

**Department of State Health Services
Agenda Item for State Health Services Council
January 31, 2007**

Agenda Item Title: Proposed Amendments to 25 TAC §§419.371, 419.373 – 419.377, and 419.379, and repeal of §§419.372 and 419.378, concerning Institutions for Mental Diseases

Agenda Number: 5b

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background: The department administers the federal Medicaid program for Institutions for Mental Diseases (IMD), and establishes by rule the criteria for Medicaid reimbursement of inpatient hospital services provided by hospitals that contract with the department to provide care and treatment to individuals with mental diseases aged 65 and older. The department has reviewed and considered for re-adoption each rule in the subchapter as required by Government Code §2001.039, and has determined that reasons for adopting these rules continue to exist because rules on this subject are needed, although two rules are proposed for repeal. The proposed amendments and repeals are necessary to update statutory and other references, ensure consistency with current law and best practices, and provide greater clarity to the rules.

Summary: Proposed amendments are made to the definition of "mental diseases" to ensure a comprehensive and current list of appropriate diagnoses. Other proposed amendments include a change in the notice requirement for IMD provider reviews and the addition of criteria for the review that holds the IMD provider accountable for assessing barriers and taking efforts to achieve a less restrictive setting for patients. Additional proposed amendments identify certain provider actions and omissions as contract violations, which would subject the provider to sanctions identified in the contract, including termination. Because nothing in the proposed amendments has a substantive impact on the eligibility criteria of an IMD provider or the reimbursement of covered services, there are no fiscal implications as a result of the proposed amendments.

Summary of Stakeholder Input to Date (including advisory committees): Informal input has already been obtained via emailed requests for input to the Mental Health Planning and Advisory Council and to hospital providers. This input was considered and taken into account in reviewing and proposing amendments to the rules. On November 9, 2006, the proposed rules and preamble were submitted to the Medical Care Advisory Committee, which recommended approval of the proposed rules for publication.

Proposed Motion: Motion to recommend HHSC approval for publication of rules contained in agenda item 5b.

Agenda Item Approved by: _____

Presented by: Peggy Perry **Title:** Assistant Director State Hospital Section

Program/Division: MHSA **Contact Name/Phone:** Chris DeWitt 512/206-4510

Date Submitted
November 14, 2006

Title 25. HEALTH SERVICES

Part 1. DEPARTMENT OF STATE HEALTH SERVICES

Chapter 419. Mental Health Services--Medicaid State Operating Agency Responsibilities

Subchapter J. Institutions for Mental Diseases

Amendments to §§419.371, 419.373 - 419.377, and 419.379

Repeal of §§419.372 and 419.378

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes amendments to §§419.371, 419.373 - 419.377, and 419.379, concerning Institutions for Mental Diseases (IMD), and repeal of §§419.372 and 419.378.

BACKGROUND AND PURPOSE

The department is authorized to administer the Texas Medicaid IMD program. The rules in this subchapter describe the criteria used to determine whether an IMD provider is eligible to receive Medicaid reimbursement for inpatient hospital services provided to people aged 65 and older in an IMD. They describe the methods by which IMD provider eligibility is established and reimbursement for covered services is accomplished, and the standards for which IMD providers will be held accountable. The proposed amendments and repeals are necessary to update statutory and other references, to ensure consistency with current law and best practices, and to provide greater clarity to the rules.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 419.371 - 419.379 have been reviewed and the department has determined that reasons for adopting these sections continue to exist because rules on this subject are needed, with the exception of §§419.372 and 419.378, which are proposed for repeal.

SECTION-BY-SECTION SUMMARY

Proposed amendments to §419.371 include incorporating the language from §419.372 and changing the title to Purpose and Application, and §419.372 is proposed for repeal.

An amendment to §419.373 is proposed for the definition of “Mental diseases,” to delete reference to a specific edition of the International Classification of Diseases and to add reference to the Diagnostic and Statistical Manual of Mental Disorders in order to define the term as an inclusive and up-to-date listing of relevant diagnoses.

A proposed amendment to §419.375(c) would eliminate the requirement that an IMD provider be given a maximum of 48 hours notice before a review. The department is authorized under Health and Safety Code §533.015 to make any inspection of a facility or program under the

department's jurisdiction without announcing the inspection. The proposed change is necessary to afford staff sufficient flexibility to accomplish the reviews, and the rule would not prohibit the department from continuing to provide notice.

