

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 3. OFFICE OF THE ATTORNEY GENERAL

CHAPTER 69. PROCUREMENT

SUBCHAPTER D. CONTRACT MONITORING

1 TAC §69.55

The Office of the Attorney General (OAG), Contracts and Asset Management Division, adopts a new Subchapter D, §69.55, regarding identifying and escalating contracts that require enhanced contract or performance monitoring. The new section is adopted with changes to the proposed text as published in the February 12, 2016, issue of the *Texas Register* (41 TexReg 1055) and will be republished.

The subchapter is adopted in order to address provisions included in Senate Bill 20's newly-enacted §2261.253(c) of the Government Code, which passed during the 84th Texas legislative session.

No comments were received regarding adoption of the subchapter during the comment period.

The section is adopted in accordance with Texas Government Code, §2261.253(c), which requires the OAG to adopt a procedure to identify each contract that requires enhanced contract or performance monitoring.

No other code, article, or statute is affected by this adoption.

§69.55. *Identification and Escalation of Contracts that Require Enhanced Contract or Performance Monitoring.*

(a) The agency will complete a risk assessment to identify contracts that require enhanced contract or performance monitoring;

(b) Information on these contracts will be reported to the First Assistant Attorney General at least quarterly. The First Assistant Attorney General will be notified immediately of any serious issue or risk that is identified with respect to such a contract.

(c) This subchapter does not apply to a memorandum of understanding, interagency contract, interlocal agreement, or contract for which there is not a cost.

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

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 35. REIMBURSEMENT ADJUSTMENTS FOR POTENTIALLY PREVENTABLE EVENTS

1 TAC §354.1445, §354.1446

The Texas Health and Human Services Commission (HHSC) adopts amendments to §354.1445, concerning Potentially Preventable Readmissions; and §354.1446, concerning Potentially Preventable Complications. The amendments are adopted with changes to the proposed text as published in the February 5, 2016, issue of the *Texas Register* (41 TexReg 873). The text of the rules will be republished.

BACKGROUND AND JUSTIFICATION

Texas Government Code §536.151 and §536.152 require HHSC to implement a reporting process and reimbursement adjustments to hospitals based on performance of potentially preventable readmissions (PPRs) and potentially preventable complications (PPCs). HHSC first adopted §354.1445 and §354.1446 to implement the statutory directive, at least with respect to reimbursement reductions, in 2013. See 38 TexReg 2315 (2013), *amended by* 39 TexReg 6403 (2014).

HHSC adopts these two rules for three reasons.

First, the amendments clarify a hospital's ability to request its underlying data used in HHSC's analysis that determines penalties and incentive payments for the hospital. The amendments specify the additional information a hospital can expect in the underlying data, including readmission data on other hospitals.

Each year, hospitals are provided a confidential report based on their performance of PPRs and PPCs. The report states that hospitals may request the underlying data from HHSC via e-mail.

In regards to PPRs, hospitals are held accountable for readmissions to their own hospital and to different hospitals within the 15-day readmission window. Currently, the underlying data does not separately identify the names of other hospitals where readmissions occurred. In a recent survey from HHSC, hospitals indicated that this information, including patient-level identifiers, is crucial to identify opportunities to close gaps in care, assist with care coordination, identify trends, foster collaborative efforts in their communities, develop innovative methods for prevention, and reduce readmission rates.

Second, the amendments identify a methodology for incentives for HHSC-defined safety-net hospitals. The 2016-2017 General Appropriations Act, House Bill 1, 84th Legislature, Regular Session, 2015 (Article II, Special Provisions Section 59(b)), directs HHSC to provide incentive payments to safety-net hospitals in the amount of \$150,378,593 (all funds) in fiscal year 2016 and \$148,641,716 (all funds) in fiscal year 2017. It requires HHSC to establish a program to use ten percent of these additionally appropriated funds to distribute to these hospitals based on quality metrics. Total reimbursement for each hospital must not exceed its hospital-specific limit, but HHSC must expend ten percent of these funds to provide additional increases to safety-net that exceed existing quality metrics, which may result in exceeding the hospital-specific limit. To the extent possible, HHSC must ensure that any funds included in Medicaid managed care capitation rates are distributed by the managed care organizations (MCOs) to the hospitals.

Third, the amendments further refine the methodology, such as clarifying definitions, the present on admission screening adjustment described in §354.1446, the rounding of the actual-to-expected ratio that is used to determine the penalties and incentives, and adds flexibility required for the changing needs of the program.

COMMENTS

The 30-day comment period ended March 7, 2016. During this period, HHSC received comments regarding the amended rules from five commenters: Teaching Hospitals of Texas, Texas Hospital Association, Children's Hospital Association of Texas, Texas Association of Health Plans, and Tenet Health. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Commenters would like PPRs and PPCs to be considered independently, so that an entity performing well in one area/measure can be rewarded for their good work despite lower performance in the other area. The commenters request HHSC to de-link the incentives in §354.1445(h)(4)(C) and §354.1446(h)(4)(C).

Response: HHSC disagrees and declines to revise the rule as the commenters suggests. Even though the measures are separate, they relate to each other. PPRs and PPCs are both indicators of quality of care because they reflect poor clinical care or poor coordination of services during hospitalization or during the post-discharge period. Moreover, de-linking the incentives creates the possibility that, within one measurement year, a given hospital could be penalized for one measure while simultaneously being rewarded for another measure. HHSC feels as though this sends a mixed message. Additionally, coupling these two measures creates an elite pool of hospitals, which HHSC feels is important in an incentive program.

Comment: Commenters suggest that the threshold as proposed of ten percent lower than the statewide average is too restrictive

in the initial year of the incentive payment funding. Commenters point out that the incentive program is brand new to hospitals, and thus qualification criteria for payment, especially in the early years, should not be set at especially high levels. Thresholds for qualification can be tightened up, if necessary, in future years. In subsequent years, HHSC could set the threshold more restrictively once more data is available to both the State and the individual hospitals, as hospitals are afforded the opportunity to review their data in more detail with the release of the underlying data.

Response: HHSC declines to revise the rule as the commenters suggests. HHSC feels that the established levels for eligibility are appropriate. In the first year of the incentive program (fiscal year 2014 reporting period), an initial analysis indicates that over one-third of qualified hospitals will be eligible for an incentive payment.

Comment: A commenter suggests that, given the complexity of the PPR and PPC programs, their early stages of design and development, and the data reporting problems experienced by some of the MCOs, HHSC may wish to retain some flexibility in assigning the amount of available funds awarded for each metric in the event no safety-net hospitals are deemed eligible in a given year.

Response: HHSC agrees with this comment and will add language to §354.1445(h)(2) and §354.1446(h)(2).

