TO: Medical Care Advisory Committee

DATE: August 24, 2017

FROM: Bobby Schmidt, Manager
DADS Regulatory Services

Agenda Item No.: 10

SUBJECT: Nursing Facility Applications and Informal Reviews

Amendments to: Texas Administrative Code Title 40, Part 1, Chapter 19, Nursing Facility Requirements Related to Licensure and Medicaid Requirements, §19.212, relating to Time Periods for Processing License Applications, and §19.2322, relating to Medicaid Bed Allocation Requirements

BACKGROUND: ☐ Federal Requirement ☐ Legislative Requirement ☒ Other: (e.g., HHSC Initiative)

The proposed amendments require HHSC to receive a nursing facility license application at least 60 days prior to the requested issuance date of the license, rather than within 60 days of that date. The proposal also allows HHSC to pend an application for up to six months to allow an applicant to comply with licensure requirements and to pend an application for renewal if HHSC is proposing to deny or revoke the facility's license. The proposal allows an existing nursing facility to request an informal review when it has been denied an increase in Medicaid bed allocations or was subject to decertification or de-allocation of Medicaid beds.

ISSUES AND ALTERNATIVES:

There are no outstanding issues or concerns with implementation of the proposed amendments.

STAKEHOLDER INVOLVEMENT:

External stakeholders were provided a copy of the proposal via Gov-delivery and email on April 3, 2017. In addition, a public meeting was held on April 10, 2017, at the John H. Winters Building to provide an opportunity for external stakeholders to comment and ask questions regarding the proposal. DADS received no comments from external stakeholders during the meeting.

FISCAL IMPACT:

☒ None ☐ Yes

RULE DEVELOPMENT SCHEDULE:

August 24, 2017	Present to the Medical Care Advisory Committee
September 7, 2017	Present to HHSC Executive Council
October 2017	Publish proposed rules in *Texas Register*
December 2017	Publish adopted rules in *Texas Register*
January 2018	Effective date

REQUESTED ACTION: (Check appropriate box)

☒ The MCAC recommends approval of the proposed rules for publication.
☐ Information Only

TITLE 40	SOCIAL SERVICES AND ASSISTANCE
PART 1	DEPARTMENT OF AGING AND DISABILITY SERVICES
CHAPTER 19	NURSING FACILITY REQUIREMENTS RELATED TO LICENSURE AND MEDICAID CERTIFICATION
SUBCHAPTER C	NURSING FACILITY LICENSURE APPLICATION PROCESS
§19.212	Time Periods for Processing License Applications
SUBCHAPTER X	REQUIREMENTS FOR MEDICAID-CERTIFIED FACILITIES
§19.2322	Medicaid Bed Allocation Requirements

The Texas Health and Human Services Commission (HHSC) proposes amendments to Title 40, §19.212, concerning Time Periods for Processing License Applications, and §19.2322, concerning Medicaid Bed Allocation Requirements, in Chapter 19, Nursing Facility Requirements Related to Licensure and Medicaid Certification.

BACKGROUND AND PURPOSE

The proposed rule amendments are the result of an HHSC Medicaid Bed Allocation Audit and an HHSC internal audit requested by DADS Regulatory Services Licensing and Credentialing Section. The proposal amends rules regarding the nursing facility licensure process at HHSC and adds new rules regarding timeframes and additional circumstances for pending an application for renewal. These changes would allow a nursing facility time to comply with licensure requirements while an application is pending. The proposal also amends rules to allow a nursing facility to request an informal review regarding decisions related to Medicaid bed allocations. These changes would provide a mechanism for a nursing facility to contest HHSC decisions regarding de-allocated or decertified Medicaid beds, not just applications for waivers and exemptions.

SECTION-BY-SECTION SUMMARY

The proposed amendment of §19.212, Time Period for Processing License Applications, requires HHSC to receive a license application at least 60 days prior to the requested issuance date of the license, rather than within 60 days of that date. The proposal also adds that HHSC may pend an application for up to six months to allow an applicant to comply with licensure requirements. In addition, the proposal adds that HHSC can pend an application for renewal if HHSC is proposing to deny or revoke the facility's license.

The proposed amendment of §19.2322(k), Informal Review Procedures, allows an existing nursing facility to request an informal review when it has been denied an increase in Medicaid bed allocations or was subject to decertification or de-allocation of Medicaid beds.

In both sections, all references to DADS are changed to HHSC to reflect the transfer of functions from DADS to HHSC in accordance with Senate Bill 200, 84th Legislature, 2015.

FISCAL NOTE

David Cook, Deputy Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

HHSC has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because the amendments do not impose any economic requirements on small businesses or micro-businesses.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to person who are required to comply with the sections as proposed.

There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Mary T. Henderson, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public will benefit from the adoption of the rules. The anticipated public benefit will be the provision of time to allow providers to comply with licensure requirements and, therefore, maintain continuity of care for residents. In addition, the amendments provide an appropriate mechanism for facilities to contest agency actions regarding Medicaid bed allocation other than decisions about applications for waiver and exemptions.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that this 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

Questions about the content of this proposal may be directed to Sharon Wallace at (210) 619-8292. Written comments on the proposal may be submitted to Rules Coordination Office, P. O. Box 149030, Mail Code H600, Austin, Texas 78714-9030, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to HHSCRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to HHSC before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed by midnight on the last day of the comment period. When submitting comments, please indicate “Comments on Proposed Rule 40R011” in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of health and human services; Texas Health and Safety Code, §242.031, which requires licensing of nursing facilities; and Texas Human Resources Code, §32.0213, which authorizes nursing facility Medicaid bed certification and decertification.

The amendments implement Texas Government Code, §531.0055; Texas Health and Safety Code, §242.037; and Texas Human Resources Code, §32.0213.

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

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 40	SOCIAL SERVICES AND ASSISTANCE
PART 1	DEPARTMENT OF AGING AND DISABILITY SERVICES
CHAPTER 19	NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION
SUBCHAPTER C	NURSING FACILITY LICENSURE APPLICATION PROCESS

§19.212. Time Periods for Processing License Applications.

(a) The Health and Human Services Commission (HHSC) [~~Texas Department of Human Services (DHS)~~] will process [~~only~~] applications received at least [~~within~~] 60 days prior to the requested date of the issuance of the license.

(b) An application is complete when all requirements for licensing have been met, including compliance with standards. If an inspection for compliance is required, the application is not complete until the inspection has occurred, reports have been reviewed, and the applicant complies with the standards.

(c) If the application is postmarked by the filing deadline and received by HHSC within 15 days of the postmark, the application is [~~will be~~] considered to be timely filed [~~if received in the Licensing Section of the state office of Long-Term Care-Regulatory Texas Department of Human Services, within 15 days of the postmark~~].

(d) HHSC notifies a facility [~~Long-Term Care-Regulatory will notify facilities~~] within 30 days of receipt of the application if any of the following applications are incomplete:

(1) initial application;

(2) change of ownership;

(3) renewal; and

(4) increase in capacity.

(e) A [~~Except as provided in the following sentence, a~~] license will be issued

or denied within 30 days of the receipt of a complete application or within 30 days prior to the expiration date of the license. [~~However, DHS may pend action on an application for renewal of a license for up to six months if the facility is subject to a proposed or pending licensure termination action on or within 30 days prior to the expiration date of the license. The issuance of the license constitutes DHS's official written notice to the facility of the acceptance and filing of the application.~~]

(f) HHSC may pend action for up to six months on an application:

(1) of any type listed in subsection (d) of this section to give an applicant time to comply with licensure requirements imposed by HHSC; or

(2) for renewal of the license if the facility is subject to a proposed denial or pending licensure revocation action.

(g) [~~(f)~~] Criteria for reimbursement of fees are as follows.

(1) In the event the application is not processed in the time periods as stated, the applicant has a right to request of the program director full reimbursement of all filing fees paid in that particular application process. If the program director does not agree that the established periods have been violated or finds that good cause existed for exceeding the established periods, the request will be denied. Good cause for exceeding the period established is considered to exist if:

(A) the number of applications to be processed exceeds by 15% or more the number processed in the same calendar quarter of the preceding year;

(B) another public or private entity used in the application process caused the delay; or

(C) other conditions existed giving good cause for exceeding the established periods.

