.

(2) Examples of records and documents that may be requested and photocopied or otherwise reproduced are individual program plans, person-directed plans, and medication records.

(3) Upon request, an individualized skills and socialization provider must provide HHSC with a list of all individuals served by the individualized skills and socialization provider. The list must include the waiver program or funding source used by the individual to receive services from the individualized skills and socialization provider.

(4) The individualized skills and socialization provider may charge HHSC at a rate not to exceed the rate HHSC charges for copies. The procedure of copying is the responsibility of the director or designee. If copying requires that the records be removed from the individualized skills and socialization provider, a representative of the individualized skills and socialization provider is expected to accompany the records and assure their order and preservation.

(5) HHSC protects the copies for privacy and confidentiality in accordance with recognized standards of medical records practice, applicable state laws, and HHSC policy.

(g) The source of the complaint is not revealed.

(h) HHSC inspects an individualized skills and socialization provider at least once every two years after the initial inspection.

§559.233. Determinations and Actions Pursuant to Inspections.

(a) The Texas Health and Human Services Commission (HHSC) determines if an individualized skills and socialization provider is in compliance with the licensing rules.

(b) Violations of regulations are listed on forms designed for the purpose of the inspection.

(c) At the conclusion of an inspection or survey, the violations are discussed in an exit conference with the individualized skills and socialization provider's management. A written list of the violations is left with the individualized skills and socialization provider at the time of the exit conference.

(d) If, after the initial exit conference, additional violations are cited, the violations are communicated to the individualized skills and socialization provider within 10 working days after the initial exit conference.

(e) HHSC provides a clear and concise summary in nontechnical language of each licensure inspection and complaint investigation, if applicable. The summary outlines significant violations noted at the time of the inspection or survey, but does not include names of individuals, staff, or any other information that would identify individuals or other prohibited information under general rules of public disclosure. The summary is provided to the individualized skills and socialization provider at the time the report of contact or similar document is provided.

(f) Upon receipt of the final statement of violations, the individualized skills and socialization provider has 10 working days to submit an acceptable plan of correction to the HHSC Regulatory Services regional director. An acceptable plan of correction must address:

(1) how the individualized skills and socialization provider will accomplish the corrective action for those individuals affected by each violation;

(2) how the individualized skills and socialization provider will identify other individuals with the potential to be affected by the same violation;

(3) how the individualized skills and socialization provider will put the corrective measure into practice or make systemic changes to ensure that the violation does not recur;

(4) how the individualized skills and socialization provider will monitor the corrective action to ensure that the violation is corrected and will not recur; and

(5) the date the corrective action will be completed.

(g) If the individualized skills and socialization provider and the inspector cannot resolve a dispute regarding a violation of regulations, the individualized skills and socialization provider is entitled to an informal dispute resolution (IDR) at the regional level for all violations. For a violation that resulted in an adverse action, the individualized skills and socialization provider is entitled to an IDR at either the regional or state office level.

(1) A written request and all supporting documentation must be submitted to the Regional Director, HHSC Long-term Care Regulation, for a regional IDR; or to Regulatory Services, Texas Health and Human Services Commission, P.O. Box 149030, E-351, Austin, Texas 78714-9030, for a central office IDR, no later than the 10th day after receipt of the official statement of violations.

(2) HHSC completes the IDR process no later than the 30th day after receipt of a request from an individualized skills and socialization provider.

(3) Violations deemed invalid in an IDR will be so noted in HHSC's records.

§559.235. Referrals to the Attorney General.

The Texas Health and Human Services Commission (HHSC) may refer an individualized skills and socialization provider to the attorney general who may petition a district court for:

(1) a temporary restraining order to restrain a person from a violation or threatened violation of the requirements or any other law affecting individuals if HHSC reasonably believes that the violation or threatened violation creates an immediate threat to the health and safety of an individual; and

(2) an injunction to restrain a person from a violation or threatened violation of the requirements or any other law affecting individuals if HHSC reasonably believes that the violation or threatened violation creates a threat to the health and safety of an individual.

§559.237. Procedures for Inspection of Public Records.

(a) Procedures for inspection of public records will be in accordance with the Texas Government Code, Chapter 552, and as further described in this section.