Comment: A commenter supports the optional present on admission penalty in §354.1446(g)(4) and delaying the implementation date. However, the commenter would like HHSC to provide technical assistance regarding present on admission and present on admission coding.

Response: HHSC declines to revise the rule as the commenter suggests. However, HHSC is committed to providing ongoing technical assistance.

Comment: A commenter believes that the potential POA penalties in §354.1445(f) and §354.1446(f) are disproportionately high.

Response: HHSC disagrees and declines to revise the rule in response to this comment. HHSC feels that the established levels are appropriate.

Comment: A commenter recommends adding language to both §354.1445 and §354.1446 requiring that HHSC share hospital FFS rate adjustments resulting from PPRs and PPCs with the MCOs in a timely manner. Receiving this data timely will allow MCOs to reflect the same payment adjustments for hospitals whose negotiated rates are based off the FFS rate HHSC has in effect.

Response: HHSC declines to revise the rule as the commenter suggests; HHSC believes the rules as written and HHSC's current practices are sufficient. Once the analysis for the PPR and PPC hospital-based program is complete, HHSC promptly sends the reductions list to the MCOs and the claims administrator prior to the September 1 effective date. This is done on an annual basis and in a timely manner for rates to be negotiated. However, if there is a reason to rerun the data, this will require a new list of reductions to be sent to the MCOs and claims administrator in a timely manner.

Comment: A commenter recommends that HHSC add a provision to the rule to allow a hospital to request corrections to HHSC's data, if the hospital believes that data is incorrect. In

the commenter's view, this would include an appeals process for hospitals to appeal HHSC data that directly impacts the incentive payment calculation. The commenter indicates that HHSC should design appeals process to allow a final determination to be made before the incentive payment period begins so that the hospital receives the incentive payment.

Response: HHSC disagrees and declines to revise the rule as the commenter suggests. Unless there is an error in the data used for the calculations, HHSC historically has not had an appeals process in place. The entire analytical dataset is used to create a state norm, which is used to determine each hospital's actual-to-expected ratios. HHSC is dedicated to providing technical assistance in regards to this program to receive and resolve requests for corrections.

Comment: A commenter notes that the underlying data used in analyzing or calculating the PPR and PPC ratios does not contain patient level identifiers, which has made the review of the calculations by hospitals very difficult. For this reason, the commenter believes that the initial year of the incentive payment should exclude §354.1445(h)(4)(B) and (C) and §354.1446(h)(4)(B) and (C).

Response: HHSC disagrees and declines to revise the rule as the commenter suggests. HHSC provides some patient level identifiers in the underlying data for hospitals who request it, including Medicaid Client Identification, Medicaid Claim Identification, and Client Gender. However, HHSC will review the comments and feedback provided by the agency's Hospital Payment Advisory Committee on this issue and HHSC will also use the data collected from an HHSC administered survey (2015) that was sent to stakeholders regarding meaningful information to be provided in the underlying data. HHSC feels that any future or additional data elements to the underlying will be captured under §354.1445(e)(2) and §354.1446(e)(2).

Comment: A commenter supports the proposed language that excludes the incentive payments from the Hospital-Specific Limit calculations. However, the commenter believes that such incentive payments should also be excluded from the Low Income Utilization Rate (LIUR) calculation as used for Medicaid Disproportionate Share funding and qualification purposes. The commenter recommends that HHSC revise the rules to clarify the treatment of these targeted incentive payments in the LIUR calculation.

Response: HHSC agrees with this comment and will add language to §354.1445(h)(9) and §354.1446(h)(9).

Comment: A commenter recommends HHSC provide clarification on the rounding of the actual-to-expected ratios that are used to determine the penalties and incentives. Currently, the rules do not indicate that the actual-to-expected ratio is rounded to two decimal places and should be specified in the rules.

Response: HHSC agrees and will revise the rules to include language on rounding the actual-to-expected ratio to two decimal places that is used to determine the penalties and incentives in §354.1445(c) and §354.1446(c).

General Comments

Comment: A commenter cited to studies pointing to the impact of socioeconomic factors on quality outcomes, in particular related to potentially preventable readmissions. The commenter requests that HHSC consider other socioeconomic factors in the calculation of potentially preventable events.

Response: HHSC declines to revise the rule as the commenter suggests. HHSC does not believe that the studies can accurately be applied to the Medicaid program. The studies that have been submitted and reviewed have been based on the Medicare population, but the Medicaid population is more socioeconomically homogeneous. However, HHSC will continue to examine this issue in collaboration with the hospital associations.

Comment: A commenter suggests that HHSC seek out opportunities to identify additional sources of quality measurement, and specifically measures that focus on clinical outcome measures, as opposed to claims-based process measures.

Response: HHSC declines to revise the rule as the commenter suggests. PPRs and PPCs are computed from claims data, and HHSC feels that they are appropriate clinical outcome measures.

Comment: Regarding potentially preventable readmissions, a commenter states that the difference between a 30-day versus 15-day readmission window (Medicare versus Medicaid) does not empirically show that the window can or should be discounted.

Response: HHSC disagrees and declines to revise the rule in response to this comment. HHSC feels that the shorter, 15-day window enables the measure to be more attributable to the hospital.

Comment: A commenter would like to better understand the timing of when the data validation can occur, to ensure that the calculation of penalties and incentives is not based on bad data.

Response: HHSC does not understand this to be a comment on the rule language. During each fiscal year, HHSC and the Medicaid claims administrator employ an editing process to help ensure adequate MCO encounter and fee-for-service (FFS) claims data integrity. Additionally, the Medicaid External Quality Review Organization reviews the Medicaid data as it is transmitted to it as well. The data quality issue that was discovered last year pertained to present on admission data for one MCO. The reason that this data issue was not caught through these routine processes is that each POA data element from the MCO was technically a correct value, and so these passed through the edit process. Only in review of the aggregate was this issue identified. HHSC has since implemented improved controls to monitor this.

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements. The amended rules are adopted specifically under Texas Government Code §536.151 and §536.152, which require HHSC to adopt rules for identifying potentially preventable readmissions (PPRs) and potentially preventable complications (PPCs); to establish a program for providing reports to hospitals on PPR and PPC performance; and to adjust reimbursements based on a hospital's PPR and PPC performance.

§354.1445. Potentially Preventable Readmissions.

(a) Introduction. The Health and Human Services Commission (HHSC) may reward or penalize a hospital under this section based on the hospital's performance with respect to exceeding or failing to

meet outcome and process measures relative to all Texas Medicaid and CHIP hospitals regarding the rates of potentially preventable events.

(b) Definitions.

(1) Actual-to-Expected Ratio--A ratio that measures the impact of potentially preventable readmissions (PPRs) by deriving an actual hospital rate compared to an expected hospital rate based on a methodology defined by HHSC. HHSC may use cost of PPR as a factor in weighting PPRs and in calculating PPR Actual-to-Expected Ratio.

