



Convener's Report
for
Negotiated Rulemaking
on
Provider of Last Resort

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Submitted
by
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Executive Summary

This convener's report for negotiated rulemaking on provider of last resort recommends that the Department of State Health Services proceed with the process and post its notice of intent in the Texas Register.

There are a diverse but limited set of stakeholders who are significantly affected by this rule. They include:

- consumers of mental health services and their families;
- advocates for consumers and families;
- interested parties who do not have a personal stake in the outcome of the rule;
- designated local mental health authorities (LMHAs);
- private providers of mental health services;
- county judges and county commissioners, from both rural and urban counties, the appointing authorities for Community Mental Health Centers (CMHCs) boards of directors; and,
- the state agency that is required to regulate and provide oversight for public mental health services provided to Texans who are eligible.

A preliminary list of issues to be negotiated include:

1. Ground Rules
2. Definitions
3. Provider Solicitation Guidelines
4. Local Decision-making
5. Criteria for CMHCs that provide services
6. Evaluation

In designing the negotiation process, consideration should be given to prior work in this area, objective criteria, staff resources needed by the committee, and the structure of subcommittees.

If the agency should decide to proceed with negotiated rulemaking, it is required that it post such intent in the Texas Register and include the following items in the posting:

- A statement of intent to engage in negotiated rulemaking;
- A description of the subject and scope of the rule;
- A description of the known issues to be considered in developing the rule;
- A list of the interests likely affected by the rule;
- A list of individuals the agency intends to appoint to the committee;
- A request for comments on the proposal and proposed membership; and
- A description of the procedure for persons significantly affected by the rule to apply for membership on the committee or to nominate someone to represent their interests.

DSHS can expedite the process of soliciting input by posting the report and the notice of intent to proceed in a prominent place on the HHSC and DSHS website.

Convener's Report for Negotiated Rulemaking on Provider of Last Resort

Convener Purpose and Process

Negotiated rulemaking is resource and time intensive for the agency and all other participating parties. It requires a significant commitment of time and financial resources for individuals to represent their stakeholder groups at multiple negotiation meetings and to keep those stakeholder groups informed of progress in the negotiation. The purpose for convening is to assist the agency in determining the feasibility of using negotiated rulemaking for developing an implementation plan, in the form of a rule, for the provider of last resort provisions of HB 2292¹ and to inform the agency on relevant considerations.

The process used for convening included individual interviews with representatives of affected parties and a convention of a broad range of stakeholders who are members of the Mental Health and Substance Abuse Strategic Partnership. The interviews occurred over the course of six weeks in July and August and included discussions about the willingness of stakeholders to participate, the utility of the negotiated rulemaking process for this subject matter, the issues that should be on the table for negotiation, and identification of other parties affected by this rule.

The convening resulted in a recommendation and several areas for consideration by the agency should it choose to proceed with negotiated rulemaking.

Recommendation

After gathering information from the affected parties I recommend the agency proceed with the negotiated rulemaking process and post notice to the Texas Register to inform stakeholders and to solicit their input.

This recommendation is based on the findings that:

- a diverse, but limited, set of stakeholders exists who will be affected by the subject matter of this rule;
- stakeholders have a high degree of interest in having a fair and balanced group negotiate a rule that includes an implementation plan for continuing the implementation of the provider of last resort provisions of HB 2292;
- stakeholders have both diverse and common interests which are suitable for negotiation
- stakeholders have something to gain by participating in the process and non-participation would likely result in negative and significant consequences;
- reaching consensus on most aspects of this rule appears possible, however, there will be some areas that will involve tough compromise on the part of all affected parties;
- the unprecedented opportunity exists for stakeholders to share information, communicate their interests and have the chance to have their data and assumptions questioned by others who have their own perspectives and data; and
- the agency stands to gain important information about how its stakeholders view the issues involved in this rule and criteria the agency can use to determine

¹ See Appendix 1 - Provider of last resort provisions

compliance with the provider of last resort provisions of HB 2292 and the Governor's Executive Order RP 45.²

The following sections of this report are considerations for the agency relevant to negotiated rulemaking for the provider of last resort implementation plan. These considerations are based on my assessment of the information gathered from interviews and my analysis of factors that will be relevant to enhancing the chances of reaching a negotiated agreement in this situation.