(b) The Texas Health and Human Services Commission (HHSC) Regulatory Services Division is responsible for the maintenance and release of records on licensed facilities, and other related records.

(c) The application for inspection of public records is subject to the following criteria.

(1) The application must be made to HHSC Long-term Care Regulation, Regulatory Services Division, Mail Code E-349, P.O. Box 149030, Austin, Texas 78714-9030;

(2) The requester must identify themselves.

(3) The requester must give reasonable prior notice of the time for inspection or copying of records.

(4) The requester must specify the records requested.

(5) On written applications, if HHSC is unable to ascertain the records being requested, HHSC may return the written application to the requester for clarification.

(6) HHSC will provide the requested records as soon as possible; however, if the records are in active use, or in storage, or time is needed for proper de-identification or preparation of the records for inspection, HHSC will so advise the requester and set an hour and date within a reasonable time when the records will be available.

(d) Original records may be inspected or copied, but in no instance will original records be removed from HHSC offices.

(e) Records maintained by HHSC Regulatory Services Division are open to the public, with the following exceptions.

(1) Incomplete reports, audits, evaluations, and investigations made of, for, or by HHSC are confidential.

(2) All reports, records, and working papers used or developed by HHSC in and investigation of reports of abuse and neglect are confidential and may be released to the public as provided in §559.95 of this chapter (relating to confidentiality).

(3) All names and related personal, medical, or other identifying information about an individual are confidential.

(4) Information about any identifiable person that is defamatory or an invasion of privacy is confidential.

(5) Information identifying complainants or informants is confidential.

(6) Itineraries of surveys and inspections are confidential.

(7) Other information that is excepted from release by Texas Government Code, Chapter 552, is not available to the public.

(8) To implement this subsection, HHSC may not alter or de-identify original records. Instead, HHSC will make available for public review or release only a properly de-identified copy of the original record.

(f) HHSC will charge for copies of records upon request.

(1) If the requester simply wants to inspect records, the requester will specify the records to be inspected. HHSC will make no charge for this service, unless HHSC determines a charge is appropriate based on the nature of the request.

(2) If the requester wants copies of a record, the requester will specify in writing the records to be copied on an appropriate HHSC form, and HHSC will complete the form by specifying the cost of the records, which the requester must pay in advance. Checks and other instruments of payment must be made payable to the Texas Health and Human Services Commission.

(3) Any expenses for standard-size copies incurred in the reproduction, preparation, or retrieval of records must be borne by the requester on a cost basis in accordance with costs established by the Office of the Attorney General or HHSC for office machine copies.

(4) For documents that are mailed, HHSC will charge for the postage at the time it charges for the production. All applicable sales taxes will be added to the cost of copying records.

(5) When a request involves more than one long-term care facility, each facility will be considered a separate request.

§559.239. Definitions of Abuse, Neglect, and Exploitation.

For purposes of this subchapter, the definitions of abuse, neglect, and exploitation are those found in Chapter 48, Texas Human Resources Code, and §559.2 of this chapter (relating to Definitions).

§559.241. Reporting Abuse, Neglect, Exploitation, or Critical Incidents.

(a) Any individualized skills and socialization provider staff who has reasonable cause to believe that an individual is in a state of abuse, neglect, or exploitation must report the abuse, neglect, or exploitation to the Texas Health and Human Services (HHSC) Complaint and Incident Intake Section at 1-800-458-9858 within one hour after suspecting or learning of the alleged abuse, neglect, or exploitation.

(b) In addition to the reporting requirements described in subsection (a) of this section, an individualized skills and socialization provider must report any of the following incidents to the HHSC Complaint and Incident Intake Section at 1-800-458-9858 within one hour after suspecting or learning of the incident, including:

(1) sexual activity between individuals resulting from coercion, physical force, or taking advantage of the disability of an individual;

(2) sexual activity involving an individual less than 18 years of age;

(3) the pregnancy of an individual;

(4) individual-to-individual aggression that results in serious physical injury;

(5) the death of an individual; and

(6) an individual whose location has been unknown by the individualized skills and socialization provider for more than eight hours or less than eight hours if there are circumstances that place the individual's health or safety at risk.

