

# EMERGENCY RULES

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

## TITLE 22. EXAMINING BOARDS

### PART 9. TEXAS MEDICAL BOARD

#### CHAPTER 174. TELEMEDICINE

##### SUBCHAPTER A. TELEMEDICINE

###### 22 TAC §174.5

The Texas Medical Board (Board) adopts, on an emergency basis, amendments to 22 TAC §174.5, effective July 31, 2021, at 12:01 a.m.

On March 13, 2020, the Governor of Texas certified COVID-19 as posing an imminent threat of disaster to the public health and safety and declared a state of disaster in all counties of Texas. The utilization of telemedicine to prescribe scheduled drugs for the treatment of chronic pain is needed to protect public health and curb the spread of COVID-19, while ensuring continuity of care for chronic pain patients and the avoidance of potential adverse consequences associated with the abrupt cessation of pain medicine. On June 30, 2021, the Board adopted, on an emergency basis, amendments to 22 TAC §174.5. Such rule is set to expire at 11:59 p.m. on July 30, 2021.

Therefore, the emergency amendment to §174.5(e) is immediately necessary to help the state's physicians, physician assistants and other health care professionals continue to mitigate the risk of exposure to COVID-19 and provide necessary medical services to related to issuance of prescriptions including controlled substances for patients. Pursuant to the Governor's declaration of disaster issued on March 13, 2020, related to COVID-19, physicians can continue the treatment of chronic pain with scheduled drugs for established patients after having an in-person or two-way audio and video communications telemedicine medical services within the last 90 days.

The emergency amendment would allow physicians to utilize telemedicine to continue issuing previous prescription(s) for scheduled medications to established chronic pain patients, if the physician has, within the past 90 days, seen a patient in-person or via a telemedicine visit using two-way audio and video communication.

Pursuant to Section 2001.034 and 2001.036(a)(2) of the Texas Government Code, the amendment is adopted on an emergency basis and with an expedited effective date because an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice. The emergency amendment shall be in effect for only 75 days or the duration of the time period that the Governor's disaster declaration of March 13, 2020 in response to the COVID-19 pandemic is in effect, whichever is shorter, pursuant to Section 2001.034 of the Texas Government Code.

The emergency rule amendments are adopted under the authority of the Texas Occupations Code, §153.001, which provides authority for the Board to recommend and adopt rules and by-laws as necessary to: govern its own proceedings; perform its duties; regulate the practice of medicine; and enforce this subtitle.

Another statute affected by this rule is Chapter 111 of the Texas Occupations Code.

###### §174.5. *Issuance of Prescriptions.*

(a) The validity of a prescription issued as a result of a telemedicine medical service is determined by the same standards that would apply to the issuance of the prescription in an in-person setting.

(b) This rule does not limit the professional judgment, discretion or decision-making authority of a licensed practitioner. A licensed practitioner is expected to meet the standard of care and demonstrate professional practice standards and judgment, consistent with all applicable statutes and rules when issuing, dispensing, delivering, or administering a prescription medication as a result of a telemedicine medical service.

(c) A valid prescription must be:

(1) issued for a legitimate medical purpose by a practitioner as part of patient-practitioner relationship as set out in §111.005, of Texas Occupations Code; and

(2) meet all other applicable laws before prescribing, dispensing, delivering or administering a dangerous drug or controlled substance.

(d) Any prescription drug orders issued as the result of a telemedicine medical service, are subject to all regulations, limitations, and prohibitions set out in the federal and Texas Controlled Substances Act, Texas Dangerous Drug Act and any other applicable federal and state law.

(e) Limitation on Treatment of Chronic Pain. Chronic pain is a legitimate medical condition that needs to be treated but must be balanced with concerns over patient safety and the public health crisis involving overdose deaths. The Legislature has already put into place laws regarding the treatment of pain and requirements for registration and inspection of pain management clinics. Therefore, the Board has determined clear legislative intent exists for the limitation of chronic pain treatment through a telemedicine medical service.

