



TO: Medical Care Advisory Committee

DATE: August 12, 2021

FROM: Sonja Gaines, Deputy Executive Commissioner of
IDD and Behavioral Health Services

SUBJECT: Disaster Rule Flexibilities for Community Behavioral Health Providers

Agenda Item No.: 8

New Rule: §306.1251. Disaster Flexibilities in Title 26, Chapter 306, Subchapter X,
Disaster Rule Flexibilities for Community Behavioral Health Providers

BACKGROUND: Federal Requirement Legislative Requirement Other:
Program Initiative

HHSC adopts rules to establish requirements and flexibilities to protect public health and safety during a disaster declared by the Governor. The requirements established in these rules are effective in all Texas counties or in a particular Texas county or counties during an active state of disaster as declared pursuant to Government Code, Section 418.014. The purpose of the proposal is to allow HHSC the flexibility to waive certain requirements for behavioral health community providers in the event of a state of disaster. HHSC adopted an emergency rule in response to COVID-19 pandemic, however, the rule will expire on July 17, 2021, unless another set of emergency rules is approved. This new rule is based on the existing emergency rule created in Texas Administrative Code Title 26, Part 1, Chapter 306, Subchapter Z, §306.1351, relating to COVID-19 Flexibilities. This proposal creates a standing rule, allowing providers subject to the rule to operate with the same flexibilities afforded by the emergency rule and it ensures continuity of services for individuals receiving community-based behavioral health services. To the extent authorized under federal and state law, HHSC waives the types of rules outlined in proposed new subsection (b), in the event a state of disaster is declared by the Governor. The proposed rule requires providers to comply with all policy guidance applicable to the rules issued, including policy guidance issued by HHSC's Medicaid Services Department.

ISSUES AND ALTERNATIVES:

HHSC does not anticipate any known concerns, issues, or objections to the proposal. The proposal allows the same flexibility afforded by the emergency rule and it aligns with current agency emergency policies and practices, the continued state of disaster, and the emergency rule expiring in July 2021. The only other alternative to the proposed rule is to adopt emergency rules that are time-limited.

STAKEHOLDER INVOLVEMENT:

The draft rule was not posted for informal comments due to time constraints for adopting a permanent rule to replace the emergency rule when it expires in July

2021. However, the Texas Council of Community Centers provided feedback regarding the already approved emergency rule, that is similar to the proposed rule, which was incorporated. Additionally, Behavioral Health Services worked with the Medicaid Services Department on language to address stakeholders' concerns. HHSC is not aware of any other concerns.

FISCAL IMPACT:

None

RULE DEVELOPMENT SCHEDULE:

August 12, 2021	Present to the Medical Care Advisory Committee
August 19, 2021	Present to HHSC Executive Council
September 2021	Publish proposed rules in Texas Register
January 2022	Publish adopted rules in <i>Texas Register</i>
January 2022	Effective date

REQUESTED ACTION: (Check appropriate box)

The MCAC recommends approval of the proposed rules for publication.

Information Only

TITLE 26 HEALTH AND HUMAN SERVICES
PART 1 HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 306 BEHAVIORAL HEALTH DELIVERY SYSTEM
SUBCHAPTER X DISASTER RULE FLEXIBILITIES FOR BEHAVIORAL HEALTH PROVIDERS

PROPOSED PREAMBLE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §306.1251, concerning Disaster Rule Flexibilities for Community Behavioral Health Providers.

BACKGROUND AND PURPOSE

HHSC adopts rules to establish requirements and flexibilities to protect public health and safety during a disaster declared by the Governor. The requirements established in these rules are effective in all Texas counties or in a particular Texas county or counties during an active state of disaster as declared pursuant to Texas Government Code §418.014. The purpose of the proposal is to allow HHSC the flexibility to waive certain requirements for the delivery of services in response to a declared disaster. This proposed new rule is based on the existing emergency rule created in Texas Administrative Code Title 26, Part 1, Chapter 306, Subchapter Z, §306.1351, relating to COVID-19 Flexibilities. This proposal creates a standing rule, allowing providers subject to the rule to operate with the same flexibilities afforded by the emergency rule and it ensures continuity of services for individuals receiving community-based behavioral health services.