(c) The following information must be reported to HHSC when making a report described in subsections (a) or (b) of this section:

(1) name, age, and address of the individual;

(2) name and address of the person responsible for the care of the individual, if available;

(3) nature and extent of the individual's condition;

(4) basis of the reporter's knowledge; and

(5) any other relevant information.

(d) Within five working days after making a report described in subsections (a) or (b) of this section, the individualized skills and socialization provider must ensure an investigation of the incident is conducted and send a written investigation report on Form 3613-A, Provider Investigation Report, or a form containing, at a minimum, the information required by Form 3613-A, to HHSC's Complaint and Incident Intake.

§559.243. Complaint Investigation.

(a) A complaint is any allegation received by the Texas Health and Human Services Commission (HHSC) regarding abuse, neglect, or exploitation of an individual, or a violation of state standards.

(b) HHSC must give the individualized skills and socialization provider notification of the complaint received and a summary of the complaint, without identifying the source of the complaint.

(c) HHSC investigates complaints of abuse, neglect, or exploitation when the alleged victim is an individual receiving services from an individualized skills and socialization provider, and:

(1) the act occurs at the on-site individualized skills and socialization location;

(2) the act occurs during the provision of off-site individualized skills and socialization;

(3) the individualized skills and socialization provider is responsible for the supervision of the individual at the time the act occurs; or

(4) the alleged perpetrator is affiliated with the individualized skills and socialization provider.

(d) Complaints of abuse, neglect, or exploitation not meeting the criteria in subsection (a) of this section must be referred to the Texas Department of Family and Protective Services.

(e) Complaint investigations must include a visit to the individualized skills and socialization provider and consultation with persons thought to have knowledge of the circumstances. If the individualized skills and socialization provider fails to admit HHSC staff for a complaint investigation, HHSC will seek a probate or county court order for admission. Investigators may request of the court that a peace officer accompany them.

(f) In cases concluded to be physical abuse, the written report of the investigation by HHSC must be submitted to the appropriate law enforcement agency.

(g) In cases concluded to be abuse, neglect, or exploitation of an individual with a guardian, the written report of the investigation by HHSC must be submitted to the probate or county court that oversees the guardianship.

§559.245. Confidentiality.

All reports, records, communications, and working papers used or developed by the Texas Health and Human Services Commission (HHSC) in an investigation are confidential and may be released only as provided in this section.

(1) The final written investigation report on cases may be furnished to the district attorney and appropriate law enforcement agencies if the investigation reveals abuse that is a criminal offense. HHSC may provide to another state agency or governmental entity information that is necessary for HHSC, state agency, or entity to properly execute its duties and responsibilities to provide services to a person with a disability or the elderly.

(2) The final written investigation report may be released to the public upon request provided the report is de-identified to remove all names and other personally identifiable data, including any information from witnesses and other person furnished to HHSC as part of the investigation.

(3) The reporter and the individualized skills and socialization provider will be notified of the results of HHSC's investigation of a reported case of abuse, neglect, or exploitation, whether HHSC concluded that abuse, neglect, or exploitation occurred or did not occur.

(4) Upon written request of the person who is the subject of the report of abuse, neglect, or exploitation or his or her legal representative, HHSC releases to the person or his or her legal representative otherwise confidential information relating to the final report. The request must specify the information desired and be signed and dated by the person or his or her legal representative. The legal representative of a deceased person may make a written request for this information. The legal representative of a deceased person must also specify the reason the information is requested. Any legal representative must include with the request sufficient documentation to establish his or her authority. HHSC edits the information before release to protect the confidentiality of information related to the reporter's identify and to protect any other person whose safety or welfare may be endangered by disclosure.

§559.247. Nonemergency Suspension.

(a) The Texas Health and Human Services Commission (HHSC) may suspend an individualized skills and socialization provider's license when the individualized skills and socialization provider's violation of the licensure rules threatens to jeopardize the health and safety of individuals.

(b) Suspension of a license may occur simultaneously with any other enforcement provision available to HHSC.

