

TITLE 40 HEALTH AND HUMAN SERVICES
PART 1 HEALTH AND HUMAN SERVICES COMMISSION
CHAPTER 9 INTELLECTUAL DISABILITY SERVICES--MEDICAID STATE
OPERATING AGENCY RESPONSIBILITIES
SUBCHAPTER D HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM
AND COMMUNITY FIRST CHOICE (CFC)

EMERGENCY RULE ADOPTION PREAMBLE

The Executive Commissioner of the Health and Human Services Commission (HHSC or Commission) adopts on an emergency basis in Title 40, Part 1, Texas Administrative Code, Chapter 9, Intellectual Disability Services – Medicaid State Operating Agency Responsibilities, new §9.199 and §9.299, concerning emergency rules in response to COVID-19. As authorized by Texas Government Code §2001.034, the Commission 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. The Commission accordingly finds that an imminent peril to the public health, safety, and welfare of the state requires immediate adoption of these Emergency Rules for Program Provider Response to COVID-19 and HCS Provider Response to COVID-19 – Limited Visitation for a Level 1 Residence Provider.

To protect individuals receiving Home and Community-based Services (HCS) and the public health, safety, and welfare of the state during the COVID-19 pandemic, HHSC is adopting emergency rules to reduce the risk of spreading COVID-19 to individuals in the HCS program. These new rules describe the requirements HCS program providers must immediately put into place and the requirements they must follow for visitation and day habilitation. The rules also identify changes to HHSC survey procedures in response to the COVID-19 pandemic.

STATUTORY AUTHORITY

The emergency rules are adopted under Texas Government Code §§2001.034, 531.0055 and 531.021 and 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 HHSC. Texas Government Code §531.021 provides HHSC with the authority to administer federal Medicaid funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program. Texas Human Resources Code §32.021 provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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

The agency hereby certifies that the emergency adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

ADDITIONAL INFORMATION

For further information, please call: (512) 438-3161.

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

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

(b) In this section:

(1) Provider of essential services means a person who provides a service that is necessary to ensure the health and safety of an individual and can include a service provider, a physician, an employee or contractor of a local intellectual and developmental disability authority (LIDDA), local mental health authority (LMHA), or hospice organization.

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

(3) Persons providing critical assistance include providers of essential services, persons with legal authority to enter, and family members or friends of individuals providing compassionate care.

(4) Residence means a host home/companion care, three-person, or four-person residence, as defined by the [HCS Billing Guidelines](#), unless otherwise specified.

(5) Probable case of COVID-19 means a case that meets the clinical criteria for epidemiologic evidence as defined and posted by the [Council of State and Territorial Epidemiologists](#).

(c) Screening requirements.

(1) A program provider must implement and document screening of visitors, individuals, and staff and prohibit entry of a person who has:

(A) fever, defined as a temperature of 100.4 Fahrenheit or above, or other signs or symptoms of a respiratory infection, such as cough, shortness of breath, or sore throat;

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

_____ (C) any other signs and symptoms identified by the Centers for Disease Control and Prevention (CDC) in Symptoms or Coronavirus at [cdc.gov](https://www.cdc.gov);

_____ (D) contact in the last 14 days, unless to provide critical assistance, with someone who has a confirmed diagnosis of COVID-19, is under investigation for COVID-19, or is ill with a respiratory illness; or

_____ (E) engaged in international travel within the last 14 days.

_____ (2) A program provider must not prohibit government personnel performing their official duty from entering the residence unless the person meets the above screening criteria.

_____ (3) A program provider must not prohibit an individual who lives in the residence from entering the residence even if the individual meets any of the screening criteria.

(d) Communication.

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

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

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

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

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

(e) Infection Control.

(1) A program provider must develop and implement an infection control policy that:

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

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

(C) is revised if a shortcoming is identified.

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

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

(4) A program provider must encourage social distancing, defined as maintaining six feet of separation between persons and avoiding physical contact.

(5) A program provider must require staff to wear a mask or cloth face covering over both the nose and mouth if not providing care to an individual with COVID-19, or appropriate PPE as defined by CDC if providing care to an individual with COVID-19. For individuals who rely on lip reading or facial cues for communication needs, service providers may use face masks with a clear screen over the mouth or temporarily remove it during communication. Service providers should maintain social distance.

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

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

(B) live-in staff providing supervised living services may provide services to an individual who has also tested positive for COVID-19 in accordance with §9.174(a)(37).

(7) A program provider must monitor the health status of a staff person providing services under paragraph (6) of this section to verify that the staff person continues to be able to deliver services. If the staff person's condition worsens, the

program provider must activate the service back-up plan to ensure the individual receives services.

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

(9) A program provider must screen individuals for signs or symptoms of COVID-19 at least twice a day.