(2) Adjustment time period--The state fiscal year (September through August) that a hospital's claims are adjusted in accordance with subsection (f) of this section. Adjustments will be done on an annual basis.

(3) All Patient Refined Diagnosis Related Group (APR DRG)--A diagnosis and procedure code classification system for inpatient services.

(4) Candidate admission--An admission that is at risk of a PPR.

(5) Case-mix--A measure of the clinical characteristics of patients treated during the reporting time period and measured using APR DRG or its replacement classification system, severity of illness, patient age, and the presence of a major mental health or substance abuse comorbidity.

(6) Claims during the reporting time period--Includes Medicaid traditional fee-for-service (FFS), Children's Health Insurance Program or CHIP, and managed care inpatient hospital claims filed for reimbursement by a hospital that:

(A) had a date of admission occurring within the reporting period;

(B) were adjudicated and approved for payment during the reporting period and the six-month grace period that immediately followed, except for claims that had zero inpatient days;

(C) were not claims for patients who are covered by Medicare;

(D) were not claims for individuals classified as undocumented immigrants; and

(E) were not subject to other exclusions as determined by HHSC.

(7) Children's Health Insurance Program or CHIP or Program--The Texas State Children's Health Insurance Program established under Title XXI of the federal Social Security Act (42 U.S.C. Chapter 7, Title XXI) and Chapters 62 and 63 of the Texas Health and Safety Code.

(8) Clinically related--A requirement that the underlying reason for readmission be plausibly related to the care rendered during or immediately following the initial admission. A clinically related readmission occurs within a specified readmission time interval resulting from the process of care and treatment during the initial admission or from a lack of post admission follow-up, but not from unrelated events occurring after the initial admission.

(9) HHSC--The Health and Human Services Commission or its designee.

(10) Hospital--A public or private institution licensed under Chapter 241 or Chapter 577, Texas Health and Safety Code, including a general or special hospital as defined by §241.003, Texas Health and Safety Code.

(11) Initial admission--A candidate admission followed by one or more readmissions that are clinically related.

(12) Managed care organization (MCO)--A provider or organization under contract with HHSC to provide services to Medicaid or CHIP recipients using a health care delivery system or dental services delivery system in which provider or organization coordinates the patient's overall care.

(13) Medicaid program--The medical assistance program established under Chapter 32, Texas Human Resources Code.

(14) Potentially preventable event (PPE)--A potentially preventable admission, a potentially preventable ancillary service, a potentially preventable complication, a potentially preventable emergency room visit, a potentially preventable readmission, or a combination of these events, which are more fully defined in §354.1070 of this title.

(15) Potentially preventable readmission (PPR)--A return hospitalization of a person within a period specified by HHSC that may have resulted from deficiencies in the care or treatment provided to the person during a previous hospital stay or from deficiencies in post-hospital discharge follow-up. The term does not include a hospital readmission necessitated by the occurrence of unrelated events after the discharge. The term includes the readmission of a person to a hospital for:

(A) the same condition or procedure for which the person was previously admitted;

(B) an infection or other complication resulting from care previously provided;

(C) a condition or procedure that indicates that a surgical intervention performed during a previous admission was unsuccessful in achieving the anticipated outcome; or

(D) another condition or procedure of a similar nature, as determined by HHSC.

(16) Readmission chain--A sequence of PPRs that are all clinically related to the Initial Admission. A readmission chain may contain an Initial Admission and only one PPR, or may contain multiple PPRs following the Initial Admission.

(17) Reporting time period--The period of time that includes hospital claims that are assessed for PPRs. This may be a state fiscal year (September through August) or other specified time frame as determined by HHSC. PPR Reports will consist of statewide and hospital-specific reports and will be done at least on an annual basis, using the most complete data period available to HHSC.

(18) Safety-net hospital--As defined in §355.8052 of this title (relating to Inpatient Hospital Reimbursement).

(c) Calculating a PPR rate. Using claims during the reporting time period and HHSC-designated software and methodology, HHSC calculates an actual PPR rate and an expected PPR rate for each hospital in the analysis. The methodology for inclusion of hospitals in the analysis will be described in the statewide and hospital-specific reports. The actual-to-expected ratio is rounded to two decimal places and used to determine reimbursement adjustments described in subsection (f) of this section.

(1) The actual PPR rate is the number of readmission chains divided by the number of candidate admissions.

(2) The expected PPR rate is the expected number of readmission chains divided by the number of candidate admissions. The expected number of readmission chains is based on the hospital's case-

mix relative to the case-mix of all hospitals included in the analysis during the reporting period.

(3) HHSC may weight PPRs based on expected resource use.

(d) Comparing the PPR performance of all hospitals included in analysis. Using the rates determined in subsection (c) of this section, HHSC calculates a ratio of actual-to-expected PPR rates.

(e) Reporting results of PPR rate calculations. HHSC provides a confidential report to each hospital included in the analysis regarding the hospital's performance with respect to potentially preventable readmissions, including the PPR rates calculated as described in subsection (c) of this section and the hospital's actual-to-expected ratio calculated as described in subsection (d) of this section.

(1) A hospital may request the underlying data used in the analysis to generate the report via an email request to the HHSC email address found on the report.

(2) The underlying data contains patient-level identifiers, information on all hospitals where the readmissions occurred, and other information deemed relevant by HHSC.

(f) Hospitals subject to reimbursement adjustment and amount of adjustment.

(1) A hospital with an actual-to-expected PPR ratio equal to or greater than 1.10 and equal to or less than 1.25 is subject to a reimbursement adjustment of -1%;

(2) A hospital with an actual-to-expected PPR ratio greater than 1.25 is subject to a reimbursement adjustment of -2%.

(g) Claims subject to reimbursement adjustment.

(1) The reimbursement adjustments described in subsection (f) of this section will apply to all Medicaid fee-for-service claims, based on patient discharge date, for the adjustment time period after the confidential report on which the reimbursement adjustments are based is made available to hospitals.

(2) The reimbursement adjustments for a hospital will cease in the adjustment time period that is after the hospital receives a confidential report indicating an actual-to-expected ratio of less than 1.10.

(3) On an annual basis and based on review of the data quality and accuracy, HHSC may determine if reimbursement adjustments are appropriate.

(h) Targeted incentive payments for safety-net hospitals.

(1) HHSC determines annually whether a safety-net hospital may receive an incentive payment for performance on PPR incidence.

(2) The appropriated funds for the targeted incentive payments are split in half, 50 percent for PPRs and 50 percent for potentially preventable complications. HHSC may change the allocated percentages based on review of data and the changing needs of the program.

(3) The dataset used in the incentive analysis is the same as the dataset used in the PPR reimbursement adjustments.