(2) If the request for full reimbursement is denied, the applicant may appeal directly to the executive [~~DHS~~] commissioner for resolution of the dispute. The applicant must send a written statement to the executive commissioner describing the request for reimbursement and the reasons for it. The program also may send a written statement to the executive commissioner describing the program's reasons for denying reimbursement. The executive commissioner makes a timely decision concerning the appeal and notifies the applicant and the program in writing

of the decision.

TITLE 40 SOCIAL SERVICES AND ASSISTANCE
PART 1 DEPARTMENT OF AGING AND DISABILITY SERVICES
CHAPTER 19 NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION
SUBCHAPTER X REQUIREMENTS FOR MEDICAID-CERTIFIED FACILITIES

§19.2322. Medicaid Bed Allocation Requirements.

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

(1) Applicant--An individual or entity requesting a bed allocation waiver or exemption.

(2) Assignment of rights--The Health and Human Services Commission (HHSC) [~~Department of Aging and Disability Services (DADS)~~] conveyance of a specific number of allocated Medicaid beds from a nursing facility or entity to another entity for purposes of constructing a new nursing facility or for any other use as authorized by this chapter.

(3) Bed allocation--The process by which HHSC [~~DADS~~] controls the number of nursing facility beds that are eligible to become Medicaid-certified in each nursing facility.

(4) Bed certification--The process by which HHSC [~~DADS~~] certifies compliance with state and federal Medicaid requirements for a specified number of Medicaid beds allocated to a nursing facility.

(5) County or precinct occupancy rate--The number of residents, regardless of source of payment, occupying certified Medicaid beds in a county divided by the number of Medicaid beds allocated in the county, including Medicaid beds that are certified and Medicaid beds that have been allocated but are not certified. In the four most populous counties in the state, the occupancy rate is calculated for each county commissioner precinct.

(6) Licensee--The individual or entity, including a controlling person, that is:

(A) an applicant for licensure by HHSC [~~DADS~~] under Chapter 242 of the Texas Health and Safety Code and for Medicaid certification;

(B) licensed by HHSC [~~DADS~~] under Chapter 242 of the Texas Health

and Safety Code; or

(C) licensed under Chapter 242 of the Texas Health and Safety Code and holds the contract to provide Medicaid services.

(7) Lien holder--The individual or entity that holds a lien against a physical plant.

(8) Multiple-facility owner--An individual or entity that owns, controls, or operates under lease two or more nursing facilities within or across state lines.

(9) Occupancy rate--The number of residents occupying certified Medicaid beds divided by the number of certified Medicaid beds in a nursing facility.

(10) Open solicitation period--A period during which an individual or entity may apply for an allocation of Medicaid beds in a high-occupancy county or precinct.

(11) Physical plant--The land and attached structures to which beds are allocated or for which an application for bed allocation has been submitted.

(12) Property owner--The individual or entity that owns a physical plant.

(13) Transfer of beds-- HHSC [~~DADS~~] conveyance of a specific number of allocated Medicaid beds from an existing nursing facility or entity to another existing licensed nursing facility. The nursing facility may use the transferred Medicaid beds to increase the number of Medicaid-certified beds currently licensed or to increase the number of Medicaid-certified beds when additional licensed beds are added to the nursing facility in the future.

(b) Purpose. The purpose of this section is to control the number of Medicaid beds that HHSC [~~DADS~~] contracts, to improve the quality of resident care by selective and limited allocation of Medicaid beds, and to promote competition.

(c) Bed allocation general requirements. The allocation of Medicaid beds is an opportunity for the property owner or the lessee of a nursing facility to obtain a Medicaid nursing facility contract for a specific number of Medicaid-certified beds.

(1) Medicaid beds are allocated to a nursing facility and remain at the physical plant where they were originally allocated, unless HHSC [~~DADS~~] transfers or assigns the beds.

(2) When HHSC [~~DADS~~] allocates Medicaid beds to a nursing facility as a result of actions by the licensee, HHSC [~~DADS~~] requires that the beds remain allocated to the physical plant, even when the licensee ceases operating the nursing facility, unless HHSC [~~DADS~~] assigns or transfers the beds.

(3) Notwithstanding any language in subsections (f) and (g) of this section and the fact that applicants for bed allocation waivers and exemptions may be licensees or property owners, HHSC [~~DADS~~] allocates beds to the physical plant and the owner of that property controls the Medicaid beds subject to HHSC [~~DADS~~] rules and requirements and all valid physical plant liens.

(d) Control of beds. Except as specified in this section, HHSC [~~DADS~~] does not accept applications for a Medicaid contract for nursing facility beds from any nursing facility that was not granted:

(1) a valid certificate of need (CON) by the Texas Health Facilities Commission before September 1, 1985;

(2) a waiver or exemption approved by the Department of Human Services before January 1, 1993; or

(3) a valid order that had the effect of authorizing the operation of the nursing facility at the bed capacity for which participation is sought.

(e) Level of acceptable care. Unless specifically exempted from this requirement, applicants and controlling persons of an applicant for Medicaid bed allocation waivers or exemptions must comply with level of acceptable care requirements. Level of acceptable care requirements apply only in determining bed allocation waiver and exemption eligibility and have no effect on other sections of this chapter.

(1) HHSC [~~DADS~~] determines a waiver or exemption applicant or a controlling person of an applicant complies with level of acceptable care requirements if, within the preceding 24 months, the applicant or controlling person:

(A) has not received any of the following sanctions:

(i) termination of Medicaid or Medicare certification;

(ii) termination of Medicaid contract;

(iii) denial, suspension, or revocation of a nursing facility license;

(iv) cumulative Medicaid or Medicare civil monetary penalties totaling more than $5,000 per facility;

(v) civil penalties pursuant to §242.065 of the Texas Health and Safety Code; or

(vi) denial of payment for new admissions;

(B) does not have a pattern of substantial or repeated licensing and Medicaid sanctions, including administrative penalties or other sanctions; and

(C) does not have a condition listed in §19.214(a) of this chapter (relating to Criteria for Denying a License or Renewal of a License).

(2) HHSC [~~DADS~~] considers the criteria in paragraph (1) of this subsection to determine if local facilities provide a level of acceptable care in counties, communities, ZIP codes or other geographic areas that are the subject of a waiver application. HHSC [~~DADS~~] only considers sanctions that are final and are not subject to appeal when determining if a local facility complies with level of acceptable care requirements.

(3) Nursing facilities that have received any of the sanctions listed in paragraph (1) of this subsection within the previous 24 months are not eligible for an allocation of Medicaid beds under subsection (h) of this section or an allocation of additional Medicaid beds under subsection (f) of this section. In the case of sanctions against the nursing facility to which the beds would be allocated that are appealed, either administratively or judicially, an application will be suspended until the appeal has been resolved. Sanctions that have been administratively withdrawn or were subsequently reversed upon administrative or judicial appeal are not considered.

(4) If an applicant for an allocation of additional Medicaid beds or a controlling person of an applicant is a multiple-facility owner or a multiple-facility owner owns the applicant, the multiple-facility owner must demonstrate an overall record of complying with level of acceptable care requirements. HHSC [~~DADS~~] considers the number of facilities that have received sanctions listed in paragraph (1) of this subsection in relation to the number of facilities that the multiple-facility owner owns to determine if a multiple-facility owner meets level of acceptable care requirements. HHSC [~~DADS~~] only considers sanctions that are final and are not subject to appeal

when determining whether the multiple-facility owner's facilities not receiving the new bed allocation comply with level of care requirements.

(5) When the applicant is a licensee that has operated a nursing facility less than 24 months, the nursing facility must establish at least a 12-month compliance record immediately preceding the application in which the nursing facility has not received any of the sanctions listed under paragraph (1) of this subsection.

(6) When the applicant has no history of operating nursing facilities, HHSC [~~DADS~~] will review the compliance record of health-care facilities operated, managed, or otherwise controlled by controlling parties of the applicant. If a controlling party or the applicant has never operated, managed, or otherwise controlled any health-care facilities, a compliance review is not required.

(7) The executive commissioner, or the executive commissioner's designee, may make an exception to any of the requirements in this subsection if the executive commissioner or the executive commissioner's designee determines the needs of Medicaid recipients in a local community will be served best by granting a Medicaid bed allocation waiver or exemption. In determining whether to make an exception to the requirements, the executive commissioner or the executive commissioner's designee may consider the following:

(A) the overall compliance record of the waiver or exemption applicant;

(B) the current availability of Medicaid beds in facilities that comply with level of acceptable care requirements in the local community;

(C) the level of support for the waiver or exemption from the local community;

(D) the way a waiver or exemption will improve the overall quality of care for nursing facility residents; and

(E) the age and condition of nursing facility physical plants in the local community.

