

TITLE 40 SOCIAL SERVICES AND ASSISTANCE
PART 1 DEPARTMENT OF AGING AND DISABILITY SERVICES
CHAPTER 9 INTELLECTUAL DISABILITY SERVICES--MEDICAID STATE
OPERATING AGENCY RESPONSIBILITIES
SUBCHAPTER D HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM
AND COMMUNITY FIRST CHOICE (CFC)

EMERGENCY RULE ADOPTION PREAMBLE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts on an emergency basis in Title 40, Part 1, Texas Administrative Code, Chapter 9, Intellectual Disability Services--Medicaid State Operating Agency Responsibilities, new §§9.198 and §9.199, concerning emergency rules in response to COVID-19. As authorized by Texas Government Code §2001.034, HHSC may adopt an emergency rule without prior notice or hearing upon finding that an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. Emergency rules adopted under Texas Government Code §2001.034 may be effective for not longer than 120 days and may be renewed for not longer than 60 days.

BACKGROUND AND PURPOSE

The purpose of the emergency rulemaking is to support the Governor's March 13, 2020, proclamation certifying that the COVID-19 virus poses an imminent threat of disaster in the state and declaring a state of disaster for all counties in Texas. In this proclamation, the Governor authorized the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster and directed that government entities and businesses would continue providing essential services. HHSC accordingly finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of these Emergency Rules for Program Provider Response to COVID-19 and Home and Community-based Services (HCS) Expansion of Reopening Visitation.

To protect individuals receiving HCS and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting emergency rules to reduce the risk of spreading COVID-19 to individuals in the HCS program. These new rules describe the requirements HCS program providers must immediately put into place and the requirements they must follow for visitation, essential caregivers, and day habilitation.

STATUTORY AUTHORITY

The emergency rules are adopted under Texas Government Code §§2001.034, 531.0055, and 531.021 and Texas Human Resources Code §32.021. Texas Government Code §2001.034 authorizes the adoption of emergency rules without prior notice and hearing, if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice. Texas Government Code §531.0055 authorizes the Executive Commissioner of

HHSC to adopt rules and policies necessary for the operation and provision of health and human services by the health and human services system. Texas Government Code §531.021 provides HHSC with the authority to administer federal Medicaid funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program. Texas Human Resources Code §32.021 provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The new sections implement Texas Government Code §531.0055 and §531.021, and Texas Human Resources Code §32.021.

The agency hereby certifies that the emergency rulemaking 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.

TITLE 40 SOCIAL SERVICES AND ASSISTANCE
PART 1 DEPARTMENT OF AGING AND DISABILITY SERVICES
CHAPTER 9 INTELLECTUAL DISABILITY SERVICES--MEDICAID STATE
OPERATING AGENCY RESPONSIBILITIES
SUBCHAPTER D HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM
AND COMMUNITY FIRST CHOICE (CFC)

§9.198. Program Provider Response to COVID-19 Emergency Rule.

(a) Applicability. Based on state law and federal guidance, Texas Health and Human Services Commission (HHSC) finds COVID-19 to be a health and safety risk and requires a program provider to take the following measures. The screening required by this section does not apply to emergency services personnel entering the residence in an emergency situation.

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

(1) Individual--A person enrolled in the Home and Community-based Services (HCS) program.

(2) Isolation--Practices that separate persons who are sick to protect those who are not sick.

(3) Fully vaccinated person--A person who received the second dose in a two-dose series or a single dose of a one dose COVID-19 vaccine and 14 days have passed since this dose was received.

(4) Persons providing critical assistance--Providers of essential services, persons with legal authority to enter, and family members or friends of individuals at the end of life and designated essential caregivers as described in §9.199(f) of this subchapter (relating to HCS Provider Response to COVID-19--Expansion of Reopening Visitation).

(5) Persons with legal authority to enter--Law enforcement officers, representatives of Disability Rights Texas, and government personnel performing their official duties.

(6) Physical distancing--Maintaining a minimum distance between persons as recommended by the Centers for Disease Control and Prevention (CDC), avoiding gathering in groups in accordance with state and local orders, and avoiding unnecessary physical contact.

(7) Probable case of COVID-19--A case that meets the clinical criteria for epidemiologic evidence as defined and posted by the Council of State and Territorial Epidemiologists.

(8) Provider of essential services--Contract doctors or nurses, home health and hospice workers, health care professionals, contract professionals, clergy members and spiritual counselors, guardians, advocacy professionals, and individuals operating under the authority of a local intellectual and developmental disability authority (LIDDA) or a local mental health authority (LMHA), whose services are necessary to ensure individual health and safety.

(9) Residence--A host home/companion care, three-person, or four-person residence, as defined by the HCS Billing Guidelines, unless otherwise specified.

(c) Screening requirements.