(4) Hospitals that are eligible for a targeted incentive payment must meet the following requirements:

(A) be a safety-net hospital;

(B) have an actual-to-expected ratio of at least 10 percent lower than the statewide average (actual-to-expected ratio is less than or equal to 0.90);

(C) have not received a penalty for either PPRs or potentially preventable complications; and

(D) are not low-volume, as defined by HHSC.

(5) Calculation of targeted incentive payments.

(A) Calculate base allocation. Each eligible hospital is awarded a base allocation not to exceed \$100,000.

(B) Calculate variable allocation. Each eligible hospital is awarded a variable allocation, which is calculated from remaining funds after distribution of base allocations to all eligible hospitals. The variable allocation has the following components:

(i) Hospital size score. Each eligible hospital's size divided by the average size of the whole group of hospitals within each incentive pool. Size is calculated based on total inpatient facility claims paid to each eligible hospital. Each eligible hospital's size calculation is capped at 2.00.

(ii) Hospital Performance score. Each eligible hospital's performance divided by the average performance of the whole group of hospitals within each incentive pool. Performance is calculated by actual to expected ratio.

(iii) Composite score. Each eligible hospital receives a composite score, which is the hospital's size score multiplied by the hospital's performance score.

(iv) Each hospital's composite score divided by the sum of all eligible hospitals' composite scores is multiplied by the remaining incentive funds, after distribution of base allocations.

(C) Calculate final allocation: The final allocation to each eligible hospital is equal to the eligible hospital's base allocation plus the eligible hospital's variable allocation.

(6) Each eligible hospital's PPR incentive payment will be divided between FFS and MCO reimbursements based on the percentage of its total paid FFS and MCO Medicaid inpatient hospital reimbursements for the reporting time period accruing from FFS.

(7) PPR incentive payments may be made as lump sum payments or tied to particular claims or recipients, at HHSC's discretion.

(8) HHSC will post the methodology for calculating and distributing incentives on its public website.

(9) Targeted incentive payments for safety-net hospitals are not included in the calculation of a hospital's hospital-specific limit or low income utilization rate.

§354.1446. *Potentially Preventable Complications.*

(a) Introduction. The Health and Human Services Commission (HHSC) may reward or penalize a hospital under this section based on the hospital's performance with respect to exceeding or failing to achieve outcome and process measures relative to all Texas Medicaid and CHIP hospitals that address the rates of potentially preventable events.

(b) Definitions.

(1) Actual to Expected Ratio--The ratio of actual potentially preventable complications (PPCs) within an inpatient stay compared with expected PPCs within an inpatient stay, where the expected number depends on the all patient refined diagnosis related group at the time of admission (APR DRG or its replacement classification sys-

tem) is adjusted for the patient's severity of illness. HHSC, at its discretion, determines the relative weights of PPCs when calculating the actual to expected ratio. Expected PPC results calculation is based on the statewide norms and is calculated from Medicaid traditional fee-for-service (FFS), Children's Health Insurance Program or CHIP, and, if available, managed care data.

(2) Adjustment time period--The state fiscal year (September through August) that a hospital's claims are adjusted in accordance with subsection (f) or (g)(5) of this section. Adjustments will be done on an annual basis.

(3) All Patient Refined Diagnosis Related Group (APR DRG)--A diagnosis and procedure code classification system for inpatient services.

(4) Case-mix--A measure of the clinical characteristics of patients treated during the reporting time period based on diagnosis and severity of illness. "Higher" case-mix refers to sicker patients who require more hospital resources.

(5) Children's Health Insurance Program or CHIP or Program--The Texas State Children's Health Insurance Program established under Title XXI of the federal Social Security Act (42 U.S.C. Chapter 7, Title XXI) and Chapters 62 and 63 of the Texas Health and Safety Code.

(6) Inpatient claims during the reporting time period--Includes Medicaid traditional FFS, CHIP, and, if available, managed care data for inpatient hospital claims filed for reimbursement by a hospital that:

(A) had a date of admission occurring within the reporting time period;

(B) were adjudicated and approved for payment during the reporting time period and the six-month grace period that immediately followed, except for such claims that had zero inpatient days;

(C) were not inpatient stays for patients who are covered by Medicare;

(D) were not claims for patients diagnosed with major metastatic cancer, organ transplants, human immunodeficiency virus (HIV), or major trauma; and

(E) were not subject to other exclusions as determined by HHSC.

(7) HHSC--The Health and Human Services Commission or its designee.

(8) Hospital--A public or private institution licensed under Chapter 241 or Chapter 577, Texas Health and Safety Code, including a general or special hospital as defined by §241.003, Texas Health and Safety Code.

(9) Managed care organization (MCO)--Managed care is a health care delivery system or dental services delivery system in which the overall care of a patient is coordinated by or through a single provider or organization. MCO refers to such a provider or organization under contract with HHSC to provide services to Medicaid recipients.

(10) Medicaid program--The medical assistance program established under Chapter 32, Texas Human Resources Code.

(11) Norm--The Texas statewide average or the standard by which hospital PPC performance is compared.

(12) Potentially preventable complication (PPC)--A harmful event or negative outcome with respect to a person, including an infection or surgical complication, that:

(A) occurs after the person's admission to an inpatient acute care hospital; and

(B) may have resulted from the care, lack of care, or treatment provided during the hospital stay rather than from a natural progression of an underlying disease.

(13) Potentially preventable event (PPE)--A potentially preventable admission, a potentially preventable ancillary service, a potentially preventable complication, a potentially preventable emergency room visit, a potentially preventable readmission, or a combination of those events, which are more fully defined in §354.1070 of this title.

(14) Present on Admission (POA) Indicators--A coding system that requires hospitals to accurately submit principal and secondary diagnoses that are present at the time of admission. POA codes are essential for the accurate calculation of PPC rates and consist of the current coding set approved by CMS.

(15) Reporting time period--The period of time that includes hospital claims that are assessed for PPCs. This may be a state fiscal year (September through August) or other specified time frame as determined by HHSC. PPC Reports will consist of statewide and hospital-specific reports and will be done at least on an annual basis, using the most complete data period available to HHSC.

(16) Safety-net hospital--As defined in §355.8052 of this title (relating to Inpatient Hospital Reimbursement).

(c) Calculating a PPC rate. Using inpatient claims during the reporting time period and HHSC-designated software and methodology, HHSC calculates an actual PPC rate and an expected PPC rate for each hospital included in the analysis. The methodology for inclusion of hospitals in the analysis will be described in the statewide and hospital-specific reports. HHSC will determine at its discretion the relative weights of PPCs when calculating the actual to expected ratio. The actual-to-expected ratio is rounded to two decimal places and used to determine reimbursement adjustments described in subsection (f) of this section.

(d) Comparing the PPC performance of all hospitals included in the analysis. Using the rates determined in subsection (c) of this section, HHSC calculates a ratio of actual-to-expected PPC rates.