(f) Exemptions. HHSC [~~DADS~~] may grant an exemption from the requirements in subsection (d) of this section. All exemption actions must comply with the requirements in this subsection and with requirements of the Centers for Medicare & [~~and~~] Medicaid Services (CMS) regarding bed

capacity increases and decreases. When a bed allocation exemption is approved, the licensee must comply with the requirements in §19.201 of this chapter (relating to Criteria for Licensing) at the time of licensure and Medicaid certification of the new beds or nursing facility.

(1) Replacement Medicaid nursing facilities and beds. An applicant may request that HHSC [~~DADS~~] approve replacement of allocated Medicaid beds by the construction of one or more new nursing facilities.

(A) The applicant must own the physical plant where the beds are allocated or possess a valid assignment of rights to the Medicaid beds.

(B) The applicant must obtain written approval by all lien holders of the physical plant where the beds are allocated before requesting HHSC [~~DADS~~] approval to relocate the Medicaid beds to the replacement facility if the replacement facility will be constructed at a different address than the current facility. The applicant must submit the lien holder approval with the replacement nursing facility request. If the physical plant where the Medicaid beds are allocated does not have a lien, the applicant must submit a written attestation of that fact with the replacement nursing facility request.

(C) Replacement nursing facility applicants, including those who obtained the rights to the beds through a HHSC [~~DADS~~] assignment of beds, must comply with the level of acceptable care requirements in subsection (e) of this section, unless the applicant for a replacement nursing facility is the current property owner.

(D) HHSC [~~DADS~~] may grant a replacement facility an increase of up to 25 percent of the currently allocated Medicaid beds, if the applicant complies with the level of acceptable care requirements in subsection (e) of this section. HHSC [~~DADS~~] will not transfer or assign the additional allocation of beds until they are certified at the replacement facility.

(E) The physical plant of the replacement nursing facility must be located in the same county in which the Medicaid beds currently are allocated.

(2) Transfer of Medicaid beds. An applicant may request HHSC [~~DADS~~] transfer allocated Medicaid beds certified or previously certified to another physical plant.

(A) The applicant must own the physical plant where the beds are allocated, or the applicant must present HHSC [~~DADS~~] with:

(i) a valid Medicaid bed transfer agreement that specifies the number of additional Medicaid beds the applicant is requesting HHSC [~~DADS~~] allocate to the receiving nursing facility; or

(ii) a valid Medicaid bed assignment that specifies the number of additional Medicaid beds the applicant is requesting HHSC [~~DADS~~] allocate to the receiving nursing facility.

(B) If the Medicaid beds are allocated to a specific physical plant, the applicant must obtain and submit written approval from the property owner and, if the physical plant has a lien, written approval from all lien holders to obtain a HHSC [~~DADS~~] transfer of the Medicaid beds to another facility. If the physical plant where the Medicaid beds are allocated does not have a lien, the applicant must submit a written attestation of that fact with the transfer request.

(C) The receiving licensee must comply with level of acceptable care requirements in subsection (e) of this section.

(D) Both facilities must be located in the same county.

(3) High-occupancy facilities. Medicaid-certified nursing facilities with high occupancy rates may periodically apply to HHSC [~~DADS~~] to receive bed allocation increases.

(A) The occupancy rate of the Medicaid beds of the applicant nursing facility must be at least 90.0 percent for nine of the previous 12 months prior to the application.

(B) The application for additional Medicaid beds may be for no more than 10 percent (rounded to the nearest whole number) of the facility's Medicaid-certified nursing facility beds.

(C) The applicant nursing facility must comply with level of acceptable care requirements in subsection (e) of this section.

(D) The applicant nursing facility may reapply for additional Medicaid beds no sooner than nine months from the date of the previous allocation increase.

(E) Medicaid beds allocated to a nursing facility under this requirement may only be certified at the applicant nursing facility. HHSC [~~DADS~~] does not transfer or assign the additional allocation of beds until they are certified at the applicant nursing facility.

(4) Non-certified nursing facilities. Licensed nursing facilities that do not have Medicaid-certified beds may apply to HHSC [~~DADS~~] for an initial allocation of Medicaid beds.

(A) The application for Medicaid beds may be for no more than 10 percent (rounded to the nearest whole number) of the facility's licensed nursing facility beds.

(B) The applicant nursing facility must comply with level of acceptable care requirements in subsection (e) of this section.

(C) After the applicant nursing facility receives an allocation of Medicaid beds, the facility may apply for additional Medicaid beds in accordance with paragraph (3) of this subsection.

(5) Low-capacity facilities. For purposes of efficiency, nursing facilities with a Medicaid bed capacity of less than 60 may receive additional Medicaid beds to increase their capacity up to a total of 60 Medicaid beds.

(A) The nursing facility must be licensed for less than 60 beds and have a current certification of less than 60 Medicaid beds.

(B) The nursing facility must have been Medicaid-certified before June 1, 1998.

(C) The applicant licensee must comply with level of acceptable care requirements in subsection (e) of this section.

(D) Facilities that have a Medicaid capacity of less than 60 beds due to the loss of Medicaid beds under provisions in subsection (j) of this section are not eligible for this exemption.

(6) Spend-down Medicaid beds. Licensed nursing facilities may apply to HHSC [~~DADS~~] for temporary spend-down Medicaid beds for residents who have "spent down" their resources to become eligible for Medicaid, but for whom no Medicaid bed is available. A HHSC [~~DADS~~] approval of spend-down Medicaid beds allows a nursing facility to exceed temporarily its allocated Medicaid bed capacity.

(A) The applicant nursing facility must have a Medicaid contract with a Medicaid bed capacity of at least 10 percent of licensed capacity authorized in paragraph (4) of this subsection. If the nursing facility is not currently Medicaid-certified, the licensee must be approved for Medicaid certification and obtain a Medicaid contract with a Medicaid bed capacity at least as large

as that authorized in paragraph (4) of this subsection.

(B) All Medicaid or dually certified beds must be occupied by Medicaid or Medicare recipients at the time of application.

(C) The application for a spend-down Medicaid bed must include documentation that the person for whom the spend-down bed is requested:

(i) was not eligible for Medicaid at the time of the resident's most recent admission to the nursing facility; and

(ii) was a resident of the nursing facility for at least the immediate three months before becoming eligible for Medicaid, excluding hospitalizations.

(D) The nursing facility is eligible to receive Medicaid benefits effective the date the resident meets Medicaid eligibility requirements.

(E) The nursing facility must assign a permanent Medicaid bed to the resident as soon as one becomes available.

(F) Facilities with multiple residents in spend-down beds must assign permanent Medicaid beds to those residents in the same order the residents were admitted to spend-down beds.

(G) The assignment of residents in spend-down beds to permanent Medicaid beds must precede the admission of new residents to permanent beds.

(H) The nursing facility must notify HHSC [~~DADS~~] immediately upon the death or permanent discharge of the resident or transfer of the resident to a permanent Medicaid bed. Failure of the nursing facility to notify HHSC [~~DADS~~] of these occurrences in a timely manner is basis for denying applications for spend-down Medicaid beds.

(I) The nursing facility is not required to comply with level of acceptable care requirements in subsection (e) of this section.

(g) Waivers. The executive commissioner or the executive commissioner's designee may grant a waiver of the requirements stated in subsection (d) of this section under certain conditions.

(1) Applicants must meet the following conditions to be eligible for the specific waivers in subsection (h) of this section.

(A) The applicant must meet the level of acceptable care requirement in subsection (e) of this section.

(B) The applicant must submit a complete HHSC [~~DADS~~] waiver application.

(C) At the time of licensure and Medicaid certification of the allocated beds, the licensee must comply with the requirements in §19.201 of this chapter.

(D) A waiver recipient or a subsequent waiver assignee must, at the time of licensure and Medicaid certification, be the property owner or the licensee of the facility where Medicaid beds allocated through the waiver process are certified.

(2) A waiver recipient may request that HHSC [~~DADS~~] approve the assignment of an approved waiver to another entity in accordance with this paragraph. A waiver recipient may request HHSC [~~DADS~~] approval of only one assignment. A waiver assignment is not valid unless and until it is approved by HHSC [~~DADS~~].

(A) The waiver recipient or the owner of the waiver recipient must maintain majority ownership and management control of the assignee.