(1) A program provider must screen all visitors and individuals outside of the residence prior to allowing them to enter, except emergency services personnel entering the property in an emergency. Visitor screenings must be documented in a log, which must include the name of each person screened, the date and time of the screening, and the results of the screening. The visitor screening log may contain protected health information and must be protected in accordance with applicable state and federal law.

(2) Visitors who meet any of the following screening criteria must leave the residence and reschedule the visit:

(A) fever, defined as a temperature of 100.4 Fahrenheit or above;

(B) signs or symptoms of COVID-19, including chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, or diarrhea;

(C) any other signs and symptoms identified by the CDC in Symptoms of Coronavirus at [cdc.gov](https://www.cdc.gov);

(D) contact in the last 14 days with someone who has a confirmed diagnosis of COVID-19, is under investigation for COVID-19, or is ill with a respiratory illness, regardless of whether the person is fully vaccinated, unless the visitor is seeking entry to provide critical assistance; or

(E) testing positive for COVID-19 in the last 10 days.

(3) A program provider must allow persons providing critical assistance, including essential caregivers and persons with legal authority to enter the residence if they pass the screening in paragraph (2) of this subsection.

(4) A program provider must not prohibit an individual who lives in the residence from entering the residence even if the individual meets any of the screening criteria.

(d) Communication.

(1) Program providers must contact their local health department, or the Department of State Health Services (DSHS) if there is no local health department, if the program provider knows an individual has COVID-19.

(2) Within 24 hours of becoming aware of an individual or staff member with confirmed COVID-19, a program provider must notify HHSC via encrypted or secure email to waiversurvey.certification@hhsc.state.tx.us. If a program provider is not able to send a secure or encrypted email, the program provider should notify HHSC by emailing waiversurvey.certification@hhsc.state.tx.us. A program provider is not required to provide identifying information of a staff member to HHSC when reporting a positive COVID-19 test result and must comply with applicable law regarding patient privacy. A program provider must comply with any additional HHSC monitoring requests.

(3) A program provider must notify an individual's legally authorized representative (LAR) if the individual is confirmed to have COVID-19, or if the presence of COVID-19 is confirmed in the residence.

(4) A program provider must notify any individual who lives in the residence, and his or her LAR, if the program provider is aware of probable or confirmed cases among program provider staff or individuals living in the same residence.

(5) A program provider must not release personally identifying information regarding confirmed or probable cases.

(e) Infection Control.

(1) A program provider must develop and implement an infection control policy to prevent the spread of COVID-19 that:

(A) prescribes a cleaning and disinfecting schedule for the residence, including high-touch areas and any equipment used to care for more than one individual;

(B) is updated to reflect current CDC or DSHS guidance;

(C) may include the use of face masks; and

(D) is revised if a shortcoming is identified.

(2) A program provider must provide training to service providers on the infection control policy initially and upon updates.

(3) A program provider must educate staff and individuals on infection prevention, including hand hygiene, physical distancing, the use of personal protective equipment (PPE) and cloth face coverings, and cough etiquette.

(4) A program provider must encourage physical distancing according to CDC guidance in the community whenever reasonably possible.

(5) A program provider must require staff to:

(A) wear appropriate PPE as defined by the CDC if providing care to an individual with COVID-19; and

(B) maintain physical distance according to CDC guidance as practicable.

(6) Provider staff who have confirmed or probable COVID-19 may not provide services to individuals, except that:

(A) a host home/companion care provider may provide services to an individual who has also tested positive for COVID-19; or

(B) live-in staff providing supervised living services may provide services to an individual who has also tested positive for COVID-19 in accordance with §9.174(a)(37) of this subchapter (relating to Certification Principles: Service Delivery).

(7) A program provider must monitor the health status of a staff person providing services under paragraph (6) of this subsection to verify that the staff person continues to be able to deliver services. If the staff person's condition worsens, the program provider must activate the service back-up plan to ensure the individual receives services.

(8) A program provider must isolate individuals with confirmed or probable COVID-19 in accordance with CDC guidance. The program provider should isolate the individual within the residence, if possible. If individuals cannot be isolated within the residence, the program provider must convene the service planning team to identify alternative residential arrangements.

(9) A program provider must screen individuals for the criteria in section (c)(2)(A)–(D) once a day in accordance with CDC guidance.

(f) A program provider must update the emergency plan developed in accordance with §9.178(d) of this subchapter (relating to Certification Principles: Quality Assurance) to address COVID-19. The updated plan must include:

(1) plans for maintaining infection control procedures and supplies of PPE during evacuation;

(2) a list of locations and alternate locations for evacuation both for individuals with confirmed or probable COVID-19 and for individuals with negative or unknown COVID-19 status; and

(3) a list of supplies needed if required to shelter in place, including PPE.