(1) Treatment for Chronic Pain. For purposes of this rule, chronic pain has the same definition as used in §170.2(4) of this title (relating to Definitions).

(A) Telemedicine medical services used for the treatment of chronic pain with scheduled drugs by any means other than via audio and video two-way communication is prohibited, unless a patient:

(i) is an established chronic pain patient of the provider issuing the prescription;

(ii) is receiving a prescription that is identical to a prescription issued at the previous visit; and

(iii) has been seen by the prescribing physician or health professional defined under Chap 111.001(1) of Texas Occupations Code, in the last 90 days either:

(I) in-person; or

(II) via telemedicine using audio and video two-way communication.

(B) The emergency amendment of this rule effective July 31, 2021 at 12:01 A.M. shall be in effect for only 75 days or the duration of the time period that the Governor's disaster declaration of March 13, 2020 in response to the COVID-19 pandemic is in effect, whichever is shorter.

(2) Treatment for Acute Pain. For purposes of this rule, acute pain has the same definition as used in §170.2(2) of this title. Telemedicine medical services may be used for the treatment of acute pain with scheduled drugs, unless otherwise prohibited under federal and state law.

~~[(A) Treatment of chronic pain with scheduled drugs through use of telemedicine medical services is prohibited, unless otherwise allowed under federal and state law.]~~

~~[(B) Treatment of acute pain with scheduled drugs through use of telemedicine medical services is allowed, unless otherwise prohibited under federal and state law.]~~

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

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Texas Medical Board

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For further information, please call: (512) 658-9691



## PART 11. TEXAS BOARD OF NURSING

### CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

#### 22 TAC §217.24

Introduction. The Texas Board of Nursing (Board) adopts emergency amendments to §217.24(e), relating to *Telemedicine Medical Service Prescriptions*, pursuant to a finding of imminent peril to the public health, safety, and welfare, which requires adoption in fewer than thirty (30) days' notice, as authorized by Tex. Gov't. Code §2001.034.

#### Background.

On March 13, 2020, the Governor of the State of Texas certified COVID-19 as posing an imminent threat of disaster to the public health and safety and declared a state of disaster in all counties of Texas. On March 23, 2020, the Office of the Governor granted a waiver of 22 Texas Administrative Code §217.24(e), which prohibits an advanced practice registered nurse (APRN)

from treating chronic pain with scheduled drugs through the use of telemedicine medical services, unless otherwise permitted under federal and state law. The waiver, however, expired on June 6, 2020.

The Board held a public meeting on June 8, 2020, to consider the adoption of an emergency rule to permit APRNs to treat chronic pain with scheduled drugs through the use of telemedicine medical services under certain conditions during the COVID-19 pandemic. At the conclusion of the meeting, the Board voted to adopt the emergency amendments to 22 Texas Administrative Code §217.24(e). The emergency amendments took effect June 8, 2020; were published in the *Texas Register* on June 19, 2020; and expired on July 7, 2020.

Because the continuation of the effects of the COVID-19 pandemic necessitated the continuation of an emergency rule beyond the July 7, 2020 expiration date, the Board held a public meeting on July 6, 2020, and again adopted emergency amendments to §217.24(e). The emergency amendments took effect July 7, 2020; were published in the *Texas Register* on July 17, 2020; and expired on September 4, 2020.

The Board again considered the need for the adoption of emergency amendments to §217.24(e) in a public meeting on September 4, 2020 and voted to adopt emergency amendments to §217.24(e) at the conclusion of that meeting. The emergency amendments took effect September 5, 2020; were published in the *Texas Register* on September 18, 2020; and expired on November 3, 2020.

The Board again considered the need for the adoption of emergency amendments to §217.24(e) in a public meeting on November 4, 2020, and voted to adopt emergency amendments to §217.24(e) at the conclusion of that meeting. The emergency amendments took effect November 4, 2020; were published in the *Texas Register* on November 20, 2020; and expired on January 3, 2021.