(B) The assignee must not have an owner or controlling person who was not an owner or controlling person of the waiver recipient.

(C) The assignee must own the physical plant of the waiver facility at the time of licensure and certification (as landlord) or be the licensee at the time of licensure and certification (as the licensed operator). Under either circumstance, the allocated beds are subject to subsection (c) of this section.

(D) The assignee must meet the requirements in subsection (e) of this section regarding level of acceptable care.

(3) A waiver recipient entity may remove a controlling person from ownership of the entity, but the waiver recipient entity must not add an owner after the waiver is approved by HHSC [~~DADS~~]. A change to the ownership of the waiver recipient entity or the waiver assignment entity must be reported to HHSC [~~DADS~~].

(4) HHSC [~~DADS~~] may in its sole discretion determine that a waiver applicant that submits false or fraudulent information is not eligible for a

waiver. HHSC [~~DADS~~] may, in its sole discretion, revoke a waiver issued and decertify Medicaid beds issued based on false or fraudulent information provided by the applicant.

(5) Except as provided in paragraphs (6) - (9) of this subsection, HHSC [~~DADS~~] considers waiver applications in the order in which they are received. A waiver applicant may request that review of its application be deferred until one or more applications submitted after its application has been reviewed. This request must be in writing.

(6) HHSC [~~DADS~~] gives priority to a small house waiver application submitted in accordance with subsection (h)(9) of this section over a pending community needs waiver application submitted in accordance with subsection (h)(2) of this section for the same county. If approved, HHSC [~~DADS~~] includes the small house facility beds when determining the need for a community needs waiver.

(7) During any period in which HHSC [~~DADS~~] is processing a waiver application in accordance with subsection (h)(2), (4), (5), or (9) of this section, HHSC [~~DADS~~] may suspend processing the waiver application for up to six months if HHSC [~~DADS~~] determines the county or precinct occupancy rate of the county or precinct in which the site of the proposed waiver is located is at least 85 percent during at least six of the previous nine months. HHSC [~~DADS~~] calculates the occupancy rate based on the monthly Medicaid occupancy reports submitted to HHSC [~~DADS~~] by Medicaid-certified nursing facilities and includes the occupancy rate of certified Medicaid beds and allocated Medicaid beds that are encumbered for future certification as a result of approval of a waiver or exemption in the subject county or precinct.

(8) HHSC [~~DADS~~] initiates the high occupancy county or precinct waiver process referenced in subsection (h)(1) of this section if HHSC [~~DADS~~] determines requirements for the open solicitation process for a high occupancy county or precinct waiver are met during the temporary suspension period referenced in paragraph (7) of this subsection. HHSC [~~DADS~~] does not process any pending waiver applications in the affected county or precinct until the open solicitation process referenced in subsection (h)(1) of this section is complete.

(9) HHSC [~~DADS~~] continues to process a suspended waiver application in the affected county or precinct if HHSC [~~DADS~~] determines requirements for the open solicitation process of the high occupancy county or precinct waiver are not met during the suspension period referenced in paragraph (7) of this subsection.

(h) Specific waiver types. HHSC [~~DADS~~] may grant a waiver if it determines that Medicaid beds are necessary for the following circumstances.

(1) High occupancy waiver. A high occupancy waiver is designed to meet the needs of counties and certain precincts that have a high county or precinct occupancy rate for multiple months.

(A) HHSC [~~DADS~~] monitors monthly county or precinct occupancy rates. If HHSC [~~DADS~~] determines that a county or precinct occupancy rate equals or exceeds 85 percent for at least nine of the previous twelve months, HHSC [~~DADS~~] may initiate a waiver process by placing a public notice in the Texas Register and the Electronic State Business Daily (ESBD) to announce an open solicitation period.

(B) The public notice announces that HHSC [~~DADS~~] may allocate 90 additional Medicaid beds in the county or precinct.

(C) The notice identifies the county or precinct and the beginning and end dates of the solicitation period. The notice also includes the HHSC [~~DADS~~] address to which the application for additional Medicaid beds must be submitted and specifies that the application must be received by HHSC [~~DADS~~] before the close of business on the end date of the solicitation period.

(D) An applicant for additional Medicaid beds must comply with the level of acceptable care requirements in subsection (e) of this section.

(E) An applicant must submit a complete HHSC [~~DADS~~] waiver application.

(F) At the end of the solicitation period, HHSC [~~DADS~~] determines if an applicant is eligible for additional Medicaid beds. If multiple applicants are eligible, the applicant who will receive the allocation of beds will be chosen by a lottery selection.

(G) If no application for the waiver process is received or if no applicant meets the requirements in this section, HHSC [~~DADS~~] conducts no further solicitation. HHSC [~~DADS~~] closes the process without allocating Medicaid beds.

(H) An applicant that is granted a high occupancy waiver must provide to HHSC [~~DADS~~] a performance bond, surety bond, or an irrevocable letter of credit in the amount of $500,000 payable to HHSC [~~DADS~~] to ensure that the Medicaid beds granted to the applicant under the waiver are certified

within the time periods required by subsection (i)(4)(G) of this section, including any extensions granted under subsection (i)(6) of this section. HHSC [~~DADS~~] will revoke a waiver if the performance bond, surety bond, or irrevocable letter of credit is not provided within 90 days after HHSC [~~DADS~~] approves the waiver application.

(I) If an applicant chooses to provide a performance bond or surety bond instead of an irrevocable letter of credit, the performance bond or surety bond provided under this subchapter must:

(i) be executed by a corporate entity in accordance with Texas Insurance Code, Chapter 3503, Subchapter A;

(ii) be in a form approved by HHSC [~~DADS~~]; and

(iii) clearly and prominently display on the face of the bond:

(I) the name, mailing address, physical address, and telephone number of the surety company or financial institution to which any notice of claim should be sent; or

(II) the toll-free telephone number maintained by the Texas Department of Insurance in accordance with Texas Insurance Code, Chapter 521, Subchapter B, and a statement that the address of the surety company to which any notice of claim should be sent may be obtained from the Texas Department of Insurance by calling the toll-free telephone number.

(J) If an applicant chooses to provide an irrevocable letter of credit, the irrevocable letter of credit must be issued by a banking institution or similar financial institution.

(K) An applicant must notify HHSC [~~DADS~~] at least 60 days in advance if:

(i) the applicant does not intend to renew its performance bond, surety bond, or irrevocable letter of credit on the annual renewal date; or

(ii) the applicant changes the lending institution or surety bond company administering the performance bond, surety bond, or irrevocable letter of credit.

(L) An applicant may choose a performance bond, surety bond, or irrevocable letter of credit and substitute one for the other over the course of development and construction, but regardless of which option is chosen,

the performance bond, surety bond, or irrevocable letter of credit must continue in effect until the facility is certified to participate in the Medicaid program or until paid to HHSC [~~DADS~~] after notice provided in accordance with subparagraph (M) of this paragraph.

(M) A performance bond, surety bond, or irrevocable letter of credit is immediately due and must be paid to HHSC [~~DADS~~] upon receipt of notice from HHSC [~~DADS~~] to the issuer of the performance bond, surety bond, or irrevocable letter of credit that:

(i) the applicant did not comply with subsection (i)(4)(G) of this section, which may include an extension granted under subsection (i)(6) of this section;

(ii) HHSC [~~DADS~~] revokes the applicant's waiver;

(iii) the applicant did not notify HHSC [~~DADS~~] of its intent not to renew the performance bond, surety bond, or irrevocable letter of credit at least 60 days before its automatic annual renewal date; or

(iv) the applicant did not notify HHSC [~~DADS~~] of a change in the lending institution or surety bond company administering the performance bond, surety bond, or irrevocable letter of credit.

(2) Community needs waiver. A community needs waiver is designed to meet the needs of communities that do not have reasonable access to acceptable nursing facility care.

(A) The applicant must submit a demographic or health needs study, prepared by an independent professional experienced at preparing demographic or health needs studies, that documents:

(i) an immediate need for additional Medicaid beds in the community; and

(ii) Medicaid residents in the community do not have reasonable access to acceptable nursing facility care.

(B) The application must include a statement by the preparer of the study that the preparer has no interest, financial or otherwise, in the outcome of the waiver application.

(C) The demographic or health needs study must include at least the following information pertaining to the community's population:

(i) population growth trends;

(ii) population growth trends specific to the elderly, including income or financial condition;

(iii) Medicaid bed occupancy data;

(iv) level of acceptable care provided by local nursing facilities; and

(v) any existing allocated Medicaid beds not currently certified but that could be used for a new Medicaid nursing facility.