(g) A program provider must develop and implement a staffing policy that addresses how the program provider plans to minimize the movement of staff between health care providers and encourage communication among providers regarding COVID-19 probable and confirmed cases. The policy must limit sharing of staff between residences, unless doing so will result in staff shortages.

(h) Except as provided in subsection (e)(6) of this section, if a service provider at a host home, three-person or four-person home, or a staff member at a respite or Community First Choice Personal Assistance Services/Habilitation (CFC PAS/HAB) setting, has confirmed or probable COVID-19, the service provider or staff member must discontinue providing services until eligible to return to work in accordance with the CDC guidance document, "Criteria for Return to Work for Healthcare Personnel with Suspected or Confirmed COVID-19." The program provider must activate the back-up service plan.

(i) A program provider may conduct the annual inspection required by §9.178(c) of this subchapter by video conference. A program provider must conduct an on-site inspection required by §9.178(c) of this subchapter within 30 days of the expiration or repeal of the public health emergency.

(j) A program provider must develop a safety plan for a four-person residence if the annual fire marshal inspection required by §9.178(e)(3)(A) of this subchapter is expired and document attempts to obtain the fire marshal inspection. The safety plan should require:

(1) verification that fire extinguishers are fully charged;

(2) a schedule for fire watches and plan to increase fire drills if the residence does not have a sprinkler system installed or monitored fire panel;

(3) verification of staff training on the needs of the individual in the event of an emergency; and

(4) verification that emergency plans are updated to reflect needs as listed in paragraph (3) of this subsection.

(k) Flexibilities in federal requirements granted by the Centers for Medicare and Medicaid Services during the COVID-19 pandemic, including waivers under the Social Security Act §1135, activation of Appendix K amending a 1915(c) home and community-based waiver, and other federal flexibilities or waivers are applied to corresponding state certification principles for HCS. HHSC will identify and describe

federal flexibilities and flexibility in corresponding state certification principles in guidance issued through HCS provider letters.

(l) If this emergency rule is more restrictive than any minimum standard relating to the HCS program, this emergency rule will prevail so long as this emergency rule is in effect.

(m) If an executive order or other direction is issued by the Governor of Texas, the President of the United States, or another applicable authority, that is more restrictive than any minimum standard relating to the HCS program or this emergency rule, the program provider must comply with the executive order or other direction.

§9.199. HCS Provider Response to COVID-19–Expansion of Reopening Visitation.

(a) Applicability. This section does not apply to host home/companion care, unless otherwise specified.

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

(1) COVID-19 negative--The status of an individual who has either tested negative for COVID-19 or who exhibits no symptoms of COVID-19 and has had no known exposure to the virus in the last 14 days.

(2) COVID-19 positive--The status of an individual who has tested positive for COVID-19 or who is presumed positive for COVID-19 and who has not yet met the Centers for Disease Control and Prevention (CDC) guidance for the discontinuation of transmission-based precautions.

(3) End-of-life visit--A personal visit between a personal visitor and an individual who is receiving hospice services or is at or near end of life, with or without receiving hospice services; or whose prognosis does not indicate recovery. An end-of-life visit is permitted for all individuals at or near the end of life.

(4) Essential caregiver--A family member or other outside caregiver, including a friend, volunteer, clergy member, private personal caregiver, or court-appointed guardian, who is at least 18 years old, designated to provide regular care and support to an individual.

(5) Essential caregiver visit--A personal visit between an individual and an essential caregiver as described in subsection (f)(1) of this section. An essential caregiver visit is permitted for all individuals with any COVID-19 status.

(6) Fully vaccinated person--A person who received the second dose in a two-dose series or a single dose of a one dose COVID-19 vaccine and 14 days have passed since this dose was received.

(7) Individual--A person enrolled in the Home and Community-based Services (HCS) program.

(8) Indoor visit--A personal visit between an individual and one or more personal visitors that occurs in-person in a dedicated indoor space.

(9) Outbreak--One or more confirmed or probable cases of COVID-19 identified in either an individual or paid or unpaid staff.

(10) Outdoor visit--A personal visit between an individual and one or more personal visitors that occurs in-person in a dedicated outdoor space.

(11) Physical distancing--Maintaining a minimum distance between persons as recommended by the CDC, avoiding gathering in groups in accordance with state and local orders, and avoiding unnecessary physical contact.

(12) Probable case of COVID-19--A case that meets the clinical criteria for epidemiologic evidence as defined and posted by the Council of State and Territorial Epidemiologists.

(13) Unknown COVID-19 status--The status of a person, except as provided by the CDC for individuals who are fully vaccinated for COVID-19 or recovered from COVID-19, who:

(A) is a new admission or readmission;

(B) has spent one or more nights away from the residence;

(C) has had known exposure or close contact with a person who is COVID-19 positive; or

(D) is exhibiting symptoms of COVID-19 while awaiting test results.