Parties to Involve

There are a diverse but limited set of stakeholders who are significantly affected by this rule. They include:

- consumers of mental health services and their families;
- advocates for consumers and families;
- interested parties who do not have a personal stake in the outcome of the rule;
- designated local mental health authorities (LMHAs);
- private providers of mental health services;
- county judges and county commissioners, from both rural and urban counties, the appointing authorities for Community Mental Health Centers (CMHCs) boards of directors; and,
- the state agency that is required to regulate and provide oversight for public mental health services provided to Texans who are eligible.

For the sake of effective negotiations, the overall size of the negotiated rulemaking committee should not exceed fifteen to twenty members. Therefore, the agency should consider including two representatives from each identified stakeholder group with the exception of consumers and family members who should have additional members. It would be useful to appoint two consumers and two family members who ideally would have sought services from the public mental health system. At least one of the family members should be able to represent the perspective of families with a child or adolescent that has experienced a severe emotional disturbance.

A special consideration for consumer and family involvement

Most stakeholders readily acknowledge that, even beyond consumer choice, any changes to the existing service system must be done holding responsiveness to consumer needs as paramount. Participation of consumers and families in this process is essential however it presents challenges. Unlike most stakeholders, consumers and families have a difficult time participating due to resources constraints and the fact that their participation in this process is not, in most cases, a key part of their job. Candidates for participation on the negotiated rulemaking committee may have to take personal time from work to participate, which is often difficult. The agency should be prepared to financially support their participation.

Stakeholders recommended seeking input from consumers of services from various local communities. A variety of methods were suggested such as surveys, focus groups and town hall meetings. As part of the implementation plan it will be important to develop a

² See Appendix 2 – Executive Order RP 45

communication plan to include notification and education on the changes that are planned and how consumers can best exercise choice of providers.

Scope of Negotiations

For the successful outcome of the negotiated rulemaking process it is necessary that the agency clearly define the scope of the negotiations. During the course of convening it became clear that a tendency exists to have the scope include discussion of the service array to be provided in addition to who will provide the service array and how the providers will be solicited. It will be helpful to the negotiation if it is confined to items necessary for the implementation plan and not include discussions of changes to the current service array.

Preliminary Issues to be Negotiated

1. Ground rules

It will be necessary to establish ground rules for the negotiated rulemaking committee regarding participation during, between and after meetings. The committee should determine the degree of formality for the ground rules and the rules should be a topic for ongoing discussion throughout the process as the need arises. This presents the opportunity for all representatives to voluntarily arrive at a consensus definition of good faith commitment as well as set boundaries for effective communication within the meetings and in terms of communication with the constituencies each stakeholder represents. The ground rules can also include guidelines for communication to other interested parties.

2. Definitions

There are several definitions to be addressed in order to operationalize the provisions of the law and the requirements of the Governor's Executive Order. The provider of last resort provisions of HB 2292 require that LMHAs make every reasonable attempt to solicit the development of an available and appropriate provider base sufficient to meet the needs of consumers in its area and determine whether or not there are willing providers of services in the service area or county. Executive Order RP 45 requires that the implementation plan ensure protection of consumer choice, protection of the safety net, recognize local differences and contain a timeline that ensures no disruption of existing services to consumers, is responsive to local community readiness and the need for a safety net.

Examples of terms that need definition include:

- every reasonable attempt;
- available and appropriate provider base;
- sufficient to meet the needs;
- no willing providers of the relevant services;
- consumer choice;
- safety net; and,
- local community readiness.

It is apparent from the input of stakeholders that very little common understanding of these terms exist and therefore consensus on how these are demonstrated is impossible to reach without such clarification.

3. Provider Solicitation Guidelines

Specific guidelines should be developed for use in demonstrating and monitoring attempts to solicit an available and appropriate provider base. This will require negotiation of how the current array of services will be parceled out in the solicitation of providers. Within the scope of the current service array, the determination of *what* services to contract out, to *which* providers, *when*, and in *what* combinations is an important component of the negotiation.

The economic reality of the mental health system is dependent upon providing a mixture of services, some of which have little to no operating margin while others provide an operating margin that allows providers to sustain the complete array of required services. Both the public and private providers currently in the system have the expertise and experience of creating those balances and can provide useful insights and concrete recommendations for the implementation plan.