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

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

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

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

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

(h) A program provider may contract with a day habilitation site only if the day habilitation site agrees to comply with the most current guidance from DSHS for day habilitation sites. In addition:

(1) the program provider must facilitate and document an individual's informed decision to return to outside day habilitation, including discussion of:

(A) available options and alternatives;

(B) risks of attending day habilitation; and

(C) PPE, hygiene, and social distancing;

(2) except for individuals in host home and own home/family home settings, the program provider must ensure the availability of PPE required for the individual to safely attend day habilitation; and

(3) the program provider must include in its contract with a day habilitation site a requirement for the day habilitation site to communicate with individuals, program providers, staff, and family when the day habilitation site is aware of a probable or confirmed case of COVID-19 among day habilitation site staff or individuals. The requirement must prohibit a day habilitation site from releasing personally identifying information regarding confirmed or probable cases.

(i) Regarding meals, the program provider must:

(1) plate food and serve it to individuals rather than using communal serving bowls and shared serving utensils;

(2) ensure social distancing of at least six feet;

(3) sanitize the meal preparation and dining areas before and after meals; and

(4) encourage individuals to practice hand hygiene before and after meals.

(j) If a service provider at a host home or a staff member at a respite or CFC PAS/HAB setting has confirmed or probable COVID-19, the service provider or staff member must discontinue providing services until eligible to return to work in accordance with the CDC guidance document, "[Criteria for Return to Work for Healthcare Personnel with Suspected or Confirmed COVID-19](#)." The program provider must activate the back-up service plan.

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

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

(1) verification that fire extinguishers are fully charged;

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

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

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

(m) The program provider must train an individual on the risks of leaving and encourage isolation of the individual to the extent possible upon return. The individual must be screened upon return in accordance with subsection (c) of this section.

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

(o) If this emergency rule is more restrictive than any minimum standard relating to the Home and Community-based Services program, this emergency rule will prevail so long as this emergency rule is in effect.

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

§9.299. HCS Provider Response to COVID-19 – Limited Visitation for a Level 1 Residence Provider.

(a) Applicability. This rule applies to host home/companion care and a three-person or four-person residence, unless otherwise specified.

(b) Definitions. In this section:

____ (1) Level 1 Residence means a residence in which no cases of COVID-19 have been confirmed among staff in at least 14 days and no active cases of COVID-19 exist among individuals and which meets the requirements in subsection (c) of this section;

____ (2) social distancing means maintaining a minimum of six feet between persons, avoiding gathering in groups in accordance with state and local orders, and avoiding unnecessary physical contact; and

____ (3) visitors means persons entering the residence for a purpose other than those defined in §9.199(b) of this subchapter (relating to Program Provider Response to COVID-19 Emergency Rule).

(c) To operate a Level 1 residence, a program provider must complete and maintain in the residence an HHSC attestation form that HHSC may request for verification, stating that:

(1) The residence meets the definition of a Level 1 residence in paragraph (b)(1) of this section;

(2) The residence has access to sufficient staff and PPE to provide essential care and services to the individuals living in the residence;

(3) The service back-up plan for host home services has been evaluated and determined to be viable at the time of review;

(4) The program provider has a plan to respond to new confirmed or probable cases of COVID-19 in the residence; and

(5) The emergency preparedness plan required by §9.178(d) of this subchapter has been updated to address COVID-19.

(d) If, at any time after the attestation form is completed, the residence no longer meets the definition of a Level 1 residence in paragraph (b)(1) of this section, the attestation is no longer in effect, and the residence must return to the visitation and activities restrictions outlined in PL 20-22. The provider must notify HHSC that the residence no longer meets Level 1 criteria, and all Level 1 visitation must be suspended until the residence meets the criteria described in paragraph (b)(1) of this section and the provider completes a new HHSC attestation form.

(e) Allowed visit types in a Level 1 residence.

(1) A program provider may allow limited outdoor visits and indoor visits through the use of a plexiglass booth or wall. The program provider must:

(A) ensure social distancing;

(B) require all visitors to wear masks or face coverings over both the nose and mouth throughout the visit and encourage the individual to do so, if tolerated;

(C) remind visitors and individuals about social distancing and face mask or face covering requirements either verbally or with a notice posted visible to visitors or handed to them;

(D) screen all visitors in accordance with subsection §9.199(d) of this subchapter;

(E) sanitize all furniture used during the visit after use;

(F) schedule visits as necessary to allow time for sanitation between visits;

(G) require visitors and encourage individuals to perform hand hygiene before the visit and make hand hygiene supplies available; and

_____ (H) for indoor visitation, designate space for each visit that limits the ability of visitors to interact with other individuals and limits movement through the residence.

____ (2) A program provider may allow window visits, in which the individual and visitor are separated by a window. If the window is open, the program provider must:

_____ (A) require all visitors to wear masks or face coverings throughout the visit and encourage the individual to do so, if tolerated; and

_____ (B) encourage social distancing.

____ (3) A program provider may allow vehicle parades, in which personal visitors drive by the residence. During a vehicle parade, the program provider must:

_____ (A) require personal visitors to remain in their vehicles;

_____ (B) ensure a comfortable and safe outdoor area for individuals who participate;

_____ (C) encourage social distancing between individuals;

_____ (D) prohibit individuals from being closer than 10 feet to the vehicles for safety reasons; and

_____ (E) encourage individuals to wear a cloth face covering or mask, if tolerated.

(f) Level 1 visitation does not include in-room visitation.