



TO: Medical Care Advisory Committee
DATE: August 12, 2021
FROM: Diana Conces, Director of Long-Term Care Regulation

SUBJECT: Medicaid Bed Reallocation

Agenda Item No.: 9

Amendments to: Title 26, Texas Administrative Code §261.220

BACKGROUND: Federal Requirement Legislative Requirement Other:
(e.g., Program Initiative)

The purpose of the proposed new rule is to implement House Bill 3117, 86th Legislature, Regular Session, 2019, which requires HHSC to develop a process to redistribute existing intermediate care facilities for individuals with an intellectual disability or related conditions (ICF/IID) Medicaid beds under the authority of the State Plan for Individuals with Intellectual and Developmental Disabilities.

Adding a new rule to 26 TAC 261 will enable HHSC to reallocate available beds reverted to HHSC due to provider closure or expiration of beds in suspension. With the addition of new §261.220, ICF/IID providers can apply to HHSC to request up to a maximum of six additional beds.

ISSUES AND ALTERNATIVES:

There are no known issues, concerns, or alternatives. Participation is voluntary and this new rule formalizes the current process for Medicaid bed reallocation authorized by the Long-Term Care Plan for Individuals with Intellectual Disabilities and Related Conditions, based on the Texas Health and Safety Code §533A.062 (b-1), relating to Plan on Long-Term Care for Persons with an Intellectual Disability.

STAKEHOLDER INVOLVEMENT:

Providers surveyed informally were interested in reallocated beds. The proposed new rule was published in the *Texas Register* for public comment on July 23, 2021, and it will be presented at the HHSC Executive Council meeting on August 19, 2021.

FISCAL IMPACT:

None

RULE DEVELOPMENT SCHEDULE:

July 2021

Publish proposed rules in *Texas Register*

August 12, 2021
August 19, 2021
October 2021
October 2021

Present to Medical Care Advisory Committee
Present to HHSC Executive Council
Publish adopted rules in *Texas Register*
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 261 INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH AN
INTELLECTUAL DISABILITY OR RELATED CONDITIONS (ICF/IID)
PROGRAM--CONTRACTING
SUBCHAPTER C PROVIDER ADMINISTRATIVE REQUIREMENTS

PROPOSED PREAMBLE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §261.220, concerning Medicaid Bed Reallocation.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement House Bill (H.B.) 3117, 86th Legislature, Regular Session, 2019, which requires HHSC to develop a process to redistribute existing intermediate care facilities for individuals with an intellectual disability or related conditions (ICF/IID) Medicaid beds under the authority of the State Plan for Individuals with Intellectual and Developmental Disabilities.

Adding a new section to Texas Administrative Code, Title 26, Chapter 261 will enable HHSC to reallocate available beds reverted to HHSC due to provider closure or expiration of beds in suspension. With the addition of new §261.220, ICF/IID providers can apply to HHSC to request up to a maximum of six additional beds.

SECTION-BY-SECTION SUMMARY

Proposed new §261.220, Medicaid Bed Reallocation, formalizes the current process for Medicaid bed reallocation authorized by the Long-Term Care Plan for Individuals with Intellectual Disabilities and Related Conditions, based on the Texas Health and Safety Code §533A.062 (b-1), relating to Plan on Long-Term Care for Persons with an Intellectual Disability. Subsection (a) of the rule contains the requirements from H.B. 3117, for HHSC to review state-wide bed capacity of community ICF/IIDs and develop a process to reallocate beds held in suspension. Subsection (b) states that an ICF/IID may not increase its Medicaid bed capacity unless HHSC approves. Subsection (c) indicates, notwithstanding §261.206 (relating to Application Process) that the process for Medicaid bed reallocation is established in the provisions following Subsection (c). Subsection (d) establishes the process for an applicant, which includes a current provider or a new provider, to follow if the applicant wants to request reallocated Medicaid beds. Subsection (e) sets forth the way HHSC calculates the number of beds made available. Subsection (f) contains the process HHSC follows on receiving a request for reallocated Medicaid beds. Subsection (g) includes what an applicant must provide to show a need for requested reallocated beds. Subsection (h) contains what regulatory compliance history HHSC reviews to determine if it is acceptable. Subsection (i) indicates that an applicant having no compliance history must meet all other criteria for reallocation. Subsection (j) states that HHSC approves an application for reallocated beds if ICF/IID beds are available, the applicant meets all criteria for reallocation, and HHSC sends an

approval letter. Subsection (k) contains the steps an applicant must complete after approval for reallocation. Subsection (l) states what happens if an applicant fails to complete the required steps after receiving approval for reallocation. Subsection (m) states what occurs if HHSC denies a license application or the applicant does not complete provider enrollment or Medicaid contracting. Subsection (n) explains what occurs if HHSC revokes the reallocation of beds. Subsection (o) explains the process HHSC follows when HHSC reallocates all beds available.

FISCAL NOTE

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

GOVERNMENT GROWTH IMPACT STATEMENT

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

- (1) the proposed 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 new rules;
- (6) the proposed rule will not expand existing rules;
- (7) the proposed rule will not change the number of individuals subject to the rules;

and

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

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

Trey Wood has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. There is no imposed cost to comply and 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 implement legislation that does not specifically state that §2001.0045 applies to the rule.