The Board again considered the need for the adoption of emergency amendments to §217.24(e) in a public meeting on December 30, 2020, and voted to adopt emergency amendments to §217.24(e) at the conclusion of that meeting. The emergency amendments took effect January 3, 2021; were published in the *Texas Register* on January 15, 2021; and expired on March 3, 2021.

Because the Board determined that the continuation of the effects of the COVID-19 pandemic necessitated the continuation of an emergency rule, the Board voted to adopt emergency amendments to §217.24(e) in a public meeting on February 25, 2021. The emergency amendments took effect March 4, 2021; were published in the *Texas Register* on March 12, 2021; and expired on May 2, 2021.

Because the Board determined that the continuation of the effects of the COVID-19 pandemic necessitated the continuation of an emergency rule, the Board voted to adopt emergency amendments to §217.24(e) in a public meeting on April 29, 2021. The emergency amendments took effect May 3, 2021; were published in the *Texas Register* on May 14, 2021; and expired on July 1, 2021.

Because the Board determined that the continuation of the effects of the COVID-19 pandemic necessitated the continuation of an emergency rule, the Board voted to adopt emergency amendments to §217.24(e) in a public meeting on June 30, 2021. The emergency amendments took effect July 2, 2021; were pub-

lished in the *Texas Register* on July 16, 2021; and will expire on July 31, 2021.

The Board has determined that the continuation of the effects of the COVID-19 pandemic necessitates the continuation of an emergency rule beyond the July 31, 2021, expiration date.

#### Reasoned Justification.

The adoption of emergency amendments to §217.24(e) is immediately necessary to allow APRNs to provide necessary treatment to established patients with chronic pain while mitigating the risk of exposure to COVID-19. Under the emergency amendments, the treatment of chronic pain with scheduled drugs through the use of telemedicine medical services by any means other than via audio and video two-way communication is prohibited, unless certain conditions are met. First, a patient must be an established chronic pain patient of the APRN. Second, the patient must be receiving a prescription that is identical to a prescription issued at the previous visit. Third, the patient must have been seen by the prescribing APRN or physician or health professional as defined in Tex. Occ. Code §111.001(1) in the last 90 days, either in-person or via telemedicine using audio and video two-way communication. These requirements are consistent with the rules adopted by the Texas Medical Board at 22 Texas Administrative Code §174.5 (relating to Issuance of Prescriptions) on an emergency basis and the provisions of federal law that currently permit the use of telemedicine medical services for the prescription of controlled substances during the COVID-19 pandemic.

Further, an APRN must exercise appropriate professional judgment in determining whether to utilize telemedicine medical services for the treatment of chronic pain with controlled substances. In order to ensure that telemedicine medical services are appropriate for the APRN to use, the emergency amendments require an APRN to give due consideration to factors that include, at a minimum, the date of the patient's last in-person visit, patient co-morbidities, and occupational related COVID-19 risks. These are not the sole, exclusive, or exhaustive factors an APRN should consider under this rule. Further, the emergency amendments only apply to those APRNs whose delegating physicians permit them to issue refills for patients, and the refills are limited to controlled substances contained in Schedules III through V only. If a patient is treated for chronic pain with scheduled drugs through the use of telemedicine medical services as permitted by this rule, the medical records must document the exception and the reason that a telemedicine visit was conducted instead of an in-person visit.

The remaining adopted changes make conforming changes to the definitions of the terms *acute pain* and *chronic pain*, consistent with the definition used by the Texas Medical Board, in 22 Texas Administrative Code §170.2(2) and (4) (relating to Definitions).

Statutory Authority. The emergency amendments are adopted under the authority of the Tex. Occ. Code §301.151, which authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing. The emergency amendments are also adopted pursuant to Tex. Gov't. Code §2001.034 and §2001.036(a)(2) on an emergency basis and with an ex-

pedited effective date because an imminent peril to the public health, safety, or welfare requires adoption on fewer than 30 days' notice.

This emergency adoption also affects Texas Occupations Code Chapter 111.