(c) The individualized skills and socialization provider will be notified by certified mail of HHSC's intent to suspend the license, including the facts or conduct alleged to warrant the suspension. The individualized skills and socialization provider has an opportunity to show compliance with all requirements of law for the retention of the license as provided in §559.217 of this subchapter (relating to Opportunity to Show Compliance). If the individualized skills and socialization provider requests an opportunity to show compliance, HHSC will give the license holder a written affirmation or reversal of the proposed action.

(d) The individualized skills and socialization provider will be notified by certified mail of HHSC's suspension of the individualized skills and socialization provider's license. If HHSC suspends an individualized skills and socialization provider's license, the licensee may request a formal appeal by following the HHSC's formal hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act). A formal administrative hearing is conducted in accordance with Texas Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I. The suspension will take effect when the deadline for appeal of the suspension passes unless the individualized skills and socialization provider appeals the suspension. If the individualized skills and socialization provider appeals the suspension, the status of the license holder is preserved until final disposition of the contested matter.

(e) The suspension will remain in effect until HHSC determines that the reason for suspension no longer exists. A suspension may last no longer than the term of the license. HHSC will conduct an on-site investigation before making a determination.

(f) An individualized skills and socialization provider with a suspended license will be removed from HHSC's Day Activity and Health Services (DAHS) directory while the suspension is in effect.

§559.249. Revocation.

(a) The Texas Health and Human Services Commission (HHSC) may revoke an individualized skills and socialization provider's license when the license holder has violated the requirements of the Texas Human Resources Code, Chapter 103.

(b) In addition, HHSC may revoke a license if the licensee:

(1) submitted false or misleading statements in the application for a license or any accompanying attachments;

(2) used subterfuge or other evasive means to obtain the license;

(3) concealed a material fact in the application for a license or failed to disclose information required in §559.205 of this subchapter (relating to Criteria for Licensing) that would have been the basis to deny the license under §559.215 of this subchapter (relating to Criteria for Denying a License or Renewal of a License); or

(4) violated the requirements of the Texas Human Resources Code, Chapter 103, or the rules adopted under this subchapter.

(c) Revocation of a license may occur simultaneously with any other enforcement provision available to HHSC.

(d) The individualized skills and socialization provider will be notified by certified mail of HHSC's intent to revoke the license, including the facts or conduct alleged to warrant the revocation. The individualized skills and socialization provider has an opportunity to show compliance with all requirements of law for the retention of the license as provided in §559.217 of this subchapter (relating to Opportunity to Show Compliance). If the individualized skills and socialization provider requests an opportunity to show compliance, HHSC will give the license holder a written affirmation or reversal of the proposed action.

(e) If HHSC revokes an individualized skills and socialization provider's license, the licensee may request a formal appeal by following the Health and Human Services Commission's formal hearing procedures in 1 TAC Chapter 357, Subchapter I. A formal administrative hearing is conducted in accordance with the formal hearing procedures in 1 TAC Chapter 357, Subchapter I. If the individualized skills and socialization provider appeals the revocation, the status of the license holder is preserved until final disposition of the contested matter.

(f) An individualized skills and socialization provider will be removed from HHSC's Day Activity and Health Services (DAHS) directory if the license is revoked.

§559.251. Emergency Suspension and Closing Order.

(a) The Texas Health and Human Services Commission (HHSC) will suspend an individualized skills and socialization provider's license or order an immediate closing of part of the facility if:

(1) HHSC finds that the individualized skills and socialization provider is operating in violation of the licensure rules; and

(2) the violation creates an immediate threat to the health and safety of an individual.

(b) The order suspending a license or closing a part of a facility under this section is immediately effective on the date the license holder receives a hand-delivered written notice or on a later date specified in the order.

(c) The order suspending a license or ordering an immediate closing of a part of the facility is valid for ten days after the effective date of the order.

(d) A licensee whose facility is closed under this section is entitled to request a formal administrative hearing under the Health and Human Services Commission's formal hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act), but a request for an administrative hearing does not suspend the effectiveness of the order.

(e) An individualized skills and socialization provider will be removed from HHSC's Day Activity and Health Services (DAHS) directory during an effective emergency suspension or closing order.

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 July 28, 2022.