(D) The applicant must submit documentation of substantial community support for the new nursing facility or beds.

(E) When determining the immediate need for additional Medicaid beds, and whether residents have reasonable access to acceptable nursing facility care, HHSC [~~DADS~~] considers:

(i) the number and occupancy rate of certified Medicaid beds that comply with level of acceptable care requirements; and

(ii) the number of encumbered Medicaid beds that have been approved by HHSC [~~DADS~~] but are not yet certified.

(F) Replacement beds or waiver beds approved in accordance with subsection (f)(1) or (h) of this section will not be considered in the calculation in subparagraph (D) of this paragraph if the owner of the replacement beds or waiver beds has not purchased land for a new construction site within 24 months after the date HHSC [~~DADS~~] initially approves the replacement request or the waiver for the beds.

(G) HHSC [~~DADS~~] considers an application withdrawn if it is not completed within 90 days after the application is submitted to HHSC [~~DADS~~].

(H) HHSC [~~DADS~~] notifies local nursing facilities when a complete community needs waiver application is received and affords local nursing facilities an opportunity to comment on the waiver application. The notification includes a deadline for submission of comments. HHSC [~~DADS~~] limits subsequent comments during the review process to facilities that submit timely comments in response to the notification of a completed application.

(I) An applicant that is granted a community needs waiver must provide to HHSC [~~DADS~~] a performance bond, surety bond, or an irrevocable letter of credit in the amount of $500,000 payable to HHSC [~~DADS~~] to ensure that the Medicaid beds granted to the applicant under the waiver are certified within the time periods required by subsection (i)(4)(G) of this section, including any extensions granted under subsection (i)(6) of this section. HHSC [~~DADS~~] will revoke a waiver if the performance bond, surety bond, or irrevocable letter of credit is not provided within 90 days after HHSC [~~DADS~~] approves the waiver application.

(J) If an applicant chooses to provide a performance bond or surety bond, instead of an irrevocable letter of credit, the performance bond provided under this subparagraph must:

(i) be executed by a corporate entity in accordance with Texas Insurance Code, Chapter 3503, Subchapter A;

(ii) be in a form approved by HHSC [~~DADS~~]; and

(iii) clearly and prominently display on the face of the bond:

(I) the name, mailing address, physical address, and telephone number of the surety company or financial institution to which any notice of claim should be sent; or

(II) the toll-free telephone number maintained by the Texas Department of Insurance in accordance with Texas Insurance Code, Chapter 521, Subchapter B, and a statement that the address of the surety company to which any notice of claim should be sent may be obtained from the Texas Department of Insurance by calling the toll-free telephone number.

(K) If an applicant chooses to provide an irrevocable letter of credit, the irrevocable letter of credit must be issued by a banking institution or similar financial/lending institution.

(L) An applicant must notify HHSC [~~DADS~~] at least 60 days in advance if:

(i) the applicant does not intend to renew its performance bond, surety bond, or irrevocable letter of credit on the annual renewal date; or

(ii) the applicant changes the lending institution or surety bond company administering the performance bond, surety bond, or irrevocable letter of credit.

(M) An applicant may choose a performance bond, surety bond, or irrevocable letter of credit, and may substitute one for the other over the course of development and construction, but regardless of which option is chosen, the performance bond, surety bond, or irrevocable letter of credit must continue in effect until the facility is certified to participate in the Medicaid program; or until paid to HHSC [~~DADS~~] after notice provided in accordance with subparagraph (N) of this paragraph.

(N) A performance bond, surety bond, or irrevocable letter of credit is immediately due and must be paid to HHSC [~~DADS~~] upon receipt of notice from HHSC [~~DADS~~] to the issuer of the performance bond, surety bond, or irrevocable letter of credit that:

(i) the applicant did not comply with subsection (i)(4)(G) of this section, which may include an extension granted under subsection (i)(6) of this section;

(ii) HHSC [~~DADS~~] revokes the applicant's waiver;

(iii) the applicant did not notify HHSC [~~DADS~~] of its intent not to renew the performance bond, surety bond, or irrevocable letter of credit at least 60 days before its automatic annual renewal date; or

(iv) the applicant did not notify HHSC [~~DADS~~] of a change in the lending institution or surety bond company administering the performance bond, surety bond, or irrevocable letter of credit.

(3) Criminal justice waiver. The criminal justice waiver is designed to meet the needs of the Texas Department of Criminal Justice (TDCJ). The applicant must document that:

(A) the waiver is needed to meet the identified and determined nursing facility needs of TDCJ; and

(B) the new nursing facility is approved by TDCJ to serve persons under their supervision who have been released on parole, mandatory supervision, or special needs parole in accordance with Texas Government Code, Chapter 508, Parole and Mandatory Supervision.

(4) Economically disadvantaged waiver. The economically disadvantaged waiver is designed to meet the needs of residents of ZIP codes located in communities where a majority of residents have an average income below the countywide average income and do not have reasonable access to acceptable nursing facility care.

(A) The applicant must submit a demographic or health needs study, prepared by an independent professional experienced at preparing demographic or health needs studies that documents:

(i) the ZIP code in which the new nursing facility will be constructed has a population with an income that is at least 20 percent below the average income of the county according to the most recent U.S. census or more recent census projection;

(ii) an immediate need for additional Medicaid beds in the ZIP code in which the new nursing facility will be constructed; and

(iii) residents in the ZIP code in which the nursing facility or beds will be located do not have reasonable access to acceptable nursing facility care.

(B) The application must include a statement by the preparer of the study that the preparer has no interest, financial or otherwise, in the outcome of the waiver application.

(C) The demographic or health needs study must include at least the following information pertaining to the community's population:

(i) population growth trends;

(ii) population growth trends specific to the elderly, including income or financial condition;

(iii) Medicaid bed occupancy data;

(iv) level of acceptable care provided by local facilities; and

(v) any existing allocated Medicaid beds not currently certified but could be used for a new Medicaid nursing facility.

(D) When determining the immediate need for additional Medicaid beds, and whether residents have reasonable access to acceptable nursing facility care, HHSC [~~DADS~~] considers:

(i) the number and occupancy rate of certified Medicaid beds that comply with level of acceptable care requirements; and

(ii) the number of encumbered Medicaid beds that have been approved by HHSC [~~DADS~~] but are not yet certified.

(E) Replacement beds or waiver beds approved in accordance with subsection (f)(1) or (h) of this section will not be considered in the calculation in subparagraph (D) of this paragraph if the owner of the replacement beds or waiver beds has not purchased land for a new construction site within 24 months after the date HHSC [~~DADS~~] initially approves the replacement request or the waiver for the beds.

(F) HHSC [~~DADS~~] considers an application withdrawn if it is not completed within 90 days after the application is submitted to HHSC [~~DADS~~].

(G) HHSC [~~DADS~~] notifies local nursing facilities when a complete economically disadvantaged waiver application is received and affords local nursing facilities an opportunity to comment on the waiver application. The notification includes a deadline for submission of comments. HHSC [~~DADS~~] limits subsequent comments during the review process to facilities that submit timely comments in response to the notification of a completed application.

(H) An applicant that is granted an economically disadvantaged waiver must provide to HHSC [~~DADS~~] a performance bond, surety bond, or an irrevocable letter of credit in the amount of $500,000 payable to HHSC [~~DADS~~] to ensure that the Medicaid beds granted to the applicant under the waiver are certified within the time periods required by subsection (i)(4)(G) of this section, including any extensions granted under subsection (i)(6) of this section. HHSC [~~DADS~~] will revoke a waiver if the performance bond, surety bond, or irrevocable letter of credit is not provided within 90 days after HHSC [~~DADS~~] approves the waiver application.

(I) If an applicant chooses to provide a performance bond or surety bond instead of an irrevocable letter of credit, the performance bond provided under this subparagraph must:

(i) be executed by a corporate entity in accordance with Texas Insurance Code, Chapter 3503, Subchapter A;

(ii) be in a form approved by HHSC [~~DADS~~]; and

(iii) clearly and prominently display on the face of the bond:

(I) the name, mailing address, physical address, and telephone number of the surety company or financial institution to which any notice of claim should be sent; or

(II) the toll-free telephone number maintained by the Texas Department of Insurance in accordance with Texas Insurance Code, Chapter 521, Subchapter B, and a statement that the address of the surety company to which any notice of claim should be sent may be obtained from the Texas Department of Insurance by calling the toll-free telephone number.