(e) Reporting results of PPC rate calculations. HHSC provides a confidential report to each hospital included in the analysis regarding the hospital's performance with respect to potentially preventable complications, including the PPC rates calculated as described in subsection (c) of this section and the hospital's actual-to-expected ratio calculated as described in subsection (d) of this section.

(1) A hospital may request the underlying data used in the analysis to generate the report via an email request to the HHSC email address found on the report.

(2) The underlying data contains patient-level identifiers and other information deemed relevant by HHSC.

(f) Hospitals subject to reimbursement adjustment and amount of adjustment.

(1) A hospital with an actual-to-expected PPC ratio equal to or greater than 1.10 and equal to or less than 1.25 is subject to a reimbursement adjustment of -2%;

(2) A hospital with an actual-to-expected PPC ratio greater than 1.25 is subject to a reimbursement adjustment of -2.5%.

(g) Claims subject to reimbursement adjustment.

(1) The reimbursement adjustments described in subsection (f) of this section apply to all Medicaid fee-for-service claims beginning November 1, 2013 and after.

(2) The reimbursement adjustments will occur after the confidential report on which the reimbursement adjustments are based is made available to hospitals.

(3) The reimbursement adjustments for a hospital will cease in the adjustment time period that is after the hospital receives a confidential report indicating an actual-to-expected ratio of less than 1.10.

(4) On an annual basis and based on review of the data quality and accuracy, HHSC may determine if reimbursement adjustments are appropriate.

(5) Based on HHSC-approved POA data screening criteria, HHSC may implement automatic payment reductions to hospitals who fail POA screening. The POA screening criteria and methodology will be described in the statewide and hospital specific reports. At its discretion, HHSC applies the following adjustments based on POA screening criteria:

(A) Failure to meet POA screening criteria, first reporting period violation: 2% reduction applied to all Medicaid fee-for-service claims in the corresponding adjustment period.

(B) Failure to meet POA screening criteria, two or more violations in a row: 2.5% applied all Medicaid fee-for-service claims in the corresponding adjustment period.

(C) If a hospital passes POA screening criteria during a reporting time period, any future violations of the POA screening criteria will be considered a first violation.

(6) The reimbursement adjustments based on POA screening criteria will cease when the hospital passes HHSC-approved POA screening criteria for an entire reporting time period, at which the hospital will be subject to reimbursement adjustments, if applicable, based on criteria outlined in subsection (f) of this section.

(7) Hospitals that receive a reimbursement adjustment based on POA screening criteria outlined in paragraph (5) of this subsection will not concurrently receive reductions outlined in subsection (f) of this section.

(h) Targeted incentive payments for safety-net hospitals.

(1) HHSC determines annually whether a safety-net hospital may receive an incentive payment for performance on PPC incidence.

(2) The appropriated funds for the targeted incentive payments are split in half, 50 percent for PPCs and 50 percent for potentially preventable readmissions. HHSC may change the allocated percentages based on review of data and the changing needs of the program.

(3) The dataset used in the incentive analysis is the same as the dataset used in the PPC reimbursement adjustments.

(4) Hospitals that are eligible for a targeted incentive payment must meet the following requirements:

(A) be a safety-net hospital;

(B) have an actual-to-expected ratio of at least 10 percent lower than the statewide average (actual-to-expected ratio is less than or equal to 0.90);

(C) have not received a penalty for either PPCs or potentially preventable readmissions; and

(D) are not low-volume, as defined by HHSC.

(5) Calculation of targeted incentive payments.

(A) Calculate base allocation. Each eligible hospital is awarded a base allocation not to exceed \$100,000.

(B) Calculate variable allocation. Each eligible hospital is awarded a variable allocation, which is calculated from remaining funds after distribution of base allocations to all eligible hospitals. The variable allocation has the following components:

(i) Hospital size score. Each eligible hospital's size divided by the average size of the whole group of hospitals within each incentive pool. Size is calculated based on total inpatient facility claims paid to each eligible hospital. Each eligible hospital's size calculation is capped at 2.00.

(ii) Hospital Performance score. Each eligible hospital's performance divided by the average performance of the whole group of hospitals within each incentive pool. Performance is calculated by actual to expected ratio.

(iii) Composite score. Each eligible hospital receives a composite score, which is the hospital's size score multiplied by the hospital's performance score.

(iv) Each hospital's composite score divided by the sum of all eligible hospitals' composite scores is multiplied by the remaining incentive funds, after distribution of base allocations.

(C) Calculate final allocation. The final allocation to each eligible hospital is equal to the eligible hospital's base allocation plus the eligible hospital's variable allocation.

(6) Each eligible hospital's PPC incentive payment will be divided between FFS and MCO reimbursements based on the percentage of its total paid FFS and MCO Medicaid inpatient hospital reimbursements for the reporting time period accruing from FFS.

(7) PPC incentive payments may be made as lump sum payments or tied to particular claims or recipients at HHSC's discretion.

(8) HHSC will post the methodology for calculating and distributing incentives on its public website.

(9) Targeted incentive payments for safety-net hospitals are not included in the calculation of a hospital's hospital-specific limit or low income utilization rate.

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

Filed with the Office of the Secretary of State on April 20, 2016.

TRD-201601935

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900

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SUBCHAPTER F. PHARMACY SERVICES

The Texas Health and Human Services Commission (HHSC) adopts amendments to §354.1835, concerning Prescriber Identification Numbers; §354.1851, concerning Substitution of One Drug for Another in a Prescription; §354.1863, concerning Prescription Requirements; §354.1901, concerning Pharmacy Claims; §354.1921, concerning Addition of Drugs to the Texas Drug Code Index; §354.1923, concerning Review and Evaluation; and §354.1927, concerning Retention and Deletion of Drugs. HHSC also adopts new §354.1868, concerning Exceptions in Disasters. The amendments and new rules are adopted without changes to the proposed text as published in the October 30, 2015, issue of the *Texas Register* (40 TexReg 7505). The text of the rules will not be republished.

BACKGROUND AND JUSTIFICATION

The new rule and adopted amendments align the rules with state and federal laws. Texas Health and Safety Code §483.047(b-1), as adopted by Senate Bill (S.B.) 460, 84th Legislature, Regular Session, 2015, allows pharmacists to fill a 30-day refill of medications in certain disaster situations. The new rule and amendments likewise allow pharmacists to fill a 30-day refill in the event of certain disasters and provide for reimbursement. Additionally, the adopted amendments replace the estimated acquisition cost (EAC) with the acquisition cost, which includes the National Average Drug Acquisition Cost (NADAC). This complies with the final rule-with-comment-period that amends 42 CFR Part 447, as published in the *Federal Register* February 1, 2016, effective April 1, 2017. The adopted rule changes related to acquisition cost affect only claims processed through the HHSC Vendor Drug Program (VDP), which includes fee-for-service (FFS) Medicaid and the Kidney Health Care, Children with Special Health Care Needs, and Texas Women's Health programs. Claims processed through managed care are not impacted by the changes to acquisition cost.