#### §217.24. *Telemedicine Medical Service Prescriptions.*

(a) - (d) (No change.)

(e) Limitation on Treatment of Chronic Pain. Chronic pain is a legitimate medical condition that needs to be treated, but must be balanced with concerns over patient safety and the public health crisis involving overdose deaths. The Legislature has already put into place laws regarding the treatment of pain and requirements for registration and inspection of pain management clinics. Therefore, the Board has determined clear legislative intent exists for the limitation of chronic pain treatment through a telemedicine medical service.

(1) For purposes of this rule, chronic pain has the same definition as used in 22 Texas Administrative Code §170.2(4) (relating to Definitions). [Treatment of chronic pain with scheduled drugs through use of telemedicine medical services is prohibited, unless otherwise allowed under federal and state law. For purposes of this section, "chronic pain" means a state in which pain persists beyond the usual course of an acute disease or healing of an injury. Chronic pain may be associated with a chronic pathological process that causes continuous or intermittent pain over months or years.]

(A) Telemedicine medical services used for the treatment of chronic pain with scheduled drugs by any means other than via audio and video two-way communication is prohibited, unless a patient:

(i) is an established chronic pain patient of the APRN;

(ii) is receiving a prescription that is identical to a prescription issued at the previous visit; and

(iii) has been seen by the prescribing APRN or physician or health professional as defined in Tex. Occ. Code §111.001(1) in the last 90 days, either:

(I) in-person; or

(II) via telemedicine using audio and video two-way communication.

(B) An APRN, when determining whether to utilize telemedicine medical services for the treatment of chronic pain with controlled substances as permitted by paragraph (1)(A) of this subsection, shall give due consideration to factors that include, at a minimum, the date of the patient's last in-person visit, patient co-morbidities, and occupational related COVID risks. These are not the sole, exclusive, or exhaustive factors an APRN should consider under this rule.

(C) If a patient is treated for chronic pain with scheduled drugs through the use of telemedicine medical services as permitted by paragraph (1)(A) of this subsection, the medical records must document the exception and the reason that a telemedicine visit was conducted instead of an in-person visit.

(2) For purposes of this rule, acute pain has the same definition as used in 22 Texas Administrative Code §170.2(2). Telemedicine medical services may be used for the treatment of acute pain with scheduled drugs, unless otherwise prohibited under federal and state law. [Treatment of acute pain with scheduled drugs through use of telemedicine medical services is allowed, unless otherwise prohibited under federal and state law. For purposes of this section, "acute pain" means the normal, predicted, physiological response to a stimulus, such

as trauma, disease, and operative procedures. Acute pain is time limited.]

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

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## TITLE 25. HEALTH SERVICES

### PART 1. DEPARTMENT OF STATE HEALTH SERVICES

#### CHAPTER 97. COMMUNICABLE DISEASES

##### SUBCHAPTER A. CONTROL OF COMMUNICABLE DISEASES

###### 25 TAC §97.7

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), adopts on an emergency basis in Title 25 Texas Administrative Code, Chapter 97 Communicable Diseases, an amendment to §97.7, concerning an emergency rule in response to COVID-19 in order to reduce the risk of transmission of COVID-19 among children returning to school. 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. DSHS and HHSC accordingly find that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of this amendment to §97.7.

To protect children returning to school and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting an emergency rule amendment to §97.7 to add the COVID-19 disease to the list of diseases requiring exclusion from schools and to provide readmission criteria. The purpose of this amendment is to identify COVID-19 as a disease

that requires exclusion from school and to provide readmission criteria.

###### STATUTORY AUTHORITY

The emergency rulemaking is adopted under Texas Government Code §2001.034 and §531.0055 and Texas Health and Safety Code §81.004 and §81.042. 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 DSHS and for the administration of Texas Health and Safety Code, Chapter 1001. Texas Health and Safety Code §81.004 authorizes the Executive Commissioner of HHSC to adopt rules governing the effective implementation of Chapter 81, Communicable Diseases. Texas Health and Safety Code §81.042 authorizes the Executive Commissioner of HHSC to adopt rules governing school exclusion criteria regarding communicable disease.