(J) If an applicant chooses to provide an irrevocable letter of credit, the irrevocable letter of credit must be issued by a banking institution or similar financial institution.

(K) An applicant must notify HHSC [~~DADS~~] at least 60 days in advance if:

(i) the applicant does not intend to renew its performance bond, surety bond, or irrevocable letter of credit on the annual renewal date; or

(ii) the applicant changes the lending institution or surety bond company administering the performance bond, surety bond, or irrevocable letter of credit.

(L) An applicant may choose a performance bond, surety bond, or irrevocable letter of credit, and may substitute one for the other over the course of development and construction, but regardless of which option is chosen, the performance bond, surety bond, or irrevocable letter of credit must continue in effect until the facility is certified to participate in the Medicaid program; or until paid to HHSC [~~DADS~~] after notice provided in accordance with subparagraph (M) of this paragraph.

(M) A performance bond, surety bond, or irrevocable letter of credit is immediately due and must be paid to HHSC [~~DADS~~] upon receipt of notice from HHSC [~~DADS~~] to the issuer of the performance bond, surety bond, or irrevocable letter of credit that:

(i) the applicant did not comply with subsection (i)(4)(G) of this section, which may include an extension granted under subsection (i)(6) of this section;

(ii) HHSC [~~DADS~~] revokes the applicant's waiver;

(iii) the applicant did not notify HHSC [~~DADS~~] of its intent not to renew the performance bond, surety bond, or irrevocable letter of credit at least 60 days before its automatic annual renewal date; or

(iv) the applicant did not notify HHSC [~~DADS~~] of a change in the

lending institution or surety bond company administering the performance bond, surety bond, or irrevocable letter of credit.

(5) Alzheimer's waiver. The Alzheimer's waiver is designed to meet the needs of communities that do not have reasonable access to Alzheimer's nursing facility services.

(A) The applicant must document that:

(i) the nursing facility is affiliated with a medical school operated by the state;

(ii) the nursing facility will participate in ongoing research programs for the care and treatment of persons with Alzheimer's disease;

(iii) the nursing facility will be designed to separate and treat residents with Alzheimer's disease by stage and functional level;

(iv) the nursing facility will obtain and maintain voluntary certification as an Alzheimer's nursing facility in accordance with §§19.2204, 19.2206, and 19.2208 of this chapter (relating to Voluntary Certification of Facilities for Care of Persons with Alzheimer's Disease; General Requirements for a Certified Facility; and Standards for Certified Alzheimer's Facilities); and

(v) only residents with Alzheimer's disease or related dementia will be admitted to the Alzheimer's Medicaid beds.

(B) The applicant must submit a demographic or health needs study, prepared by an independent professional experienced at preparing demographic studies that documents the need for the number of Medicaid Alzheimer's beds requested. The study must include a statement by the preparer of the study that the preparer has no interest, financial or otherwise, in the outcome of the waiver application.

(C) HHSC [~~DADS~~] notifies local nursing facilities when a complete Alzheimer's waiver application is received and afford local nursing facilities an opportunity to comment on the waiver application. The notification will include a deadline for submission of comments. HHSC [~~DADS~~] limits subsequent comments during the review process to facilities that submit timely comments in response to the notification of a completed application.

(D) HHSC [~~DADS~~] considers an application withdrawn if it is not completed within 90 days after the application is submitted to HHSC

[~~DADS~~].

(E) A facility that has Medicaid beds allocated under provisions of an Alzheimer's waiver may apply for a waiver in accordance with other subsections of this section, including subsection (f)(3) or (4) of this section. HHSC [~~DADS~~] does not count the beds allocated under an Alzheimer's waiver to determine the allowable bed allocation increase. For example, a 120-bed nursing facility with 60 Alzheimer waiver beds would be eligible for 10 percent of the 60 remaining beds or six additional Medicaid beds.

(6) Teaching nursing facility waiver. A teaching nursing facility waiver is designed to meet the statewide needs for providing training and practical experience for health-care professionals. The applicant must submit documentation that the nursing facility:

(A) is affiliated with a state-supported medical school;

(B) is located on land owned or controlled by the state-supported medical school; and

(C) serves as a teaching nursing facility for physicians and related health-care professionals.

(7) Rural county waiver. A rural county waiver is designed to meet the needs of rural areas of the state that do not have reasonable access to acceptable nursing facility care. For purposes of this waiver, a rural county is one that has a population of 100,000 or less according to the most recent census, and has no more than two Medicaid-certified nursing facilities. HHSC [~~DADS~~] approves no more than 120 additional Medicaid beds per county per year and no more than 500 additional Medicaid beds statewide in a calendar year under this waiver provision. HHSC [~~DADS~~] considers a waiver application on a first-come, first-served basis. Requests received in a year in which the 500-bed limit has been met will be carried over to the next year. The county commissioner's court must request the waiver.

(A) The commissioner's court must notify HHSC [~~DADS~~] of its intent to consider a rural county waiver and obtain verification from HHSC [~~DADS~~] that the county complies with the definition of rural county.

(B) The commissioner's court must publish a notice in the Texas Register and in a newspaper of general circulation in the county. The notice must seek:

(i) comments on whether a new Medicaid nursing facility should be requested; and

(ii) proposals from persons or entities interested in providing additional Medicaid-certified beds in the county, including persons or entities currently operating Medicaid-certified facilities with high occupancy rates. HHSC [~~DADS~~], in its sole discretion, may eliminate from participating in the process persons or entities that submit false or fraudulent information.

(C) The commissioner's court must determine whether to proceed with the waiver request after considering all comments and proposals received in response to the notices provided under subparagraph (B) of this paragraph. In determining whether to proceed with the waiver request, the commissioner's court must consider:

(i) the demographic and economic needs of the county;

(ii) the quality of existing Medicaid nursing facilities in the county;

(iii) the quality of the proposals submitted, including a review of the past history of care provided, if any, by the person or entity submitting the proposal; and

(iv) the degree of community support for additional Medicaid nursing facility services.

(D) The commissioner's court must document the comments received, proposals offered and factors considered in subparagraph (C) of this paragraph.

(E) If the commissioner's court decides to proceed with the waiver request, it must submit a recommendation that HHSC [~~DADS~~] issue a waiver to a person or entity who submitted a proposal for new or additional Medicaid beds. The recommendation must include:

(i) the name, address, and telephone number of the person or entity recommended for contracting for the Medicaid beds;

(ii) the location, if the commissioner's court desires to identify one, of the recommended nursing facility;

(iii) the number of beds recommended; and

(iv) the information listed in subparagraph (D) of this paragraph

used to make the recommendation.

(F) An applicant that is granted a rural county waiver must provide to HHSC [~~DADS~~] a performance bond, surety bond, or an irrevocable letter of credit in the amount of $500,000 payable to HHSC [~~DADS~~] to ensure that the Medicaid beds granted to the applicant under the waiver are certified within the time periods required by subsection (i)(4)(G) of this section, including any extensions granted under subsection (i)(6) of this section. HHSC [~~DADS~~] will revoke a waiver if the performance bond, surety bond, or irrevocable letter of credit is not provided within 90 days after HHSC [~~DADS~~] approves the waiver application.

(G) If an applicant chooses to provide a performance bond or surety bond, instead of an irrevocable letter of credit, the performance bond or surety bond provided under this subchapter must:

(i) be executed by a corporate entity in accordance with Texas Insurance Code, Chapter 3503, Subchapter A;

(ii) be in a form approved by HHSC [~~DADS~~]; and

(iii) clearly and prominently display on the face of the bond:

(I) the name, mailing address, physical address, and telephone number of the surety company or financial institution to which any notice of claim should be sent; or

(II) the toll-free telephone number maintained by the Texas Department of Insurance in accordance with Texas Insurance Code, Chapter 521, Subchapter B, and a statement that the address of the surety company to which any notice of claim should be sent may be obtained from the Texas Department of Insurance by calling the toll-free telephone number.

(H) If an applicant chooses to provide an irrevocable letter of credit, the irrevocable letter of credit must be issued by a banking institution or similar financial/lending institution.

(I) An applicant must notify HHSC [~~DADS~~] at least 60 days in advance if:

(i) the applicant does not intend to renew its performance bond, surety bond, or irrevocable letter of credit on the annual renewal date; or

(ii) the applicant changes the lending institution or surety bond

company administering the performance bond, surety bond, or irrevocable letter of credit.