TRD-202202838

Karen Ray
Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: September 11, 2022

For further information, please call: (512) 438-3161



TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 815. UNEMPLOYMENT INSURANCE

SUBCHAPTER H. COLLECTION ACTION

40 TAC §§815.190 - 815.192

The Texas Workforce Commission (TWC) proposes the following new subchapter to Chapter 815, relating to Unemployment Insurance:

Subchapter H. Collection Action, §§815.190 - 815.192

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed Chapter 815 rule change is to establish administrative rules to implement and interpret Senate Bill (SB) 695, which was passed in 2021 by the 87th Texas Legislature, Regular Session.

When an employer does not timely pay its required unemployment taxes after being notified of the debt, the Texas Unemployment Compensation Act (TUCA) provides regulations for collecting the past due contributions. TUCA, Chapter 213, Subchapter C provides methods for collections of unpaid unemployment contributions, penalties, and interest by civil suit or Notice of Assessment (NOA). TWC is required to take this action. An NOA is only attempted after TWC has exhausted other avenues of tax collections including the tax statement, default notices, pre-assessment notifications, tax liens, and tax levies.

An NOA is a written decision of a tax authority where the amount of taxable income is determined and the amount of tax due is calculated. In 1989, House Bill 1941, 71st Texas Legislature, Regular Session, provided for collection of delinquent unemployment benefit taxes, penalties, or interest by serving an NOA on an employer that owes unemployment taxes. The Legislature granted TWC this authority after an audit by the Office of the State Auditor contained findings regarding the significant amount of time taken before a judgment can be obtained by civil suit.

The NOA correspondence totals the amount of taxes, penalties, or interest owed by the employer. Once the NOA is served upon the employer, TWC loses jurisdiction over the NOA and may not change it. After being served, the employer's sole avenue of redress of an grievance is through judicial review. If the employer does not seek judicial review, or if the assessment is upheld after judicial review, the assessment is final and is recorded as a judgment against the employer. The final NOA has the same effect as a final judgment of a district court.

SB 695, a TWC initiative that amended Texas Labor Code, §213.032(a), was signed by the Governor on June 4, 2021, and became effective on September 1, 2021.

Prior to the passage of SB 695, Texas Labor Code, §213.032(a) required TWC to serve an NOA in the same manner as provided in Texas Rules of Civil Procedure Rule 106.

Texas Rules of Civil Procedure Rule 106 allows for service by personal service or by certified mail by any person authorized by Texas Rules of Civil Procedure Rule 103. However, per Texas Rules of Civil Procedure Rule 103, an interested party, such as

TWC, may not serve any process. This meant that TWC was required to use a process server to mail its NOAs to liable employers. With the passage of SB 695, this limitation is no longer in place.

Additionally, SB 695 addressed substituted service. In certain situations, an employer that owes unpaid contributions, interest, or penalties may try to escape liability by avoiding service of the NOA by personal service or mail. An example would be an employer residing in a gated community that will not allow access to a process server and the employer will not accept the mail. In these situations, Texas Rules of Civil Procedure Rule 106 states that a court may grant a substituted method of service. This created substantial difficulties as TWC could not seek substituted service because it did not have a cause number to petition for substituted service as no suit has been filed. Filing suit would defeat the Legislature's intended purpose of granting TWC the authority to issue NOAs as it is not uncommon for service to be unsuccessful in person or by mail.

Effective December 31, 2021, the Texas Supreme Court updated Texas Rules of Civil Procedure Rule 106 to allow substituted service "in any other manner, including electronically by social media, email, or other technology, that the statement or other evidence shows will be reasonably effective to give the defendant notice of the suit."

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

SUBCHAPTER H. COLLECTION ACTION

TWC proposes new Subchapter H, as follows:

§815.190. Service of a Notice of Assessment in General

New §815.190 provides general information about service of a Notice of Assessment.

New §815.190 clarifies that the language in Texas Labor Code, §213.032(a)(3), which states, "in another manner that is reasonably calculated to give the employer notice of the assessment," be referred to as substituted service and that contesting service must be done in Travis County district court as required by Texas Labor Code, §213.032(c). New §815.190 also clarifies that Texas Labor Code, §213.032(a) provides TWC with the flexibility to serve parties itself or by designated third party.