Concurrently, HHSC is adopting amendments to 1 TAC §§355.8541, 355.8546, 355.8547, 355.8548, and 355.8551; and repealing and replacing §355.8545. The adopted rules appear in this issue of the *Texas Register*.

COMMENTS

The 30-day comment period ended November 30, 2015. HHSC received multiple comments regarding the proposed rules from the pharmaceutical industry, the National Association of Chain Drug Stores, the Texas Pharmacy Business Council, the National Community Pharmacists Association, Texas TrueCare, Alliance of Independent Pharmacists of Texas, representatives of individual pharmacies and some individual chain drug stores. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Several commenters stated that they support the rule amendments (§354.1868) to allow pharmacists to refill medications without prescriber authorization in specific emergency situations, as required by S.B. 460.

Response: HHSC appreciates the comment.

Comment: Multiple commenters stated that the long term care pharmacy acquisition cost (LTCPAC) and specialty pharmacy acquisition cost (SPAC), as defined in §354.1921 and the corresponding reimbursement rule, as amended, (§355.8541) would unfairly provide reimbursement to long term care and specialty

pharmacies that is different than reimbursement to retail pharmacies. Commenters also stated that the reimbursement provided to long term care pharmacies and specialty pharmacies would be too low to maintain current business practices.

Response: HHSC disagrees and declines to revise the rule in response to these comments. In 2014, HHSC contracted with Myers and Stauffer to conduct studies to identify the acquisition cost being paid by Texas pharmacies to procure drug products, determine how much it costs them to dispense medications per prescription, and evaluate the impact of the potential adoption of the new federal upper limit prices. Myers and Stauffer recommended the adoption of a reimbursement methodology using the National Average Drug Acquisition Cost (NADAC) for drug ingredient reimbursement. For drugs without a NADAC rate, the use of wholesale acquisition cost (WAC) minus a percentage for brand and generic drugs was recommended. Myers and Stauffer's Cost of Dispensing study supports use of a differentiated NADAC price, and the rules are consistent with the Myers and Stauffer study.

Comment: Multiple commenters strongly support the proposed rule change to remove the requirement for drug manufacturers to send monthly drug price updates to HHSC.

Response: HHSC appreciates the comment and will no longer require reporting of monthly drug price updates as described by the commenters (see §354.1921 as adopted).

Comment: Multiple commenters asked HHSC to extend the amount of time drug manufacturers will have to submit drug price changes upon request from 10 days to 30 days in order to give manufacturers time to calculate, compile, and audit the data (§354.1921(c)(2)).

Response: HHSC declines to revise the rule in response to this comment. HHSC's current process requires manufacturers to submit price updates upon request within ten days; the rule merely codifies this timeframe. Further, manufacturers will no longer be required to submit monthly price updates to HHSC and will instead be required to submit updates only if requested by HHSC.

Comment: Several commenters expressed concerns about having to report pricing using SPAC and LTCPAC, as defined in §354.1921 and the corresponding reimbursement rule, as amended (§355.8541).

Response: HHSC will not require pricing information on our Certification of Information SPAC. We will continue to require pricing for drugs delivered to LTC pharmacies. Manufacturers will be required to provide prices for the price points on the Certificate of Information, which include Average Wholesale Price, Average Manufacturer Price, Price to Wholesaler/Distributor, Direct Price to Pharmacy, and Direct Price to Long Term Care Pharmacy.

Comment: One commenter asked if HHSC's price update requests (§354.1921(b) and (c)) would apply to all price changes occurring after the initial submission of prices, or if HHSC will request price updates only for specific products.

Response: HHSC does not understand this comment to suggest a revision to the rules. HHSC anticipates that the majority of price update requests will apply only to specific products.

DIVISION 2. ADMINISTRATION

1 TAC §354.1835

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.033, and §531.021, which authorize HHSC to administer the Medicaid program in Texas and to propose and adopt rules governing the determination of Medicaid reimbursements; Texas Human Resources Code §32.021 and §32.024, which authorize HHSC to administer the Medicaid program in Texas and the Texas Women's Health Program; Texas Health and Safety Code §35.009 and §42.003, which authorize HHSC to enact rules regarding the Children with Special Health Care Needs and Kidney Health Care programs.

The amendment affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32.

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

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Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900



DIVISION 3. MEDICATIONS

1 TAC §354.1851

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.033, and §531.021, which authorize HHSC to administer the Medicaid program in Texas and to propose and adopt rules governing the determination of Medicaid reimbursements; Texas Human Resources Code §32.021 and §32.024, which authorize HHSC to administer the Medicaid program in Texas and the Texas Women's Health Program; Texas Health and Safety Code §35.009 and §42.003, which authorize HHSC to enact rules regarding the Children with Special Health Care Needs and Kidney Health Care programs.

The amendment affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32.

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

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Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900



DIVISION 4. LIMITATIONS

1 TAC §354.1863, §354.1868

STATUTORY AUTHORITY

The amendment and new rule are adopted under Texas Government Code §531.033, and §531.021, which authorize HHSC to administer the Medicaid program in Texas and to propose and adopt rules governing the determination of Medicaid reimbursements; Texas Human Resources Code §32.021 and §32.024, which authorize HHSC to administer the Medicaid program in Texas and the Texas Women's Health Program; Texas Health and Safety Code §35.009 and §42.003, which authorize HHSC to enact rules regarding the Children with Special Health Care Needs and Kidney Health Care programs.

The amendment and new rule affect Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32.

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

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Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900



DIVISION 6. PHARMACY CLAIMS

1 TAC §354.1901

STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.033, and §531.021, which authorize HHSC to administer the Medicaid program in Texas and to propose and adopt rules governing the determination of Medicaid reimbursements; Texas Human Resources Code §32.021 and §32.024, which authorize HHSC to administer the Medicaid program in Texas and the Texas Women's Health Program; Texas Health and Safety Code §35.009 and §42.003, which authorize HHSC to enact rules regarding the Children with Special Health Care Needs and Kidney Health Care programs.

The amendment affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32.

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

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Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900



DIVISION 7. TEXAS DRUG CODE INDEX--ADDITIONS, RETENTIONS, AND DELETIONS

1 TAC §§354.1921, 354.1923, 354.1927

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.033, and §531.021, which authorize HHSC to administer the Medicaid program in Texas and to propose and adopt rules governing the determination of Medicaid reimbursements; Texas Human Resources Code §32.021 and §32.024, which authorize HHSC to administer the Medicaid program in Texas and the Texas Women's Health Program; Texas Health and Safety Code §35.009 and §42.003, which authorize HHSC to enact rules regarding the Children with Special Health Care Needs and Kidney Health Care programs.