(J) An applicant may choose a performance bond, surety bond, or irrevocable letter of credit, and may substitute one for the other over the course of development and construction, but regardless of which option is chosen, the performance bond, surety bond, or irrevocable letter of credit must continue in effect until the facility if certified to participate in the Medicaid program; or until paid to HHSC [~~DADS~~] after notice provided in accordance with subparagraph (K) of this paragraph.

(K) A performance bond, surety bond, or irrevocable letter of credit is immediately due and must be paid to HHSC [~~DADS~~] upon receipt of notice from HHSC [~~DADS~~] to the issuer of the performance bond, surety bond, or irrevocable letter of credit that:

(i) the applicant did not comply with subsection (i)(4)(G) of this section, which may include an extension granted under subsection (i)(6) of this section;

(ii) HHSC [~~DADS~~] revokes the applicant's waiver;

(iii) the applicant did not notify HHSC [~~DADS~~] of its intent not to renew the performance bond, surety bond, or irrevocable letter of credit at least 60 days before its automatic annual renewal date; or

(iv) the applicant did not notify HHSC [~~DADS~~] of a change in the lending institution or surety bond company administering the performance bond, surety bond, or irrevocable letter of credit.

(8) State veterans homes. State veterans homes, authorized and built under the auspices of the Texas Veterans Land Board, must meet all requirements for Medicaid participation.

(9) Small house waiver. A small house waiver is designed to promote the construction of smaller nursing facility buildings that provide a homelike environment.

(A) A facility must meet the requirements in §19.345 of this chapter (relating to Small House and Household Facilities) for HHSC [~~DADS~~] to grant a small house waiver for the facility.

(B) An applicant for a small house waiver must submit an application to HHSC [~~DADS~~] and a schematic building plan of the proposed facility with

sufficient detail to demonstrate that the proposed project meets the requirements in §19.345 of this chapter.

(C) An applicant that is granted a small house waiver must submit final construction documents in accordance with §19.344 of this chapter (relating to Plans, Approvals, and Construction Procedures) before facility construction begins.

(D) HHSC [~~DADS~~] notifies local nursing facilities when a complete small house waiver application is received and allows the local nursing facilities to comment on the waiver application. The notification includes the deadline for submitting comments. HHSC [~~DADS~~] limits subsequent comments during the review process to facilities that submit timely comments in response to the notification of a completed application.

(E) HHSC [~~DADS~~] does not approve more than 16 beds for a small house facility or for a household in a facility that is granted a small house waiver.

(F) HHSC [~~DADS~~] considers an application withdrawn if it is not completed within 90 days after the application is submitted to HHSC [~~DADS~~].

(G) Subject to subparagraph (E) of this paragraph, HHSC [~~DADS~~] approves the replacement or transfer of beds certified at a small house nursing facility in accordance with subsection (f)(1) or (2) of this section only to another small house or household facility.

(H) A facility that has Medicaid beds allocated under provisions of a small house waiver may apply for general Medicaid beds in accordance with other subsections of this section, including subsection (f)(3) or (4) of this section. HHSC [~~DADS~~] does not count the beds allocated under a small house waiver provision in determining the allowable bed allocation increase. For example, a 120-bed nursing facility with 60 Small House waiver beds would be eligible for 10 percent of the 60 remaining beds or six additional Medicaid beds.

(I) An applicant that is granted a small house waiver must provide to HHSC [~~DADS~~] a performance bond, surety bond, or an irrevocable letter of credit in the amount of $500,000 payable to HHSC [~~DADS~~] to ensure that the Medicaid beds granted to the applicant under the waiver are certified within the time periods required by subsection (i)(4)(G) of this section, including any extensions granted under subsection (i)(6) of this section. HHSC [~~DADS~~] will revoke a waiver if the performance bond, surety

bond, or irrevocable letter of credit is not provided within 90 days after HHSC [~~DADS~~] approves the waiver application.

(J) If an applicant chooses to provide a performance bond or surety bond, instead of an irrevocable letter of credit, the performance bond or surety bond provided under this subparagraph must:

(i) be executed by a corporate entity in accordance with Texas Insurance Code, Chapter 3503, Subchapter A;

(ii) be in a form approved by HHSC [~~DADS~~]; and

(iii) clearly and prominently display on the face of the bond:

(I) the name, mailing address, physical address, and telephone number of the surety company or financial institution to which any notice of claim should be sent; or

(II) the toll-free telephone number maintained by the Texas Department of Insurance in accordance Texas Insurance Code, Chapter 521, Subchapter B, and a statement that the address of the surety company to which any notice of claim should be sent may be obtained from the Texas Department of Insurance by calling the toll-free telephone number.

(K) If an applicant chooses to provide an irrevocable letter of credit, the irrevocable letter of credit must be issued by a banking institution or similar financial/lending institution.

(L) An applicant must notify HHSC [~~DADS~~] at least 60 days in advance if:

(i) the applicant does not intend to renew its performance bond, surety bond, or irrevocable letter of credit on the annual renewal date; or

(ii) the applicant changes the lending institution or surety bond company administering the performance bond, surety bond, or irrevocable letter of credit.

(M) An applicant may choose a performance bond, surety bond, or irrevocable letter of credit, and may substitute one for the other over the course of development and construction, but regardless of which option is chosen, the performance bond, surety bond, or irrevocable letter of credit must continue in effect until the facility is certified to participate in the Medicaid program; or until paid to HHSC [~~DADS~~] after notice provided in

accordance with subparagraph (N) of this paragraph.

(N) A performance bond, surety bond, or irrevocable letter of credit is immediately due and must be paid to HHSC [~~DADS~~] upon receipt of notice from HHSC [~~DADS~~] to the issuer of the performance bond, surety bond, or irrevocable letter of credit that:

(i) the applicant did not comply with subsection (i)(4)(G) of this section, which may include an extension granted under subsection (i)(6) of this section;

(ii) HHSC [~~DADS~~] revokes the applicant's waiver;

(iii) the applicant did not notify HHSC [~~DADS~~] of its intent not to renew the performance bond, surety bond, or irrevocable letter of credit at least 60 days before its automatic annual renewal date; or

(iv) the applicant did not notify HHSC [~~DADS~~] of a change in the lending institution or surety bond company administering the performance bond, surety bond, or irrevocable letter of credit.

(i) Time Limits and Extensions.

(1) Medicaid beds transferred in accordance with subsection (f)(2) of this section must be certified within six months after HHSC [~~DADS~~] grants the exemption.

(2) Time limits applicable to temporary Medicaid beds are specified in subsection (f)(6) of this section.

(3) All facilities and beds approved in accordance with waiver provisions of subsection (h) of this section and replacement nursing facilities approved in accordance with subsection (f)(1) of this section, must be constructed, licensed, and Medicaid-certified within 42 months after the waiver or replacement exemption is granted.

(4) A recipient of a waiver must provide HHSC [~~DADS~~] with evidence of compliance with subparagraphs (A) - (G) of this paragraph. The recipient must submit evidence of compliance on or before the date stated in the subparagraph, including any extensions granted under paragraph (6) of this subsection.

(A) The land must be under contract within 12 months after HHSC [~~DADS~~] approval of the waiver or replacement.

(B) An architect or engineer must be under contract to prepare final construction documents within 15 months after HHSC [~~DADS~~] approval of the waiver or replacement.

(C) The facility's preliminary plans must be completed within 18 months after HHSC [~~DADS~~] approval of the waiver or replacement.

(D) The land must be purchased and a progress report submitted to HHSC [~~DADS~~] within 24 months after HHSC [~~DADS~~] approval of the waiver or replacement.

(E) Entitlements (including municipality, planning and zoning, building permit) and the facility's foundation must be completed within six months after land purchase or 30 months after HHSC [~~DADS~~] approval of the waiver or replacement, whichever is later.

(F) Facility construction must be active and ongoing, as evidenced by a construction progress report submitted to HHSC [~~DADS~~] within 12 months after land purchase or 36 months after HHSC [~~DADS~~] approval of the waiver or replacement, whichever is later.

(G) The facility must be constructed, licensed, and certified within 18 months after land purchase or 42 months after HHSC [~~DADS~~] approval of the waiver or replacement, whichever is later.