The amendment implements Texas Government Code §531.0055, and Texas Health and Safety Code §81.004 and §81.042.

###### §97.7. Diseases Requiring Exclusion from Schools.

(a) The school administrator shall exclude from attendance any child having or suspected of having a communicable condition. Exclusion shall continue until the readmission criteria for the conditions are met. The conditions and readmission criteria are as follows:

- (1) amebiasis--exclude until treatment is initiated;
- (2) campylobacteriosis--exclude until after diarrhea free for 24 hours without the use of diarrhea suppressing medications and fever free for 24 hours without the use of fever suppressing medications;
- (3) chickenpox--exclude until the lesions become dry, or if lesions are not vesicular, until 24 hours have passed with no new lesions occurring;
- (4) common cold--exclude until fever free for 24 hours without the use of fever suppressing medications;
- (5) conjunctivitis, bacterial and/or viral--exclude until permission and/or permit is issued by a physician or local health authority or until symptom free;
- (6) coronavirus disease 2019--exclude and readmit based upon guidance from the Department of State Health Services on its website at <https://dshs.texas.gov/covid19readmission>;
- (7) [(6)] fever--exclude until fever free for 24 hours without use of fever suppressing medications;
- (8) [(7)] fifth disease (erythema infectiosum)--exclude until fever free for 24 hours without the use of fever suppressing medications;
- (9) [(8)] gastroenteritis--exclude until diarrhea free for 24 hours without the use of diarrhea suppressing medications;
- (10) [(9)] giardiasis--exclude until diarrhea free for 24 hours without the use of diarrhea suppressing medications;
- (11) [(10)] hepatitis A--exclude until one week after onset of illness;

(12) [(11)] infections (wounds, skin, and soft tissue)--exclude until drainage from wounds or skin and soft tissue infections is contained and maintained in a clean dry bandage; restrict from situations that could result in the infected area becoming exposed, wet, soiled, or otherwise compromised;

(13) [(12)] infectious mononucleosis--exclude until physician decides or fever free for 24 hours without the use of fever suppressing medications;

(14) [(13)] influenza--exclude until fever free for 24 hours without the use of fever suppressing medications;

(15) [(14)] measles (rubeola)--exclude until four days after rash onset, or in the case of an outbreak, exclude unimmunized child for at least 21 days after the last date the unimmunized child was exposed;

(16) [(15)] meningitis, bacterial--exclude until 24 hours after start of effective treatment and approval by health care provider;

(17) [(16)] meningitis, viral--exclude until fever free for 24 hours without the use of fever suppressing medications;

(18) [(17)] meningococcal infections (invasive disease)--exclude until 24 hours after start of effective treatment and approval by health care provider;

(19) [(18)] mumps--exclude until five days after the onset of swelling;

(20) [(19)] pertussis (whooping cough)--exclude until completion of five days of appropriate antibiotic therapy, or until 21 days have passed since cough onset, whichever is earlier;

(21) [(20)] ringworm--none, if infected area can be completely covered by clothing or a bandage, otherwise exclude until treatment has begun;

(22) [(21)] rubella (German measles)--exclude until seven days after rash onset, or in the case of an outbreak, unimmunized children should be excluded until at least three weeks after the onset of the last rash;

(23) [(22)] salmonellosis--exclude until diarrhea free for 24 hours without the use of diarrhea suppressing medications and fever free for 24 hours without the use of fever suppressing medications;

(24) [(23)] scabies--exclude until treatment has begun;

(25) [(24)] shigellosis--exclude until diarrhea free for 24 hours without the use of diarrhea suppressing medications and fever free for 24 hours without the use of fever suppressing medications;

(26) [(25)] streptococcal sore throat and scarlet fever--exclude until 24 hours from time antibiotic treatment was begun and fever free for 24 hours without the use of fever suppressing medications;

(27) [(26)] tuberculosis disease (suspected or confirmed), pulmonary or laryngeal--exclude until antibiotic treatment has begun and a physician's certificate or health permit obtained; and

(28) [(27)] typhoid fever--exclude until diarrhea free for 24 hours without the use of diarrhea suppressing medications and fever free for 24 hours without the use of fever suppressing medications; and 3 consecutive stool specimens have tested negative for *Salmonella Typhi*.