Additional amendments to §419.375(c) identify provider accountability for assessing barriers to serving the patient in a less restrictive setting and taking efforts to achieve a less restrictive placement for the patient. This change implements requirements of the U. S. Supreme Court decision in *Olmstead v. L.C.*, 527 U. S. 581 (1999). The proposed amendment to §419.375(c)(2) makes paragraph (3) repetitive and it is proposed for deletion.

Amendments proposed for §419.375(d) identify the failure to implement a corrective action plan as a contract violation and clarify that the provider would be subject to sanctions set forth in the contract, including termination. With these changes, paragraphs (1) and (2) of subsection (d) are proposed for deletion as unnecessary.

A new paragraph (7) is proposed for addition to subsection (b) of §419.376 to identify noncompliance with rules or a corrective action plan as a basis for contract termination. A proposed amendment to subsection (c) would permit sanctions identified in the contract to be applied for failure to timely submit an acceptable cost report. Subsection (d) is proposed for amendment to remove reference to outdated adverse action rules and to update reference to the HHSC rules governing contested case hearings for contract terminations. Subsection (e) would be amended to update reference to the HHSC rules governing Medicaid fraud and abuse. In addition, the title of §419.376 would be revised to reflect more accurately the substance of the rule.

Additional amendments are also proposed to §§419.373 – 419.377 in order to update and correct references to the name of the department and the commission, correct grammatical errors and statutory references, and improve the clarity of the rules. Section 419.378 is proposed for repeal as unnecessary. Proposed amendments to §419.379, regarding required distribution of the rules, involve removing reference to the Texas MHMR Board, and associated renumbering of paragraphs.

FISCAL NOTE

Machelle Pharr, the department's Chief Financial Officer, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Wilson Day, Director of the department's Budget Section, has also determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Dave Wanser, the department's Deputy Commissioner for Behavioral Health, has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is to clarify and update the criteria used to determine IMD provider eligibility to receive Medicaid reimbursement, and the methods for holding IMD providers accountable for compliance.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, 2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce the risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the 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 Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted in writing to Chris DeWitt, Department of State Health Services, Mail Code 2018, 909 W. 45th Street, Austin, Texas 78751, or by email to chris.dewitt@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services, General Counsel, Cathy Campbell, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed amendments and repeal of rules are authorized by Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed amendments affect the Health and Safety Code, Chapter 1001, and Government Code, Chapter 531.

Sections for Repeal

§419.372. Application.

§419.378. References.

Legend: (Proposed Amendment(s))

Single Underline = Proposed new language

[Bold Print and Brackets] = Current language proposed for deletion

Regular Print = Current language

(No change.) = No changes are being considered for the designated subdivision

§419.371. Purpose and Application. The purpose of this subchapter is to describe the criteria used to determine whether a **[an IMD]** provider is eligible to receive Medicaid reimbursement for inpatient hospital services to people aged 65 and older in an institution for mental diseases (IMD) and to describe the methods by which patient and **[IMD]** provider eligibility are established and reimbursement for covered services is accomplished. This subchapter applies to all IMD providers.

§419.373. Definitions. The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Department--The **[Texas]** Department of State **[Mental]** Health Services **[and Mental Retardation (TDMHMR)]** or its designee.

(2) HHSC--The **[Texas]** Health and Human Services Commission or its designee.

(3) - (6) (No change.)

(7) Mental diseases--Diseases listed as mental disorders in the latest editions of the International Classification of Diseases and the Diagnostic and Statistical Manual of Mental Disorders **[, Ninth Edition, modified for clinical applications (ICD-9-CM)]**, with the exception of mental retardation and chemical dependency disorders.