New §815.190 informs parties of the addresses TWC may use for service by personal delivery or substituted service.

Texas Labor Code, §212.006(b) and §214.002(a)(3) allow for NOAs to be served upon claimants as well as employers. New §815.190 interprets certain language in Texas Labor Code, Chapter 213 to more clearly apply to claimant assessments in those situations. To that end, new §815.190 states the language in Texas Labor Code, §213.033(a) prescribing a three-year limitation on employer assessments for employer contributions, penalties, and interest be limited to the third anniversary after the benefit overpayment becomes final when it relates to claimant assessments. This interpretation is prudent as overpayment amounts may change during the dispute resolution process.

§815.191. Service of a Notice of Assessment by Personal Delivery or Mail

New §815.191 provides information and clarification regarding service of an NOA by personal delivery or mail.

New §815.191 clarifies what constitutes "address as shown by commission records" for Texas Labor Code, §213.032(a)(2) and

that TWC or its designee may make multiple service attempts under Texas Labor Code, §213.032(a)(1) and (2) prior to attempting substituted service.

New §815.191 clarifies what address(es) shall be used when serving an NOA upon a claimant by personal delivery or mail.

§815.192. Service of a Notice of Assessment by Substituted Service

New §815.192 provides information and clarification regarding service of an NOA by substituted service.

New §815.192 clarifies that TWC or its designee may make multiple attempts at substituted service. It also provides methods by which TWC may effectuate substituted service. The enumerated methods are intended to put parties on notice of methods TWC intends to use and considers to be proper to effectuate substituted service, although the list is not exhaustive or dispositive in all circumstances.

Such methods may include those methods specifically mentioned by Texas Rules of Civil Procedure Rule 106(b) including by social media, email, or other technology, TWC-established contact methods, including the Unemployment Tax Services and the Unemployment Benefits Services portals, or other mailing addresses that are not maintained in TWC records as required by Texas Labor Code, §213.032(a)(2). Other mailing addresses may include those obtained from third-party background and reporting agencies, online searches, and other government records.

Additionally, certain corporations may need to be served as prescribed by Texas Business Organizations Code, Chapter 5, and Civil Practice and Remedies Code, Chapter 17. This would be applicable when attempting personal or substituted service upon the corporation's registered agent or the Secretary of State if no valid agent exists. Only Texas Labor Code, §213.032(a)(2) contains a requirement that the NOA be mailed to an address in TWC records, so personal or substituted service can be attempted upon registered agents.

PART III. IMPACT STATEMENTS

Chris Nelson, Chief Financial Officer, determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules.

There are no estimated cost reductions to the state and to local governments as a result of enforcing or administering the rules.

There are estimated increases in revenue to the state as a result of enforcing or administering the rules. TWC anticipates a positive impact to the unemployment trust fund as a result of increased service of NOAs and the corresponding recovery of debt owed to the trust fund. There are no estimated losses or increases in revenue to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to individuals required to comply with the rules.

There is no anticipated adverse economic impact on small businesses, microbusinesses, or rural communities as a result of enforcing or administering the rules.

Based on the analyses required by Texas Government Code, §2001.024, TWC determined that the requirement to repeal or amend a rule, as required by Texas Government Code, §2001.0045, does not apply to this rulemaking.

Takings Impact Assessment

Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or the Texas Constitution, Article I, §17 or §19, or restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect. TWC completed a Takings Impact Analysis for the proposed rulemaking action under Texas Government Code, §2007.043. The primary purpose of this proposed rulemaking action, as discussed elsewhere in this preamble, is to establish administrative rules to implement and interpret SB 695.

The proposed rulemaking action will not create any additional burden on private real property or affect private real property in a manner that would require compensation to private real property owners under the United States Constitution or the Texas Constitution. The proposal also will not affect private real property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of the governmental action. Therefore, the proposed rulemaking will not cause a taking under Texas Government Code, Chapter 2007.

Government Growth Impact Statement

TWC determined that during the first five years the rules will be in effect, they:

- will not create or eliminate a government program;
- will not require the creation or elimination of employee positions;
- will not require an increase or decrease in future legislative appropriations to TWC;
- will not require an increase or decrease in fees paid to TWC;
- will not create a new regulation;
- will not expand, limit, or eliminate an existing regulation;
- will not change the number of individuals subject to the rules; and
- will not positively or adversely affect the state's economy.