PUBLIC BENEFIT AND COSTS

David Kostroun, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be that, if an ICF/IID applies and receives approval for an increase in the number of beds, the ICF/IID can provide services to more individuals who would benefit from services provided in a residential setting.

Trey Wood has also determined that for the first five years the rule is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rule because there is no requirement to alter current business practices and there are no new fees.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Written comments on the proposal may be submitted to Christy Parks, ICF/IID Policy Advisor, P.O. Box 149030, Austin, Texas 78714-9030, Mail Code E-370; or by email to HHSC LTCR Rules at HSCLTCRRules@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 21R059" in the subject

STATUTORY AUTHORITY

The new section is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code §§252.008 and 252.036, which, respectively, require the Executive Commissioner of HHSC to adopt rules related to the administration and implementation of Chapter 252 and to adopt minimum standards relating to facilities licensed under Chapter 252.

The amendments and repeals affect Texas Government Code §551.0055 and Texas Health and Safety Code Chapter 252.

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) 438-3161.

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

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§261.220. Medicaid Bed Reallocation.

(a) Based on Texas Health and Safety Code §533A.062(b-1) (relating to Plan on Long-Term Care for Persons with an Intellectual Disability), and as authorized by the Long-Term Care Plan for Individuals with Intellectual Disabilities and Related Conditions, the Texas Health and Human Services Commission (HHSC) must:

(1) review the state-wide bed capacity of community intermediate care facilities for individuals with an intellectual disability or related conditions (ICF/IID); and

(2) develop a process to reallocate beds held in suspension by HHSC.

(b) As provided in §551.14 of this title (relating to Increase in Capacity), an ICF/IID must not increase its Medicaid bed capacity unless HHSC approves.

(c) Notwithstanding §261.206 of this chapter (relating to Application Process), the following provisions establish the process for HHSC Long-term Care Regulation to reallocate ICF/IID Medicaid beds.

(d) If an applicant (current provider or new provider) wants to request reallocated Medicaid beds, the applicant:

(1) can request no more than six reallocated beds for each ICF/IID license;

(2) interested in obtaining reallocated beds must:

(A) complete form HHSC 3642, ICF/IID Medicaid Bed Reallocation Application; and

(B) email the application and all supporting documentation to: Medicaid_Bed_Allocation@hhs.texas.gov.

(e) For the reallocation, HHSC calculates the number of available beds based on the numbers of surrendered or expired beds made available during the relevant state fiscal years.

(f) When HHSC receives a complete application for reallocation, HHSC:

(1) processes the application in the order received;

(2) reviews the application to determine if the applicant meets the criteria for reallocation;

(3) determines if ICF/IID beds are available for reallocation;

(4) verifies the applicant is immediately ready to use the beds;

(5) determines if the applicant demonstrates a need for the beds as described in subsection (g) of this section; and

(6) if the applicant is a current program provider, determines whether the applicant has an acceptable regulatory compliance history with HHSC.

(g) The applicant must provide documentation that demonstrates the need for the requested reallocated beds by providing:

(1) data demonstrating occupancy rates of 80 percent or greater for nine of the 12 months preceding the application if the applicant is a current program provider;

(2) documentation of a wait list, such as letters from individuals or family members attesting that they want to receive services from the applicant; or

(3) any other documentation showing a need for a new ICF/IID.

(h) HHSC considers the regulatory compliance history for any facility operated by the applicant. An acceptable regulatory compliance history means that, in the preceding 24 months, the applicant and controlling persons have not received any of the following sanctions:

(1) termination of Medicaid or Medicare certification;

(2) termination of Medicaid contract;

(3) denial, suspension or revocation of a provider license;

(4) cumulative Medicaid or Medicare civil monetary penalties totaling more than \$5,000 in a single facility;

(5) imposition of civil penalties pursuant to Texas Health and Safety Code §252.064;

(6) denial of payment for new admissions;

(7) a pattern of substantial or repeated licensing or Medicaid sanctions, including administrative penalties; or

(8) a condition listed in §551.17 of this title (relating to Criteria for Denying a License or Renewal of a License).

(i) An applicant having no compliance history to consider must meet all other criteria for reallocation.

(j) If an applicant meets all criteria for reallocation and ICF/IID beds are available, HHSC approves the application, grants the number of beds requested, up to a maximum of six beds, and sends an approval letter to the applicant.

(k) On approval of the reallocation, the applicant must submit an application for licensure in the Texas Unified Licensure Information Portal within 30 days from the date of the approval letter. The applicant must also complete the provider enrollment and Medicaid contracting process as referenced in §261.206 of this chapter and §261.208 of this chapter (relating to Provider Agreement).

(l) If the applicant fails to complete and submit the licensure application, the reallocation application is cancelled, and HHSC will reallocate the beds to another approved applicant or hold the beds until another provider is approved.

(m) If HHSC denies the application for licensure or the applicant does not complete the provider enrollment or Medicaid contracting process, HHSC reallocates the beds to another approved applicant or holds the beds until approval of another applicant.

(n) If HHSC revokes the reallocation of beds, HHSC notifies the person to whom the beds were allocated. The person may not appeal the revocation of capacity.

(o) Once HHSC reallocates all available beds, HHSC will place any approved applicants who did not receive reallocated beds on a waiting list. As additional beds become available for reallocation, HHSC will contact approved applicants on the wait list.