(8) Qualified mental health professional--A person acting within the scope of his or her training and licensure or certification, who is a:

(A) licensed social worker, as defined by the Social Work Practice Act, Occupations Code, §505.002(6) **[Human Resources Code, §50.001]**;

(B) licensed professional counselor, as defined by the Licensed Professional Counselor Act, Occupations Code, §503.002(4) **[Texas Civil Statutes, Article 4512g, §2i]**;

(C) physician, as defined by the Medical Practice Act, Occupations Code, §151.002(12) **[Texas Civil Statutes, Article 4495b §1.03]**, or a person employed by any agency of the United States having a license to practice medicine in any state of the United States;

(D) licensed **[registered]** nurse as provided for and defined in the Nursing **[Nurse]** Practice Act, Occupations Code, Chapter 301 **[(Texas Civil Statutes, Articles 4513-4528)]**; or

(E) psychologist, as defined by the Psychologists' **[Certification and]** Licensing Act, Occupations Code, §501.002(5) **[Texas Civil Statutes, Article 4512c, §2]**.

§419.374. Eligible Population.

(a) IMD provider reimbursement **[Reimbursement for IMD services]** is limited to IMD services provided to individuals:

(1) - (7) (No change.)

(8) for whom the department has authorized IMD services based on medical necessity, as follows: [.]

(A) Requests for initial authorization for IMD services must be submitted to the department **[department's Office of Medicaid Administration]** within seven calendar days after the first day for which Medicaid reimbursement for the provision of IMD services will be requested.

(B) Requests **[Request]** for authorization of continued stay must be submitted no later than seven calendar days prior to the end date of the initial and all subsequent authorizations. Initial and continued stay authorizations are valid for up to 31 calendar days.

(b) Any Medicaid eligible individual whose request for eligibility for IMD services is denied or is not acted upon with reasonable promptness, or whose IMD services have been terminated, suspended, or reduced by the department **[TDMHMR]** is entitled to a fair hearing, conducted in accordance with rules for fair hearings described in Title 1, Texas Administrative Code, Chapter 357, Subchapter A (relating to Medicaid Fair Hearings) **[by TDHS]**. A request for a fair hearing must be submitted to the department **[TDMHMR Office of Medicaid Administration]** and received within 90 days from the date the notice of denial of eligibility for IMD services or notice of termination, suspension, or reduction of IMD services is mailed.

§419.375. IMD Provider Eligibility for Reimbursement.

(a) To be eligible for reimbursement for IMD services, an IMD provider must:

(1) submit an approved application for enrollment through means established by the department, **[department's Office of Medicaid Administration]** to include evidence that the provider:

(A) meets the Medicare conditions of participation referenced in 42 CFR §482.60(b);

(B) - (D) (No change.)

(2) have in effect a written provider agreement with the department which:

(A) describes respective responsibilities of the provider and the department [department's Office of Medicaid Administration], including arrangements to ensure:

(i) - (ii) (No change.)

(iii) access by the department and HHSC to the institution, its patients, and patients' records when necessary to carry out the **[agency's agencies'** responsibilities;

(iv) - (v) (No change.)

(B) (No change.)

(C) assures that the provider is meeting the requirements specified in 42 CFR §440.140(a) pertaining to providers of inpatient hospital services to persons age 65 or older in institutions for mental diseases;

(D) assures that the provider is in compliance with those provisions of the Texas Administrative Code, Title 25, Part I **[II]**, that relate to patient care and treatment in inpatient mental health facilities;

(E) - (F) (No change.)

(b) An IMD provider's eligibility for reimbursement must be renewed periodically at a time designated by the department [department's Office of Medicaid Administration], but not to exceed two years.

(c) Evidence of compliance with subsection (a) of this section is validated through reviews by the department, which [department's Office of Medicaid Administration. Reviews] occur at intervals decided upon by the department. **[No IMD provider is notified more than 48 hours before the scheduled review.]** For each Medicaid patient, the department additionally reviews:

(1) the adequacy of services available to meet the patient's current health needs and promote the patient's maximum physical, mental, and psychosocial well-being; and

(2) the necessity or desirability of the patient's continued placement in the IMD, including an examination of barriers to serving the patient in a less restrictive setting and the efforts of the IMD to achieve a less restrictive placement for the patient. [; and]

[(3) the feasibility of meeting the patient's mental and physical health care needs through alternative institutional or non-institutional care.]

(d) If the IMD provider fails to provide evidence of compliance with subsection (c) **[(1)-(3)]** of this section, then the provider may be required to [must] take corrective action **[, as needed,]** based on the findings contained in the department's report. If corrective action is required, the IMD provider must submit a corrective action plan to the department for approval. Failure to

implement the corrective action plan constitutes a contract violation and the IMD provider may be subjected to any sanctions provided for in the contract, including termination.

