

Effective: September 1, 2014

The purpose of this information is to clarify current policies and procedures and to announce new procedures related to Medicaid bed allocation requirements cited in the Texas Administrative Code (TAC), Title 40, Part 1, Chapter 19, §[19.2322](#).

The Department of Aging and Disability Services (DADS) has updated the Medicaid bed waiver application Form 3709. An applicant for a Community Needs, Economically Disadvantaged, Small House, Rural County, Alzheimer's or High Occupancy Medicaid bed waiver must complete the form in accordance with DADS instructions and submit it to DADS in order to apply for a waiver to construct, license and certify a new Medicaid nursing facility. An applicant for Medicaid bed exemptions allowed in 40 TAC §19.2322(f) is not required to complete the new form. Requests for these exemptions may be submitted via routine correspondence to the Licensing and Credentialing section.

In addition to the requirement to complete and submit the new waiver application form, the following Medicaid bed allocation policies apply.

Medicaid Bed Waivers:

High Occupancy Waiver

The high occupancy waiver rules are found at 40 TAC §19.2322(h)(1). Instructions for submitting an application for a high occupancy waiver are included in the public notice posted in the *Texas Register* and in the Electronic State Business Daily that announces the open solicitation period. Pursuant to 40 TAC §19.2322(h)(1)(F), if multiple applicants are eligible at the end of the open solicitation period for a high occupancy waiver, the applicant who will receive the allocation of beds is chosen by a lottery selection. The lottery selection process that DADS follows is found at <http://www.dads.state.tx.us/providers/nf/HighOccupancyWaiverLotteryProcess.pdf>

Community Needs Waiver

Rules applicable to community needs waivers do not define the term "community." Except for the four most populous counties (Dallas, Tarrant, Bexar and Harris), DADS considers a county to be a "community" and will consider countywide demographic, occupancy and other relevant data during the waiver review process. For the four most populous counties, DADS considers a county commissioner's court precinct to be a "community" and considers all factors relevant to the corresponding precinct during the waiver review process. An applicant also may select a specific city, municipality or ZIP code within a county as a "community." In those cases, DADS considers demographic, occupancy and other relevant data specific to that city, municipality, or ZIP code and the nearby surrounding area, including other nearby cities, municipalities, or ZIP codes, whether those cities, municipalities, or ZIP codes are located within the county or not, during the waiver review process.

Small House Waiver

The small house waiver rules are found at 40 TAC §19.2322(h)(9). An applicant for a small house waiver must identify on the application the county in which the facility will be located. For the four most populous counties (Dallas, Tarrant, Bexar and Harris) an applicant must identify on the application the county commissioner's precinct in which the facility will be located.

A facility that has Medicaid beds allocated under the provisions of a small house waiver may apply for general Medicaid beds for any licensed-only part of the facility, if applicable, in accordance with the non-certified nursing facility exemption, high-occupancy facility exemption or the transfer exemption. DADS does not count the beds allocated under a small house waiver provision in determining the allowable bed allocation increase for the non-small house Medicaid beds. For example, a new 120-bed nursing facility with 60 small house waiver beds in the small house portion of the facility would be eligible for an additional allocation of 10 percent (six additional Medicaid beds) of the 60 remaining non-certified beds in the traditional nursing facility portion of the facility via the non-certified nursing facility exemption.

General Policies for Waivers

In accordance with 40 TAC §19.2322(g)(5) and the exception noted therein, DADS processes waiver applications in the order in which they are received. For purposes of this rule, DADS **receives** an application when DADS receives:

- a complete application form; and
- any additional information the waiver type requires. For example, a demographic study, documentation of substantial community support for the new nursing facility or schematic building plan of the proposed small house nursing facility.

Except as provided in exemptions to the requirements outlined in the next section of the document, when DADS receives a waiver application, DADS notifies by mail all nursing facilities in the county, or in the county commissioner's court precinct in the four most populous counties, that:

- DADS has received a waiver application;
- the nursing facilities may request copies of the application documents via an open records request; and
- a facility or its representative may comment on the application.

If a notified facility opposes the waiver application, the facility or its representative may submit information and data in opposition to the application. DADS must receive this information no later than 45 calendar days after the date of the notification provided by DADS. DADS may extend the 45-day time period for a response at its discretion. Involvement in the application consideration process is limited to those facilities that submit timely initial opposition information and data.

DADS notifies the waiver applicant if DADS receives waiver opposition documents. The waiver applicant may submit to DADS a written response to the opposition documents. DADS must receive this response within 45 calendar days after the date of the notification provided by DADS. DADS may extend the 45-day period at its discretion.

DADS notifies waiver opponents if the waiver applicant responds to their opposition documents. A waiver opponent may submit to DADS a final written response to the response submitted by the applicant. DADS must receive the opponent's response within 45 calendar days after the date of the notification provided by DADS. DADS may extend the 45-day period at its discretion.