(b) The school administrator shall exclude from attendance any child having or suspected of having a communicable disease designated by the Commissioner of the Department of State Health Services (commissioner) as cause for exclusion until one of the criteria listed in subsection (c) of this section is fulfilled.

(c) Any child excluded for reason of communicable disease may be readmitted, as determined by the health authority, by:

(1) submitting a certificate of the attending physician, advanced practice nurse, or physician assistant attesting that the child does not currently have signs or symptoms of a communicable disease or to the disease's non-communicability in a school setting;

(2) submitting a permit for readmission issued by a local health authority; or

(3) meeting readmission criteria as established by the commissioner.

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

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## 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 K. EMERGENCY RULES FOR THE ICF/IID PROGRAM

##### 26 TAC §261.352

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) adopts on an emergency basis in Title 26 Texas Administrative Code, Chapter 261, Intermediate Care Facilities For Individuals With An Intellectual Disability Or Related Conditions (ICF/IID) Program--Contracting, new §261.352, concerning an emergency rule related to leave during the COVID-19 pandemic. As authorized by 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 §261.352, Emergency Rule Related to Leave During the COVID-19 Pandemic.

To protect individuals enrolled in the ICF/IID Program and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting an emergency rule to pay a program provider for reserving a bed in a facility for an individual who takes COVID-19 therapeutic leave to reduce the risk of COVID-19 transmission. The emergency rule sets forth the requirements that a program provider must meet to receive payment (sometimes referred to as a bed hold payment) for an individual's COVID-19 therapeutic leave. The emergency rule allows a program provider to request payment for COVID-19 therapeutic leave by making an attestation regarding its net profit, which was not allowed under 26 TAC §261.351, effective January 29, 2021.

The emergency rule provides that HHSC recoups payments from the program provider if HHSC determines the program provider did not comply with the rule or makes an attestation that is inaccurate.

#### STATUTORY AUTHORITY

The emergency rulemaking is 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, authorizes the Executive Commissioner of HHSC to adopt rules to administer federal funds and plan and direct the Medicaid program. Texas Human Resources Code §32.021 authorizes the Executive Commissioner of HHSC to adopt rules governing the proper and efficient operation of the Medicaid program.

The new section implements Texas Government Code §531.0055 and §531.021, and Texas Human Resources Code §32.021.

#### §261.352. Emergency Rule Related to Leave During the COVID-19 Pandemic.

(a) The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise.

(1) COVID-19 therapeutic leave--Leave described in a state plan amendment approved by the Centers for Medicare and Medicaid Services for payment to providers for reserving a bed in a facility for an individual who takes a temporary leave of absence to reduce the risk of COVID-19 transmission.

(2) Extended therapeutic leave--Leave described in §261.226(c) of this chapter (relating to Leaves).

(3) Facility--An intermediate care facility for individuals with an intellectual disability or related conditions.

(4) Full day--A 24-hour period extending from midnight to midnight.

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

(6) Individual--A person enrolled in the ICF/IID Program.

(7) Net profit--Revenue minus expenses.

(8) Program provider--An entity with whom HHSC has a provider agreement.

(9) Provider agreement--A written agreement between HHSC and a program provider that obligates the program provider to deliver ICF/IID Program services.

(10) Revenue--This term does not include a loan or grant that a program provider is required to repay.

(11) Special leave--Leave described in §261.226(d) of this chapter.

(12) Staff member--An employee or contractor of a program provider.

(13) Therapeutic leave--Leave described in §261.226(b) of this chapter.

