

**Department of State Health Services
Council Agenda Memo for State Health Services Council
April 23, 2009**

Agenda Item Title: Repeal of rules concerning Adverse Actions for the Mental Health Services Medicaid Programs

Agenda Number: 5b

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background:

The Mental Health and Substance Abuse Division, Program Services Section, is responsible for developing and implementing programs concerning mental health community services. DSHS monitors quality management processes and internal controls over programmatic and administrative systems for DSHS-funded programs to ensure provider compliance with Medicaid Provider Agreements. As part of the monitoring processes, DSHS reviews compliance with Resiliency and Disease Management through Medicaid claims with the aim of ensuring program integrity. Findings relating to possible Medicaid fraud, abuse, and waste generated by these reviews are reported to the Office of Inspector General (OIG) at the Health and Human Services Commission (HHSC) for consideration of possible further action.

The source of funding for the program is provided through Medicaid, Mental Health Block Grant, and general revenue.

Summary:

The purpose of the repeals is to avoid potential confusion for the public by deleting rules that are no longer necessary and maintaining clear, concise rules in the DSHS rule base.

Sections 409.31 - 409.35, adopted by the former Texas Department of Mental Health and Mental Retardation, were part of a broader set of rules that addressed fraud, abuse, and recovery of Medicaid payments, adverse actions and sanctions, and processes for requesting an administrative hearing. After consolidation of the health and human services agencies in 2004, the responsibility for fraud, abuse, and matters addressed in the rules proposed for repeal were superseded by the HHSC OIG rules in 1 TAC, Chapter 371, Subchapter G, relating to Medicaid and Other Health and Human Services Fraud and Abuse Program Integrity.

DSHS has reviewed the rules according to the four-year review of agency rules in Government Code, Section 2001.039, and has determined the rules are no longer necessary and are proposed for repeal.

Summary of Input from Stakeholder Groups:

Notification of repeal of the rules was distributed for informal comment via email to members of the Mental Health Planning and Advisory Council and the Local Area Network Advisory Committee; executive directors of Local Mental Health Authorities; and the chief executive officer of the Texas Council of Community Mental Health and Mental Retardation Centers. No comments were received.

The rules were also presented as an action item to the Medical Care Advisory Committee at its January 2009 meeting. The item passed without discussion or comment.

Title 25, HEALTH SERVICES
Part 1. DEPARTMENT OF STATE HEALTH SERVICES
Chapter 409. Mental Health Services--Medicaid Programs
Subchapter B. Adverse Actions
Repeal §§409.31 - 409.35

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission (HHSC) on behalf of the Department of State Health Services (department) proposes the repeal of §§409.31- 409.35 concerning adverse actions for the Mental Health Services Medicaid Programs.

BACKGROUND AND PURPOSE

These rules adopted by the former Texas Department of Mental Health and Mental Retardation (TDMHMR) were part of a broader set of rules that addressed fraud, abuse, and recovery of Medicaid payments, adverse actions and sanctions, and processes for requesting an administrative hearing. At the time they were adopted, these rules were necessary to fulfill the obligations of the former TDMHMR in administering the Mental Health Services Medicaid Programs. House Bill 2292, 78th Legislature, Regular Session (2003), effective September 1, 2004, resulted in the consolidation of organizational structure and functions of the health and human services agencies. As part of that consolidation, responsibility for matters relating to Medicaid program integrity, including administrative enforcement, sanctions, damages, and penalties, was made the exclusive jurisdiction of the Office of Inspector General (OIG) at HHSC. Also, at the time of the consolidation, these former TDMHMR rules were transferred to the department.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). The department has determined that there is no need to retain the rules in Chapter 409, Subchapter B, because they have been superseded by the OIG rules in 1 TAC, Chapter 371, Subchapter G, relating to Medicaid and Other Health and Human Services Fraud and Abuse Program Integrity. Thus, the rules are being proposed for repeal.

SECTION-BY-SECTION-SUMMARY

The rules concern the application of the rules, definitions, notice of adverse actions, request for an administrative hearing, and withholding provider agreement payments.

FISCAL NOTE

Mike Maples, Assistant Commissioner for Mental Health and Substance Abuse Services, 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 ECONOMIC IMPACT STATEMENT

Mr. Maples has also determined that there will be no adverse economic impact 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. Therefore, an economic impact statement and regulatory flexibility analysis for small and micro-businesses are not required.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

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

There is no anticipated impact on local employment.