Staff of the Licensing and Credentialing section reviews the information and data submitted in support of and in opposition to the waiver application, and proposes a recommendation. DADS provides the recommendation and a brief description of the basis for the recommendation in writing to the waiver applicant and the waiver opponents.

A non-prevailing party (i.e., the waiver applicant if the proposed recommendation is to deny the application or the waiver opponents if the proposed recommendation is to approve the application) may challenge the basis for the proposed recommendation. DADS must receive the written challenge from the non-prevailing party, stating the reasons it believes the recommendation is incorrect, within 45 calendar days after the date of the notification of the proposed recommendation. DADS may extend the 45-day period at its discretion.

DADS notifies a prevailing party if a challenge to the proposed recommendation is submitted. A prevailing party may respond to the challenge submitted by the non-prevailing party. DADS must receive the written response from the prevailing party within 45 calendar days after the date of the notification of the challenge. DADS may extend the 45-day requirement at its discretion.

Licensing and Credentialing section staff considers the written responses provided by the waiver applicant and opponents and makes a final recommendation to the Commissioner or the Commissioner's designee. The Commissioner or Commissioner's designee makes a final decision and sends notice of approval or denial of the waiver application to the applicant and the opponents. Waiver applicants that are denied will be afforded an opportunity to request an informal review of the action in accordance with 40 TAC §19.2322(k). Except for the applicant's informal review there is no further review or appeal of the final decision.

Exemptions from the Above Requirements:

The Texas Veterans Land Board is not required to complete the new waiver application form in order to request a State Veterans Home Waiver and is not subject to the waiver opposition process described above.

The Texas Department of Criminal Justice is not required to complete the new waiver application form in order to request a Criminal Justice waiver and is not subject to the waiver opposition process described above.

A Texas state-supported medical school is not required to complete the new waiver application form in order to request a Teaching Nursing Facility Waiver and is not subject to the waiver opposition process described above.

If a county commissioner's court in a rural county recommends that DADS issue a Rural County Waiver to a person or entity the court selects in accordance with 40 TAC §19.2322(h)(7), the

selectee must complete and submit the new waiver application form but the application is not subject to the waiver opposition process described above.

A High occupancy waiver application is not subject to the waiver opposition process described above.

Local nursing facilities are given an opportunity to comment on a small house waiver application that is received by DADS; however, DADS only considers opposition that addresses how the applicant or application does not meet the small house waiver requirements.

DADS processes state veterans home waivers, criminal justice waivers, teaching nursing facility waivers, rural county waivers, small house waivers and high occupancy waivers after the application is complete and not in the order received relative to other waiver types.

DADS decertifies and de-allocates Medicaid beds granted through a Alzheimer's waiver, state veterans home waiver, criminal justice waiver, teaching nursing facility waiver or small house waiver if DADS determines the facility in which the beds are located does not continue to meet the waiver requirements under which the beds were awarded.

Assignment of Waivers:

Department rules at 40 TAC §19.2322(g) permit waivers to be assigned under certain circumstances. The term "waiver recipient or the owner of the waiver recipient" in 40 TAC §19.2322(g)(2)(A) refers to individuals who were granted the waiver or the individuals who owned an entity when the entity was granted a waiver.

A request for an assignment must include a copy of each agreement and document related to the assignment. All agreements and documents related to the assignment must be disclosed to DADS. Both parties to the assignment must attest that all agreements and documents directly or indirectly related to the assignment have been disclosed. Financial terms or terms related to the purchase price (if any) of the waiver assignment transaction between the parties may not be redacted from the documents.

To establish compliance with 40 TAC §19.2322(g)(2)(a), a request for a waiver assignment must include documentation showing that the individuals who were originally granted the waiver (or the individuals who owned an entity when the entity was originally granted a waiver) are the majority owners and have management control over the assignee entity. However, submitting only evidence that the individuals who were originally granted the waiver (or the individuals who owned the entity when the entity was originally granted the waiver) are the majority owners of the assignee entity is not sufficient to comply with the requirement.

The assignee must not have an owner or controlling person who was not an owner or controlling person of the waiver recipient. 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 DADS. A change to the ownership of the waiver recipient entity or the waiver assignment entity must be reported to DADS.

In addition to reviewing the evidence provided by the waiver recipient to show compliance with the assignment requirement, DADS will confirm compliance with the Secretary of State when the waiver assignment request is submitted for DADS approval and again when the license and certification application is submitted to DADS to ensure that the ownership and control circumstances reported during the assignment transaction remain unchanged. Failure to comply with these waiver assignment requirements is grounds to deny an assignment request. DADS, at its sole discretion, may invalidate an assignment if DADS determines an assignment was approved on the basis of false information or when the assignor or assignee failed to disclose all documents directly or indirectly related to the assignment.

If you have questions about this information, please contact the Regulatory Services Facility Certification unit at (512) 438-2630.