(b) If an individual is absent from a facility for one full day and such absence is not during a therapeutic, extended therapeutic, COVID-19 therapeutic, or special leave, the program provider must discharge the individual from the facility.

(c) COVID-19 therapeutic leave is in addition to the days allowed for therapeutic leave or extended therapeutic leave.

(d) If an individual takes COVID-19 therapeutic leave, the program provider must ensure that the individual's individual program plan specifies that the individual was absent from the facility to reduce the risk of COVID-19 transmission.

(e) For a program provider to receive payment for COVID-19 therapeutic leave, the program provider must submit a completed HHSC bed hold payment attestation form, as described in subsection (f) or (g) of this section, and a request for payment for COVID-19 therapeutic leave to HHSC no later than 60 days after the effective date of this section. The program provider must submit the HHSC bed hold payment attestation form on or before the date the program provider submits the request for payment.

(f) By signing an HHSC bed hold payment attestation form that contains a revenue comparison, a program provider:

(1) acknowledges that HHSC may recoup an overpayment made to the program provider if:

(A) HHSC determines, based on a federal or state audit or any other authorized third-party review, that the program provider:

(i) received an inappropriate payment, such as payment for more days than allowed for COVID-19 therapeutic leave;

(ii) received duplicate payments for services, such as payment for COVID-19 therapeutic leave for a day on which HHSC paid the program provider for therapeutic, extended therapeutic, or special leave; or

(iii) received funding from any other source to pay for the days of COVID-19 therapeutic leave for which payment is requested; or

(B) the program provider's revenue for one or more of the quarters described in the state plan amendment exceeded its revenue:

(i) during the quarter of December 2019 through February 2020; or

(ii) during an alternative pre-pandemic period authorized in writing by HHSC; and

(2) attests that, during the time period for which payment is requested, the program provider:

(A) did not lay off any staff members who were working on March 19, 2020, due to lack of work, not work performance; and

(B) maintained staff member wages and benefits at least at the levels that existed on March 19, 2020.

(g) By signing an HHSC bed hold payment attestation form that contains a net profit comparison, a program provider:

(1) acknowledges that HHSC may recoup an overpayment made to the program provider if:

(A) HHSC determines, based on a federal or state audit or any other authorized third-party review, that the program provider:

(i) received an inappropriate payment, such as payment for more days than allowed for COVID-19 therapeutic leave;

(ii) received duplicate payments for services, such as payment for COVID-19 therapeutic leave for a day on which HHSC paid the program provider for therapeutic, extended therapeutic, or special leave; or

(iii) received funding from any other source to pay for the days of COVID-19 therapeutic leave for which payment is requested; or

(B) the program provider's net profit for one or more of the quarters described in the state plan amendment exceeded its net profit:

(i) during the quarter of December 2019 through February 2020; or

(ii) during an alternative pre-pandemic period authorized in writing by HHSC; and

(2) attests that, during the time period for which payment is requested, the program provider:

(A) did not lay off any staff members who were working on March 19, 2020, due to lack of work, not work performance; and

(B) maintained staff member wages and benefits at least at the levels that existed on March 19, 2020.

(h) When submitting a request for payment, a program provider must use the designated leave code that identifies the request as payment for COVID-19 therapeutic leave.

(i) HHSC recoups payment made for COVID-19 therapeutic leave from a program provider if HHSC determines, based on a federal, state, or third-party review or audit, that:

(1) the program provider has not complied with this section;

(2) one or more of the circumstances described in subsection (f)(1) or (g)(1) of this section exists; or

(3) the program provider makes an attestation described in subsection (f)(2) or (g)(2) of this section that is inaccurate.

(j) An HHSC bed hold payment attestation form covers payments for COVID-19 therapeutic leave requested only for the dates identified on the form. A program provider must submit a separate form for each provider agreement that the program provider has with HHSC.

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

Filed with the Office of the Secretary of State on July 29, 2021.

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Karen Ray

Chief Counsel

Health and Human Services Commission

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For further information, please call: (512) 438-4287

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