SECTION-BY-SECTION SUMMARY

Proposed new §306.1251(a) establishes that in the event of a state of disaster, HHSC will waive the types of rules listed in subsection (b) until the state of disaster is terminated.

Proposed new §306.1251(b) identifies the types of rules HHSC will waive to the extent authorized under federal and state law as of the date of the state of disaster is declared. HHSC will waive rules that require providers to deliver certain services face-to-face or in-person contact, or in a specific physical space or on site. HHSC will also waive rules that require a child or adolescent participating in the Youth Empowerment Services Waiver Program to reside with their legally authorized representative to receive services; and rules that require staff training through face-to-face or in-person contact or for training to occur in a specific physical space or on site.

Proposed new §306.1251(c) requires providers subject to the rules to comply with all guidance on the application of the rules identified in subsection (b) published by HHSC, including policy guidance issued by HHSC's Medicaid Services Department.

Proposed new §306.1251(d) requires that, pursuant to subsection (b), providers must ensure any method of contact complies with all applicable requirements related to security and privacy of information.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

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

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

Trey Wood has also determined there will not be an adverse economic effect on small businesses, micro-businesses, or rural communities. The proposed rule provides certain flexibilities for operating under a declared disaster, but there is no requirement to alter current business practices.

LOCAL EMPLOYMENT IMPACT

The proposed rule will not affect a local economy.

COSTS TO REGULATED PERSONS

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

PUBLIC BENEFIT AND COSTS

Sonja Gaines, Deputy Executive Commissioner of IDD and Behavioral Health Services, has determined that for each year of the first five years the rule is in

effect, the public will benefit from continuity of services to vulnerable Texans during declared disasters.

Trey Wood has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule. The proposed rule permits certain flexibilities in the provision of services during a declared disaster but there is no requirement to alter current business practices.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to HHSRulesCoordinationOffice@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 20R130" in the subject line.

STATUTORY AUTHORITY

The new section is authorized by Texas Health and Safety Code §§531.0055, 533.014, 533.035, 533.0356, 534.052, 534.058, 572.0025, 571.006, and 577.010. Texas Government Code §531.0055 authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by health and human services system; Texas Health and Safety Code §533.014 requires the Executive Commissioner of HHSC to adopt rules regarding certain responsibilities for LMHAs; §533.035 authorizes HHSC to contract with LMHAs for the delivery of mental health services; §533.0356 allows the Executive Commissioner of HHSC to adopt rules governing Local Behavioral Health Authorities (LBHAs); §534.052 authorizes the Executive Commissioner of HHSC to adopt rules to ensure the adequate provision of community-based mental health services; §534.058 authorizes the Executive Commissioner to develop standards of care for services provided by LMHAs and their subcontractor; §572.0025 authorizes the Executive Commissioner of HHSC to

adopt rules governing the voluntary admission of a patient to an inpatient mental health facility; §571.006 authorizes the Executive Commissioner to adopt rules to ensure the proper and efficient treatment of persons with mental illness; and §577.010 authorizes the Executive Commissioner to adopt rules to ensure the proper care and treatment of patients in a private mental hospital or mental health facility.

The new section affects Texas Government Code §531.0055.

This agency hereby certifies that this proposal has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

ADDITIONAL INFORMATION

For further information, please call: (512) 468-1729.

Legend:

Single Underline = Proposed new language

~~[Strikethrough and brackets]~~ = Current language proposed for deletion

Regular print = Current language (No change.) = No changes are being considered for the designated subdivision

TITLE 26 HEALTH AND HUMAN SERVICES
PART 1 HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 306 BEHAVIORAL HEALTH DELIVERY SYSTEM
SUBCHAPTER X DISASTER RULE FLEXIBILITIES FOR COMMUNITY BEHAVIORAL
HEALTH PROVIDERS

§306.1251. Disaster Flexibilities.