PUBLIC BENEFIT

Mr. Maples has determined that for each year of the first five years the repeal of the sections is in effect, the public will benefit from adoption of the repeals. The public benefit anticipated as a result of repealing the sections is that the department will maintain a clear, concise set of rules and avoid the potential for confusion from retaining rules that have no effect.

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 rules the specific intent of which are 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 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 repeals would 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, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposed repeal may be submitted in writing to Janet Fletcher, Department of State Health Services, Mail Code 2018/552, 909 West 45th Street, Austin, Texas 78751, or by e-mail to janet.fletcher@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposed repeal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, 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 repeals 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. Review of the rules implements Government Code, §2001.039.

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

Sections for Repeal.

§409.31. Application.

§409.32. Definitions.

§409.33. Notice of Adverse Action.

§409.34. Request for an Administrative Hearing.

§409.35. Withholding Provider Agreement Payments.

Repealed Rule Text

~~§409.31. Application.~~

~~This subchapter applies to all Medicaid programs administered by the Texas Department of Mental Health and Mental Retardation.~~

~~§409.32. Definitions.~~

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

~~(1) Administrative law judge—The attorney designated or appointed by the commissioner to conduct and preside over the administrative hearing.~~

~~(2) Adverse action—Any action taken or proposed by the department against a provider in which the provider may request an administrative hearing under Chapter 406 of this title (relating to ICF/MR Programs) or this chapter, concerning Medicaid Programs.~~

~~(3) Commissioner—The commissioner of the Texas Department of Mental Health and Mental Retardation.~~

~~(4) Days—Calendar days, unless otherwise specified.~~

~~(5) Department—The Texas Department of Mental Health and Mental Retardation (TXMHMR) or its designee.~~

~~(6) Person—An individual, partnership, corporation, association, governmental subdivision or agency, or a public or private organization of any character.~~

~~(7) Provider—Any person with whom the department has a provider agreement.~~

~~(8) Provider agreement—Any written agreement that obligates the department to pay money to a person for goods or services under the Title XIX Medical Assistance Program.~~

~~§409.33. Notice of Adverse Action.~~

~~(a) The commissioner or designee is authorized to make decisions concerning adverse action.~~

~~(b) The commissioner or designee must send a provider a notice advising the provider of any adverse action. The notice is sent by certified mail, return receipt requested, unless the department determines that a more immediate form of notice is required. The notice includes a description of the basis for the adverse action, including citation of the specific rule section(s) or portion of the provider agreement with which the provider is in noncompliance and informs the provider of the provider's right to an administrative hearing to contest the adverse action. If the adverse action proposed by the department is termination of the provider agreement, then the notice must also specify the dates that the department intends to begin withholding payment and to terminate the provider agreement in accordance with §409.35 of this title (relating to Withholding Provider Agreement Payments).~~

~~(c) The department does not have to give a notice of adverse action with each billing transaction for areas of the department that have a large volume of bills or which routinely post debit and credit entries. The department must give a provider a notice of appeal rights any time the provider informs the department in writing of the provider's dissatisfaction with a claim transaction which is an adverse action.~~

~~§409.34. Request for an Administrative Hearing.~~

~~———— (a) ——— A provider must send to the department a written request for an administrative hearing within 15 days after receiving the department's official notice of adverse action. The request for an administrative hearing:~~

~~———— (1) ——— may be in the form of a petition or a letter;~~

~~———— (2) ——— must state the reasons the provider considers it is not subject to the adverse action; and~~

~~———— (3) ——— must be addressed to: Hearings Office, TXMHMR, P.O. Box 12668, Austin, Texas 78911-2668.~~

~~———— (b) ——— After the department receives the written request for an administrative hearing, the matter shall be referred to an administrative law judge for disposition according to Chapter 403, Subchapter O of this title (relating to Administrative Hearings of the Department in Contested Cases).~~

~~§409.35. Withholding Provider Agreement Payments.~~

~~———— If the department proposes to terminate a provider agreement and the provider requests an administrative hearing in accordance with §409.34 of this title (relating to Request for an Administrative Hearing), then the department may not terminate the provider agreement before the completion of the administrative hearing. If the department intends to terminate a provider agreement, then payments to the provider may be withheld by the department pending an administrative hearing appealing the proposed termination of the provider agreement. If the final decision of the administrative hearing is favorable to the department or the provider does not make a timely request for an administrative hearing, then payments withheld will not be made by the department to the provider. If the final decision is favorable to the provider, then payments withheld will be made by the department to the provider and provider agreement payments will be resumed by the department.~~