(c) The program provider must offer a complete series of a one- or two-dose COVID-19 vaccine to individuals and staff and document each individual's choice to vaccinate or not vaccinate.

(d) The program provider must develop and enforce policies and procedures that ensure infection control practices for visitors, including whether the visitor and the individual must wear a face mask or face covering and whether the visitor should wear appropriate personal protective equipment (PPE).

(e) A program provider may ask about a visitor's COVID-19 vaccination status and COVID-19 test results but must not require a visitor to provide documentation of a COVID-19 negative test or COVID-19 vaccination status as a condition of visitation or to enter the residence.

(f) The program provider must allow essential caregiver visits, end-of-life visits, indoor visits, and outdoor visits as required in this section. If a program provider fails to comply with the requirements of this section, the Texas Health and Human Services Commission (HHSC) may take action in accordance with §9.171 of this subchapter (relating to HHSC Surveys and Residential Visits of a Program Provider) and §9.181 of this subchapter (relating to Administrative Penalties).

(1) The following limits apply to all visitation allowed under this section:

(A) Visitation must be facilitated to allow time for cleaning and sanitization of the visitation area between visits and to ensure infection prevention and control measures are followed. A provider may schedule personal visits in advance to facilitate cleaning and sanitization of the visitation area. A provider may permit personal visits that are not scheduled in advance. Scheduling visits in advance must not be so restrictive as to prohibit or limit visitation for individuals.

(B) Except as provided in subparagraph (C) of this paragraph, indoor visits and outdoor visits are permitted only for individuals with a COVID-19 negative status.

(C) Essential caregiver visits and end-of-life visits are permitted for individuals with COVID-19 negative, COVID-19 positive, or unknown COVID-19 status.

(D) Except as provided in subparagraph (E) of this paragraph, the individual and their personal visitor may have close or personal contact in accordance with CDC guidance. The visitor must maintain physical distancing of at least six feet between themselves and all other persons in the residence.

(E) Essential caregiver visitors and end-of-life visitors do not have to maintain physical distancing between themselves and the individual they are visiting but must maintain physical distancing between themselves and all other persons in the residence.

(F) Visits are permitted where adequate space is available as necessary to ensure physical distancing between visitation groups and safe infection prevention and control measures, including the individual's room. The program provider must limit the movement of the visitor through the residence to ensure interaction with other persons in the residence is minimized.

(G) A program provider must ensure equal access by all individuals to visitors and essential caregivers.

(H) A program provider must allow visitors of any age.

(I) A program provider must ensure a comfortable and safe outdoor visitation area for outdoor visits, considering outside air temperature and ventilation.

(J) A program provider must inform visitors of the provider's infection control policies and procedures related to visitation.

(K) A program provider must provide hand washing stations, or hand sanitizer, to the visitor and individual before and after visits.

(L) The visitor and the individual must practice hand hygiene before and after the visit.

(2) The following requirements apply to essential caregiver visits.

(A) There may be up to two permanently designated essential caregivers per individual.

(B) Up to two essential caregiver visitors may visit an individual at the same time.

(C) The visit may occur outdoors, in the individual's bedroom, or in another area in the home that limits the essential caregiver visitor's movement through the residence and interaction with other individuals and staff.

(D) Essential caregiver visitors do not have to maintain physical distancing between themselves and the individual they are visiting but must maintain physical distancing between themselves and all other individuals and staff.

(E) The program provider must develop and enforce essential caregiver visitation policies and procedures, which include:

(i) a written agreement that the essential caregiver visitor understands and agrees to follow the applicable policies, procedures, and requirements;

(ii) training each essential caregiver visitor on proper PPE usage and infection control measures, hand hygiene, and cough and sneeze etiquette;

(iii) limiting visitation to the area designated by the program provider in accordance with subparagraph (C) of this paragraph.

(F) The program provider must:

(i) inform the essential caregiver visitor of applicable policies, procedures, and requirements;

(ii) maintain documentation of the essential caregiver visitor's agreement to follow the applicable policies, procedures, and requirements;

(iii) maintain documentation of the essential caregiver visitor's training as required in subparagraph (E)(ii) of this paragraph;

(iv) maintain documentation of the identity of each essential caregiver visitor in the individual's records; and

(v) prevent visitation by the essential caregiver visitor if the essential caregiver has signs and symptoms of COVID-19, active COVID-19 infection.

(G) The program provider may cancel the essential caregiver visit if the essential caregiver visitor fails to comply with the program provider's policy regarding essential caregiver visits or applicable requirements in this section.

(g) If an executive order or other direction is issued by the Governor of Texas, the President of the United States, or another applicable authority, that is more restrictive than this rule or any minimum standard relating to a program provider, the program provider must comply with the executive order or other direction.