(a) In the event of a state of disaster declared pursuant to Texas Government Code §418.014 for statewide disasters or limited areas subject to the declaration, the flexibilities listed under subsection (b) of this section will be available until the state of disaster is terminated.

(b) The following flexibilities are available to community behavioral health providers to the extent allowed by federal and state law.

(1) Rules under Title 25, Part 1 and Title 26, Part 1 of the Texas Administrative Code (TAC) that require providers to deliver certain services:

(A) through face-to-face or in-person contact may use telehealth, telemedicine, video-conferencing, or telephonic methods to engage with the individual to provide these services, to the extent this flexibility is permitted by and does not conflict with other law or obligation of the provider in:

(i) §301.327 of this title (relating to Access to Mental Health Community Services);

(ii) §301.351 of this title (relating to Crisis Services);

(iii) §301.353 of this title (relating to Provider Responsibilities for Treatment Planning and Service Authorization);

(iv) §301.357 of this title (relating to Additional Standards of Care Specific to Mental Health Community Services for Children and Adolescents);

(v) §301.359 of this title (relating to Telemedicine Services);

(vi) §306.207 of this chapter (relating to Post Discharge or Absence for Trial Placement: Contact and Implementation of the Recovery or Treatment Plan);

(vii) §306.263 of this chapter (relating to MH Case Management Services Standards);

(viii) §306.275 of this chapter (relating to Documenting MH Case Management Services);

(ix) §306.277 of this chapter (relating to Medicaid Reimbursement);

(x) §306.305 of this chapter (relating to Definitions);

(xi) §306.323 of this chapter (relating to Documentation Requirements);

(xii) §306.327 of this chapter (relating to Medicaid Reimbursement);

(xiii) §307.53 of this title (relating to Eligibility Criteria and HCBS-AMH Assessment);

(xiv) 25 TAC §415.10 (relating to Medication Monitoring); and

(xv) 25 TAC §415.261 (relating to Time Limitation on an Order for Restraint or Seclusion Initiated in Response to a Behavioral Emergency); or

(B) in a specific physical space or on site may provide virtual platforms, such as telephone or videoconferencing in 25 TAC §414.554 (relating to Responsibilities of Local Authorities, Community Centers, and Contractors);

(2) Section 307.5 of this title (relating to Eligibility Criteria) that require a child or adolescent participating in the Youth Empowerment Services (YES) Waiver Program to reside with their legally authorized representative to receive services may reside with another responsible adult. Providers must ensure the alternate residency complies with any applicable requirements related to participation in the YES Waiver Program. The flexibility allowed under this subsection IS NOT IN EFFECT unless and until the Centers for Medicare & Medicaid Services approves HHSC's request for activation of Appendix-K;

(3) Rules under Title 25, Part 1 and Title 26, Part 1 of the TAC that require staff training:

(A) through face-to-face or in-person contact; or

(B) in a specific physical space or on site; and

(4) Rules under Title 25, Part 1 and Title 26, Part 1 of the TAC where HHSC may issue guidance to extend timeframe flexibilities:

(A) no longer than 120 days for compliance with staff training requirements based on training availability and feasibility during, or resulting from, a declared disaster; and

(B) to the extent an individual's or staff member's health or safety are not compromised by the flexibilities for training requirements provided in:

(i) §306.83 of this chapter (relating to Staff Training); and

(ii) §301.331 of this title (relating to Competency and Credentialing).

(c) Providers that avail themselves of the flexibilities allowed under subsection (b) of this section, must comply with:

(1) all guidance on the application of the rules during the declaration of disaster that is published by HHSC on its website or in another communication format HHSC determines appropriate; and

(2) all policy guidance applicable to the rules identified in subsection (b) of this section issued by HHSC's Medicaid Services Department.

(d) Providers must ensure any method of contact complies with all applicable requirements related to security and privacy of information.