The amendments affect Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32.

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

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Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900



CHAPTER 355. REIMBURSEMENT RATES SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 28. PHARMACY SERVICES: REIMBURSEMENT

The Texas Health and Human Services Commission (HHSC) adopts amendments to §355.8541, concerning Legend and Nonlegend Medications; §355.8546, concerning Brand-Name Drugs; §355.8547, concerning Reimbursement for Compound Prescriptions; §355.8548, concerning 340B Covered Entities; and §355.8551, concerning Dispensing Fee. HHSC also repeals §355.8545, concerning Texas Maximum Allowable Cost. The amendments and repeal are adopted without changes to the text as published in the October 30, 2015, issue of the *Texas Register* (40 TexReg 7512). The text of the rules will not be republished. Section 355.8551 changes the section title name from "Dispensing Fee" to "Professional Dispensing Fee."

Concurrently, HHSC is adopting amendments to 1 TAC §§354.1851, 354.1901, 354.1921, 354.1923, and 354.1927 (relating to Pharmacy Services). The adopted rules appear in this issue of the *Texas Register*.

BACKGROUND AND JUSTIFICATION

In a final Medicaid Pharmacy Outpatient Rule adopted by the Centers for Medicare & Medicaid Services (CMS) to amend 42

CFR part 447, subpart I, effective April 1, 2016, CMS replaced the estimated acquisition cost with actual acquisition cost as the basis for state Medicaid pharmacy ingredient cost reimbursement. See 42 CFR §§447.502, 447.512, 447.518; 81 Fed. Reg. 5170 (Feb. 1, 2016). In 2014, in response to the proposed version of the Medicaid Pharmacy Outpatient Rule, HHSC contracted with Myers and Stauffer, certified public accountants, to conduct studies to identify the acquisition cost Texas pharmacies were paying to procure drug products, determine how much it costs the pharmacies to dispense medications per prescription, and evaluate the impact of the potential adoption of the proposed federal upper limit prices. In its Cost of Dispensing study (Texas COD Study), Myers and Stauffer recommended that HHSC adopt a reimbursement methodology using the National Average Drug Acquisition Cost (NADAC) for drug ingredient reimbursement. For drugs without a NADAC rate, Myers and Stauffer recommended that HHSC use wholesale acquisition cost (WAC) minus a percentage for brand and generic drugs. Based on Myers and Stauffer's reports, HHSC is adopting two new acquisition costs that are based on NADAC, long term care pharmacy acquisition cost and specialty pharmacy acquisition cost, to reimburse drug claims submitted by long term care pharmacies and specialty drug pharmacies.

In addition, CMS, in its final rule, stated that moving from an estimated pricing methodology to one that is actual acquisition cost-based will impact the balance of overall pharmacy reimbursement, thereby requiring states to concurrently re-evaluate the dispensing fee. See 42 CFR §447.518(d); 81 Fed. Reg. 5175. HHSC's Vendor Drug Program (VDP) did re-evaluate, in accordance with the federal rule as adopted, and intends to increase the dispensing fee amount on the effective date of these amendments, based on Myers and Stauffer's cost of dispensing study. These adjustments will help offset the impact of the proposed ingredient drug pricing changes and are included in the amendments' fiscal impact as published in the October 30, 2015, issue of the *Texas Register* (40 TexReg 7514).

The amendments as adopted implement the Myers and Stauffer recommendations, in addition to updating outdated language and repealing language that no longer applies to the program.

The 2016-17 General Appropriations Act (House Bill 1, 84th Legislature, Regular Session, 2015, Article II, HHSC, Rider 50) requires HHSC to achieve cost savings through initiatives such as increasing efficiencies in VDP. The amendments are expected to achieve cost savings, in accordance with this direction.

COMMENTS

The 30-day comment period ended November 30, 2015. During this period, HHSC received multiple comments regarding the amended rules from the pharmaceutical industry, the National Association of Chain Drug Stores, the State Patient Access Coalition, the Texas Independent Pharmacies Association, the Independent Pharmacy Cooperative, Texas Pharmacy Business Council, Texas TrueCare, the Alliance of Independent Pharmacists of Texas, the National Community Pharmacists Association, independent pharmacy representatives, and some individual chain drug stores. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Multiple commenters stated that the long term care pharmacy acquisition cost (LTCPAC) and specialty pharmacy acquisition cost (SPAC) (see §355.8541(b) and the corresponding definition at §354.1921, as amended) would unfairly provide

reimbursement to long term care and specialty pharmacies that is different than reimbursement to retail pharmacies.

Response: HHSC declines to revise the rules in response to these comments. The Texas COD study supports use of a differentiated NADAC price. Myers and Stauffer recommended the adoption of a reimbursement methodology using the National Average Drug Acquisition Cost (NADAC) for drug ingredient reimbursement. For drugs without a NADAC rate, the use of wholesale acquisition cost (WAC) minus a percentage for brand and generic drugs was recommended.

Comment: Commenters also stated that the reimbursement using NADAC (see §355.8541(b)(3)) provided to long term care pharmacies and specialty pharmacies would be too low to maintain current business practices.

Response: HHSC declines to revise the rules in response to the comments. The Texas COD study supported NADAC for all VDP-reimbursed pharmacy types. Further, HHSC applies this methodology only to claims submitted for services and products provided to clients in fee-for-service, which accounts for a fraction of the overall Medicaid population.

Comment: Several commenters support the implementation of an acquisition cost-based methodology such as NADAC (see §355.8541(b)(3)).

Response: HHSC appreciates the comment.

Comment: Several commenters support the variable dispensing fee because it more accurately reflects the volatility of high-cost prescription drugs prices and inflation. They stated that adopting a fixed, non-variable dispensing fee could provide an incentive for pharmacies to not maintain inventory of rarely dispensed, high cost drugs, which could limit access to needed pharmaceuticals in certain parts of the state.

Response: HHSC appreciates the comment.

Comment: One commenter stated that NADAC should be incorporated into managed care reimbursement.

Response: HHSC declines to revise the rules in response to this comment. Managed care pharmacy reimbursement is outside the scope of these rules.

Comment: One commenter stated that HHSC should create a unique Medicaid reimbursement for blood clotting factor that takes into account the extensive efforts required to provide blood clotting factor to Medicaid recipients.