(5) HHSC [~~DADS~~], in its sole discretion, may declare the exemption or the waiver void if the applicant fails or refuses to provide evidence of compliance with each benchmark or deadline, or the evidence of compliance submitted to HHSC [~~DADS~~] in accordance with paragraph (4) of this subsection contains false or fraudulent information.

(6) Waiver or exemption recipients may request an extension of the deadlines in this section. At the discretion of the executive commissioner or the executive commissioner's designee, deadlines specified in this section may be extended. The applicant must substantiate every element of its extension request with evidence of good-faith efforts to meet the benchmarks and construction deadlines or evidence confirming that delays were beyond the applicant's control.

(7) Waiver or exemption recipients who receive an extension of their waiver or exemption must submit a progress report every six months after approval of the extension until the nursing facility beds are certified. HHSC [~~DADS~~] may declare the waiver or exemption void if the applicant fails or refuses to provide the progress report as required or if the progress report

contains false or fraudulent information.

(8) HHSC [~~DADS~~] may revoke a bed allocation for failure to meet the requirements of this section.

(j) Loss of Medicaid Beds.

(1) Loss of Medicaid beds that are not available to be occupied.

(A) Medicaid nursing facilities must report certified Medicaid beds that do not comply with requirements of §19.1701 of this chapter (relating to Physical Environment) and are not available for occupancy on monthly Medicaid occupancy reports.

(B) HHSC [~~DADS~~] decertifies and de-allocates Medicaid beds that are intended for use in bedrooms that have been converted to other uses if the rooms are not being used for bedroom occupancy use on two consecutive standard surveys.

(C) HHSC [~~DADS~~] does not decertify and de-allocate Medicaid beds that are intended for use in rooms that are licensed and certified for multi-occupancy use but are being used for single occupancy only.

(D) HHSC [~~DADS~~] decertifies and de-allocates Medicaid beds granted through a criminal justice waiver, Alzheimer's waiver, a teaching nursing facility waiver, state veterans home waiver, or a small house waiver that are no longer being used for the intended purpose for which the waiver was granted.

(2) Loss of Medicaid beds based on sanctions.

(A) A Medicaid nursing facility operated by the person or entity who also owns the property will lose the allocation of all Medicaid beds assigned to the nursing facility property if the nursing facility's license is denied or revoked.

(B) A Medicaid nursing facility operated by one person or entity and owned by another person or entity will lose the allocation of Medicaid beds if two or more of the following actions occur within a 42-month period:

(i) licensure denial;

(ii) licensure revocation; or

(iii) Medicaid termination.

(C) HHSC [~~DADS~~] may waive this loss of allocation of Medicaid beds in order to facilitate a change of ownership or other actions that would protect the health and safety of residents or assure reasonable access to acceptable nursing facility care.

(3) Voluntary decertification of Medicaid beds.

(A) Facilities may request to voluntarily decertify Medicaid beds.

(B) The licensee must submit written approval of the Medicaid bed reduction signed by the property owner and all physical plant lien holders.

(C) HHSC [~~DADS~~] reduces the number of allocated Medicaid beds equal to the number of beds voluntarily decertified.

(D) Facilities that voluntarily decertify Medicaid beds are eligible to receive an increased allocation of Medicaid beds if the facility qualifies for a bed allocation waiver or exemption.

(4) Nursing facility ceases to operate or participate in Medicaid.

(A) The property owner of a nursing facility that closes or ceases to participate in the Medicaid program must inform HHSC [~~DADS~~] in writing of the intended future use of the Medicaid beds within 90 days after closure or ceasing participation in Medicaid.

(B) Unless the Medicaid beds will be used for a replacement nursing facility, the allocated beds must be re-certified within 12 months of the date the Medicaid contract was terminated.

(C) Time limits in subparagraphs (A) and (B) of this paragraph may be extended in accordance with subsection (i)(6) of this section.

(D) HHSC [~~DADS~~] may de-allocate Medicaid beds for failure to meet the requirements of this paragraph.

(5) Loss of Medicaid beds based on low occupancy.

(A) HHSC [~~DADS~~] may review Medicaid bed occupancy rates annually for the purpose of de-allocating and decertifying unused Medicaid beds. The Medicaid bed occupancy reports for the most recent six-month period that HHSC [~~DADS~~] has validated are used to determine the bed occupancy

rate of each nursing facility.

(B) HHSC [~~DADS~~] de-allocates and decertifies Medicaid beds in facilities with an average occupancy rate below 70 percent. The number of beds decertified is calculated by subtracting the preceding six-month average occupancy rate of Medicaid-certified beds from 70 percent of the number of allocated certified beds and dividing the difference by 2, rounding the final figure down if necessary. For example, for a facility with 100 Medicaid-certified beds and a 50 percent occupancy rate, the difference between 70 percent (70 beds) and 50 percent (50 beds) is 20 beds, divided by 2, is 10 beds to be decertified.

(C) Medicaid beds in a nursing facility that has obtained a replacement nursing facility exemption are not subject to the de-allocation and decertification process.

(D) Medicaid beds in a new or replacement physical plant or a newly constructed wing of an existing physical plant are exempt from this de-allocation and decertification process until the new physical plant or new wing has been certified for 24 months.

(E) Medicaid beds that have been subject to a change of ownership within the past 24 months are exempt from the de-allocation and decertification process.

(F) Medicaid beds in a county or in a precinct in one of the four most populous counties in the state in which a facility approved through the waiver process is constructed are exempt from the de-allocation and decertification process for 24 months after licensure and certification of the facility.

(G) Medicaid beds allocated to a closed nursing facility are exempt from this de-allocation and decertification process.

(H) Nursing facilities that lose Medicaid beds through this process are eligible to receive an additional allocation of Medicaid beds at a later date if the facility qualifies for a bed allocation waiver or exemption.

(I) The de-allocation and decertification of unused beds does not affect the licensed capacity of a nursing facility.

(k) Informal review procedures.

(1) A waiver or exemption applicant, or a Medicaid nursing facility that

has been denied an increase in Medicaid bed allocation or was subject to decertification or de-allocation of Medicaid beds, [~~Applicants~~] may request an informal review of HHSC [~~DADS~~] actions regarding bed allocations. The request must be submitted within 30 days after the date referenced on the notification of the proposed action.

(2) A waiver or exemption [~~An~~] applicant or a Medicaid nursing facility that has been denied an increase in Medicaid bed allocation or was subject to decertification or de-allocation of Medicaid beds must submit a request for an informal review and all documentation or evidence that forms the basis for the informal review in writing.

(3) The executive commissioner or the executive commissioner's designee conducts the informal review.

(l) Medicaid occupancy reports.

(1) Medicaid nursing facilities must submit occupancy reports to HHSC [~~DADS~~] each month.

(A) The occupancy data must be reported on a form prescribed by HHSC [~~DADS~~]. The form must be completed in accordance with instructions and the occupancy data must be accurate and verifiable. The completed report must be received by HHSC [~~DADS~~] no later than the fifth day of the month following the reporting period.

(B) HHSC [~~DADS~~] determines the Medicaid occupancy rate by calculating the monthly average of the number of persons who occupy Medicaid beds.

(C) HHSC [~~DADS~~] includes all persons residing in Medicaid-certified beds, including Medicaid recipients, Medicare recipients, private-pay residents, or residents with other sources of payment, in the calculation.

(D) Failure or refusal to submit accurate occupancy reports in a timely manner may result in the nursing facility's vendor payment being held in abeyance until the report is submitted.

(2) HHSC [~~DADS~~] determines nursing facility and county occupancy rates based on the data submitted by the nursing facilities.

(A) HHSC [~~DADS~~] uses the occupancy data to determine eligibility for or compliance with waiver and exemption requirements. HHSC [~~DADS~~] also uses the occupancy data to determine if Medicaid beds should be decertified

based on low occupancy.

(B) HHSC [~~DADS~~] makes the occupancy data available to nursing facilities, licensees, property owners, waiver or exemption applicants, and others in accordance with public disclosure requirements.

(C) HHSC [~~DADS~~] may disqualify a facility that provides inaccurate or falsified occupancy data from eligibility for bed allocation exemptions and waivers. HHSC [~~DADS~~] may refuse to accept corrections to bed occupancy data submitted more than six months after the due date of the occupancy report.

(m) School-age residents. Any bed allocation waiver or exemption applicant that serves or plans to serve school-age residents must provide written notice to the affected local education agency (LEA) of its intent to establish or expand a nursing facility within the LEA's boundary.