Economic Impact Statement and Regulatory Flexibility Analysis

TWC determined that the rules will not have an adverse economic impact on small businesses or rural communities, as the proposed rules place no requirements on small businesses or rural communities.

Mariana Vega, Director, Labor Market Information, determined that there is not a significant negative impact upon employment conditions in the state as a result of the rules.

Chuck Ross, Director, Fraud Deterrence and Compliance Monitoring, determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be increased efficiency and effectiveness in successfully collecting debts owed to the State of Texas and a corresponding positive trust fund impact.

TWC hereby certifies that the proposal has been reviewed by legal counsel and found to be within TWC's legal authority to adopt.

PART IV. PUBLIC COMMENTS

Comments on the proposed rules may be submitted to TWCPolicyComments@twc.texas.gov and must be received no later than September 12, 2022.

PART V. STATUTORY AUTHORITY

The rules are proposed under Texas Labor Code, §301.0015(a)(6), which provide TWC with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of TWC services and activities.

The proposed rules affect Texas Labor Code, Title 4.

§815.190. Service of a Notice of Assessment in General.

(a) This section applies to a service of a notice of assessment under §213.032(a) of the Act.

(b) As used in this subchapter, service "in another manner that is reasonably calculated to give the employer notice of the assessment" shall be referred to as "substituted service."

(c) The Agency may attempt all forms of service authorized by the Act. Additionally, the Agency may engage third-party designees to provide service, including a process server, sheriffs or constables, common carrier, or other courier service when attempting service, as applicable.

(d) Service by personal delivery and substituted service may be attempted at addresses other than the address as shown by Agency records, including those designated under Texas Business Organizations Code, Chapter 5 and from third-party background and reporting agencies, online searches, and other government records.

(e) When collecting an overpayment of benefits from a claimant through a notice of assessment, as authorized by §212.006(b) and §214.002(a)(3) of the Act, the term "claimant" shall be substituted for the terms "employer" and "defaulting employer" found in Chapter 213, Subchapters C and D of the Act, as applicable. Collection by making a claimant assessment is limited to the third anniversary after the benefit overpayment becomes final except as otherwise tolled by §213.033 of the Act.

(f) A party seeking to contest service shall do so under §213.032(c) of the Act.

§815.191. Service of a Notice of Assessment by Personal Delivery or Mail.

(a) This section applies to a service of a notice of assessment under §213.032(a)(1) and (2) of the Act.

(b) An "employer's address as shown by commission records" includes the employer's address as reported on its status report, as provided under §815.3 of this chapter, or other address maintained by the Agency for the purpose of corresponding with the employer.

(c) Service of a notice of assessment upon a claimant shall be served upon the claimant's address as shown by Agency records. For service upon a claimant, this includes the address as provided under §815.3(c) of this chapter, or other address maintained by the Agency for the purposes of corresponding with the claimant.

(d) The Agency or its designee may make multiple service attempts by personal delivery and registered or certified mail before attempting substituted service.

§815.192. Service of a Notice of Assessment by Substituted Service.

(a) This section applies to substituted service of a notice of assessment under §213.032(a)(3) of the Act.

(b) The Agency may use the following methods to effectuate substituted service:

(1) Those methods specifically mentioned by the Texas Rules of Civil Procedure Rule 106(b);

(2) By Agency-established contact methods including the Unemployment Tax Services and the Unemployment Benefits Services portals or their equivalents;

(3) Mail to another known address;

(4) As set out in Texas Business Organizations Code, Chapter 5, and Civil Practice and Remedies Code, Chapter 17; and

(5) Other means of service expressly permitted or prescribed by state law.

(c) The Agency or its designee may make multiple substituted service attempts if there exist multiple manners reasonably calculated to give the employer notice of the 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 July 26, 2022.

TRD-202202803

Les Trobman

General Counsel

Texas Workforce Commission

Earliest possible date of adoption: September 11, 2022

For further information, please call: (512) 689-9855

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