[(1) If the IMD provider fails to take corrective action, recoupment of Medicaid funds associated with the finding(s) is initiated as provided for in Chapter 409, Subchapter C of this title (relating to Fraud and Abuse and Recovery of Funds).]

[(2) Recoupment is an adverse action for which the IMD provider is entitled to an administrative hearing in accordance with Chapter 409, Subchapter B of this title (relating to Adverse Actions).]

§419.376. IMD Provider Reimbursement and Termination.

(a) Reimbursement for IMD services provided to eligible individuals begins on the date established by written notice from the department [**department's Office of Medicaid Administration**] and is contingent upon validation of evidence of IMD provider eligibility as described in §419.375(c) of this title (relating to IMD Provider Eligibility for Reimbursement).

(b) An IMD provider's agreement with the department is subject to termination with written notice on the date that any of the following occurs:

(1) - (3) (No change.)

(4) demonstrated noncompliance with those provisions of the Texas Administrative Code, Title 25, Part I **[III]**, that relate to patient care and treatment in inpatient mental health facilities, or with state laws governing admission and treatment of persons with mental illness;

(5) breach of the written provider agreement described in §419.375(a)(2) of this title (relating to IMD Provider Eligibility for Reimbursement); **[or]**

(6) termination of participation as a Medicaid provider by HHSC; or **[in the reimbursement for services in the IMD Medicaid program.]**

(7) evidence of noncompliance with the rules in this subchapter or a corrective action plan that is based on findings made by the department in a review described in §419.375(c) of this title.

(c) Failure to submit an acceptable cost report in the required time frame constitutes a contract violation and may result in sanctions provided for in the contract, including a hold of vendor payments.

(d) Termination of the IMD provider agreement is an **[and vendor hold are]** adverse action **[actions]** for which the IMD provider is entitled to a contested case **[an administrative]** hearing as described in Texas Administrative Code, Title 1, Chapter 357, Subchapter I (relating to Formal Appeals) **[accordance with Chapter 409, Subchapter B of this title (relating to Adverse Actions)].**

(e) IMD providers that receive Medicaid reimbursement for IMD services are governed by Texas Administrative Code, Title 1, Chapter 371 (relating to Medicaid and other Health and Human Services Fraud and Abuse Program Integrity [Chapter 409, Subchapter C of this title (relating to Fraud and Abuse and Recovery of Funds)]).

§419.377. Discharge Criteria. IMD providers must be in compliance with the following rules, as applicable, regarding discharge of individuals receiving IMD services:

(1) Chapter 412 [402], Subchapter D [A] of this title (relating to Mental Health Services—Admission, Continuity and Discharge; and [Admissions, Transfers, Absences and Discharges--Mental Health Facilities];)

[(2) Chapter 402, Subchapter B of this title (relating to Continuity of Services--Mental Health Services); and]

(2) ~~[(3)]~~ Chapter 411 [401], Subchapter J of this title (relating to Standards of Care and Treatment in Psychiatric Hospitals).

§419.379. Distribution. This subchapter shall be distributed to:

[(1) members of the Texas MHMR Board;]

(1) ~~[(2)]~~ executive [,] management, and program staff of Central Office;

(2) ~~[(3)]~~ chief executive officers of all IMD providers; and

(3) ~~[(4)]~~ advocacy organizations.

Repeal:

~~§419.372. Application. This subchapter applies to all IMD providers.~~

~~§419.378. References. The following laws and rules are referenced in this subchapter:~~

~~(1) 42 CFR Part 456, Subpart H, §§482.60, 482.30, 431.620, 440.140, and 431.107~~

~~(2) Social Security Act, §1903(i)(4);~~

~~(3) Human Resources Code, §50.001;~~

~~(4) Texas Civil Statutes, Articles 4495b, 4512c, 4512g, and 4518, §5;~~

~~(5) Texas Health and Safety Code, Chapters 572-574 and 577;~~

~~(6) those provisions in the Texas Administrative Code, Title 25, Part II that relate to patient care and treatment in inpatient mental health facilities;~~

~~(7) Chapter 409, Subchapter B of this title (relating to Adverse Actions); and~~

~~(8) Chapter 409, Subchapter C of this title (relating to Fraud and Abuse and Recovery of Funds).~~