There are limits in the capacity of existing infrastructure in the state and local systems to manage multiple providers and in the capacity of private providers to meet the statewide need for services. These capacity limitations will impact the feasibility of the implementation plan and its timeline. These factors must be seriously considered in the negotiation of plan elements. Consideration must be given to the state's capacity to manage multiple Medicaid rehabilitation providers and its ability and/or willingness to leave Medicaid Targeted Case Management with the LMHA.

Assuming there will be a phased in approach to implementing provider of last resort provisions, while the LMHAs continue to simultaneously *provide* services and control *access* to services it is important to develop a mechanism by which unbiased choice is ensured for consumers. The committee may wish to study the processes used by Medicaid to suggest criteria for this activity.

4. Local Decision-making

The importance of local community contributions to a system of care was identified by stakeholders as something that must be reinforced and incentivized. It will be crucial to determine which decisions are in the hands of local leaders and stakeholders and the degree to which variations are allowable within the parameters of state and federal requirements. It will be important to provide assurances that services considered part of the safety net will be managed in collaboration with local governments. The determination of community readiness to implement provider of last resort provisions is a factor that will be part of these negotiations.

5. Criteria for CMHCs that provide services

It would be reasonable to assume that some CMHCs will divest themselves of the LMHA designation in order to continue to provide services. It has been made clear that private providers want to know what assurances there will be to ensure a level playing field when competing with CMHCs for contracts for services. Therefore, the committee will need to develop criteria for CMHCs that function only as providers.

6. Evaluation

Stakeholders are interested in tracking the impact of implementing the provider of last resort provisions. A determination of the level of evaluation desired and definition of indicators of success and failure will need to be developed. Some stakeholders have offered a word of caution to avoid setting too high a standard for acceptable confusion and disorder. A high degree of ambiguity is to be expected in any systems change as even the most positive change has a normal period of uncertainty during implementation. Protection of consumers can be used as an excuse not to make changes. It is important to recognize that consumers have dealt with a great deal of uncertainty as the mental health system has evolved over time. Consumers tend to be resilient and can accommodate changes if they are provided timely and accurate information about the changes and access to services.

Proposed Design for the Negotiation Process

Prior Work

Stakeholders have recommended that relevant work from the past be brought forward for consideration as the implementation plan is developed. This would include information from earlier reports, steps taken to implement the provider of last resort provisions, and data regarding which services have been contracted out.

Objective Criteria

As options are generated for the development of implementation plan elements it will be useful to have objective criteria by which options are evaluated. The criteria specified in law and the Executive Order provides the framework that can be used as the plan is developed.

Staff Resources

Staff resources that need to be made available to the negotiated rulemaking committee include technical knowledge of state and federal regulations that will impact the implementation plan and staff with rule writing and legal expertise.

A highly skilled person who has no interest in the outcome of the plan and whom all parties see as neutral should provide facilitation. A resource for identifying a facilitator is the Center for Public Policy Resolution at the UT School of Law. The committee must ultimately approve whomever the agency identifies.

Structure

Most of the work of the negotiated rulemaking committee falls into the realm of technical issues or policy directions. Because the knowledge, experience and expertise to participate in either aspect will vary among the committee members, the facilitator and committee could establish a subcommittee structure to develop recommendations or options for consideration by the whole committee. This will help to prevent members from disengaging from discussions where they perceive they have little value to add.

Next Steps

If the agency decides to move ahead with negotiated rulemaking, then it must:

1. Publish its intent to proceed in the Texas Register and other appropriate media and provide required information, including:
 - A statement of intent to engage in negotiated rulemaking;
 - A description of the subject and scope of the rule;
 - A description of the known issues to be considered in developing the rule;
 - A list of the interests likely affected by the rule;
 - A list of individuals the agency intends to appoint to the committee;
 - A request for comments on the proposal and proposed membership; and
 - A description of the procedure for persons significantly affected by the rule to apply for membership on the committee or to nominate someone to represent their interests.

A posting of 10-14 days and active solicitation of comments from those parties significantly affected by this rulemaking should be sufficient to finalize the negotiating committee and schedule a meeting in September. It will also be important to share the full report with interested parties for information. DSHS can enhance the process of soliciting input by posting the report and the notice of intent to proceed in a prominent place on the HHSC and DSHS website.

2. Inform the Governor's office, HHSC, legislative leadership.
3. Identify a list of available and capable facilitators.
4. Develop a calendar that ensures completion of the draft rule in compliance with HHSC direction.
5. Compile background materials for the committee.
6. Develop a draft outline for the administrative rule.

Appendix 1

Texas Health & Safety Code § 533.035(e)-(h) *

(e) In assembling a network of service providers, a local mental health and mental retardation authority may serve as a provider of services only as a provider of last resort and only if the authority demonstrates to the department that:

- (1) the authority has made every reasonable attempt to solicit the development of an available and appropriate provider base that is sufficient to meet the needs of consumers in its service area; and
- (2) there is not a willing provider of the relevant services in the authority's area or in the county where the provision of the services is needed.

(f) The department shall review the appropriateness of a local mental health and mental retardation authority's status as a service provider at least biennially.

* item (g) is omitted from this document because it only applies to mental retardation services

Appendix 2
Executive Order RP45 - June 17, 2005

Relating to the implementation mental health and mental retardation authority provider of last resort.

**BY THE
GOVERNOR OF THE STATE OF TEXAS
Executive Department
Austin, Texas
June 17, 2005**

WHEREAS, The State of Texas is committed to providing the most effective mental health, chemical dependency and mental retardation services to the vulnerable Texans and their families who are eligible for these services; and

WHEREAS, it is imperative that consumers and their families have a choice from among the broadest range of services available so that these consumers have the opportunity to enjoy full lives of independence, productivity and self-determination; and

WHEREAS, it is imperative to ensure that the safety net of behavioral health services and services to persons who have mental retardation be strengthened and maintained, so that if a private provider of services does not operate effectively, then the services will continue to be available; and

WHEREAS, it is imperative to ensure that services to persons in rural and urban areas continue to be available; and

WHEREAS, it is imperative to ensure that input from both local leaders and local stakeholders be included in the continued development of the system of services for persons with mental illness, chemical dependency and persons with mental retardation; and

WHEREAS, it is imperative to ensure that the implementation of the provider of last resort provisions does not divert current funds away from the provision of services to administrative functions, and that any plan be implemented on a responsible timeline; and

WHEREAS, this action is in concert with previous Executive Orders which require the state's system of services for individuals with disabilities be comprehensive, community based, and provide for the broadest range of supports to most effectively meet their needs;

NOW, THEREFORE, I, Rick Perry, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following:

Implementation Plan. The Texas Health and Human Services Commission ("HHSC") shall continue the implementation of Section 533.035 (e) through (g)

of the Health and Safety Code as it relates to the requirement that community mental health and mental retardation authorities operate as providers of last resort. This process shall result in an implementation plan, developed through a negotiated rulemaking process that includes all relevant stakeholders. The plan shall ensure the following:

Protecting Consumer Choice. Current laws protecting the consumer's choice of provider shall be prioritized and upheld, regardless of any imposed limitations developed within the plan;

Protecting the Safety Net. The plan shall ensure that mental health and mental retardation authorities maintain sufficient infrastructure which reflects the needs of local communities in order to maintain a safety net which ensures that services continue to be available.

Recognizing of Local Differences. The plan shall accommodate the differences within local service delivery areas, so that the difference between rural and urban resources is recognized in the determination of a reasonable attempt to ensure the appropriate availability of a provider network.

Responsible timelines. HHSC will develop a timeline which is responsive to:

- the need for ensuring no disruption, to consumers, of their current service provision,
- the local communities readiness, and
- the required need for a safety net.

Protection of Service Funds. The HHSC implementation plan will ensure that funds directed for service delivery are not diverted for administrative purposes.

Mental Health Services. The executive commissioner of HHSC shall immediately request clarification from the Office of the Attorney General as to the applicability of Section 533.035 (e) through (g) of the Health and Safety Code to the provision of mental health services.

This executive order supersedes all previous orders in conflict or inconsistent with its terms and shall remain in effect and in full force until modified, amended, rescinded, or superseded by me or by a succeeding Governor.

Given under my hand this the 17th day of June, 2005.

RICK PERRY

Governor

ATTESTED BY:

ROGER WILLIAMS

Secretary of State