Response: HHSC declines to revise the rules in response to the comment. 42 CFR §447.502 states that the "dispensing fee includes only pharmacy costs associated with ensuring that possession of the appropriate covered outpatient drug is transferred to a Medicaid beneficiary." The costs do not include enhanced pharmacy reimbursement for blood clotting factor products. CMS responded to a similar comment in its final rules: "One commenter requested that CMS implement a unique Medicaid reimbursement for blood clotting factor..." 81 Fed. Reg. 5294 (Feb. 1, 2016). CMS responded that it did not "think it is necessary for states to implement a specific dispensing fee for providing clotting factors." *Id.*

Comment: One commenter stated that HHSC should set specialty rates specific to each individual drug's National Drug Code in order to ensure adequate reimbursement for specialty products and limited distribution drugs, which have higher costs of care and shipping than other drugs.

Response: HHSC declines to revise the rules in response to this comment. The Texas COD study supported NADAC for all VDP-reimbursed pharmacy types.

1 TAC §§355.8541, 355.8546 - 355.8548, 355.8551

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority, and §531.021, which authorizes HHSC to administer the Medicaid program in Texas and to propose and adopt rules governing the determination of Medicaid reimbursements; and Texas Human Resources Code §32.021 providing HHSC with the authority to administer the Medicaid program in Texas.

The amendments affect Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32.

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

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Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900



1 TAC §355.8545

STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority, and §531.021, which authorizes HHSC to administer the Medicaid program in Texas and to propose and adopt rules governing the determination of Medicaid reimbursements; and Texas Human Resources Code §32.021 providing HHSC with the authority to administer the Medicaid program in Texas.

The repeal affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32.

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

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Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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CHAPTER 371. MEDICAID AND OTHER HEALTH AND HUMAN SERVICES FRAUD AND ABUSE PROGRAM INTEGRITY
SUBCHAPTER B. OFFICE OF INSPECTOR GENERAL

1 TAC §371.35

The Texas Health and Human Services Commission (HHSC) adopts new §371.35, concerning Sampling and Extrapolation, without changes to the proposed text as published in the March 4, 2016, issue of the *Texas Register* (41 TexReg 1559). The rule will not be republished.

BACKGROUND AND JUSTIFICATION

New §371.35 implements Texas Government Code §531.102(s), adopted in 2015 by the passage of Senate Bill 207 (S.B. 207). See Act of May 31, 2015, 84th Leg., R.S., ch. 945, §2, 2015 Tex. Gen. Laws. S.B. 207 amended various provisions in Texas Government Code Chapter 531 related to the Office of Inspector General's (IG's) authority and duties. Texas Government Code §531.102(r), also adopted by S.B. 207, requires the IG to review its process of sampling and extrapolation. Based in part on this review and generally accepted standards among other offices of inspector general, §531.102(s) requires the HHSC Executive Commissioner, in consultation with the IG, to adopt rules standardizing sampling and extrapolation techniques for IG.

HHSC intends that any obligations or requirements that accrued under Chapter 371 before the effective date of this rule will be governed by the prior rules in Chapter 371 and that those rules continue in effect for this purpose. HHSC does not intend for the adoption of this new rule to affect the prior operation of the rules; any prior actions taken under the rules or statute; any validation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred under the rules; any violation of the rules or any penalty, forfeiture, or punishment incurred under the rules before their amendment; or any investigation, proceeding, or remedy concerning any privilege, obligation, liability, penalty, forfeiture, or punishment. HHSC additionally intends that any investigation, proceeding, or remedy may be instituted, continued, or enforced, and the penalty, forfeiture, or punishment imposed, as if the rule had not been added.

HHSC intends that should any sentence, paragraph, subdivision, clause, phrase, or section of the new rule in Chapter 371 be determined, adjudged, or held to be unconstitutional, illegal, or invalid, the same will not affect the validity of the subchapter as a whole, or any part or provision hereof other than the part so declared to be unconstitutional, illegal, or invalid, and will not affect the validity of the subchapter as a whole.

COMMENTS

The 30-day comment period ended April 4, 2016. During this period, HHSC received comments regarding the rules from one commenter: the Texas Dental Association. A summary of the comment relating to the rule and HHSC's responses follows.

Comment: The commenter supports the new rule, as it is consistent with the intent of Senate Bill 207. The commenter "remains concerned about the use of extrapolation in situations where a review of all items in which a suspected overpayment has occurred is not practical or reasonable," however. The commenter continues: "So as not to disrupt the delivery of medically necessary dental treatment, the Health and Human Services Commis-

sion's Office of Inspector General must balance its charge to prevent, detect, and investigate fraud, waste, and abuse in Medicaid with preserving dentist providers' substantive rights and procedural due process. Pertaining to extrapolation, this means not overly relying on RAT-STATS without a grasp of the underlying data. Such can lead to inaccurate conclusions unfairly penalizing providers... The TDA's first priority is the health and safety of Medicaid eligible children. The Association cautions that, in all state investigatory and enforcement processes, the necessary safeguards must be in place to protect both the patient and the treating dentist. All state investigatory and enforcement processes, must be fair, expeditious, and sensitive."

Response: HHSC made no changes in response to this comment. The IG appreciates the comment and notes that the rule does not mandate the use of extrapolation in every case. In addition, HHSC is addressing the commenter's concern, which relates to the valuation of individual errors and behavior, in previously proposed rules related to factors that the agency will consider when determining the level of sanction to pursue. (See Proposed amendments to §371.1603, Legal Basis and Scope, published in the January 29, 2016, issue of the *Texas Register* (41 TexReg 742).)

STATUTORY AUTHORITY

The new rule is adopted under Texas Government Code §531.102(a-2), which requires the Executive Commissioner to work in consultation with the Office of Inspector General to adopt rules necessary to implement a power or duty of the office; Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas, to administer Medicaid funds, and to adopt rules necessary for the proper and efficient regulations of the Medicaid program.

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

Filed with the Office of the Secretary of State on April 20, 2016.

TRD-201601900

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

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For further information, please call: (512) 424-6900



TITLE 4. AGRICULTURE

PART 6. TEXAS GRAIN PRODUCER INDEMNITY BOARD

CHAPTER 90. TEXAS GRAIN PRODUCER INDEMNITY FUND PROGRAM RULES

The Texas Grain Producer Indemnity Board (Board) adopts amendments to Chapter 90, Subchapter B, §90.21, concerning election of officers, and Subchapter D, §90.43, relating to

award of claims. Section 90.21 is adopted with changes to the proposed text as published in the March 4, 2016, issue of the *Texas Register* (41 TexReg 1561). Section 90.41 is adopted without changes. The revision to §90.21 is a minor grammatical change.

No comments were received.

SUBCHAPTER B. BOARD MEMBERS

4 TAC §90.21

The amendments are adopted pursuant to §41.202 of the Agriculture Code, which provides the Board with the authority to adopt rules to administer its duties under the Code.

The code affected by the adoption is Texas Agriculture Code, Chapter 41.

§90.21. *Election of Officers.*

Annually, the Board shall select a Chairman, Vice-Chairman, Secretary, and Treasurer among the Board members. Each officer shall be selected by a majority of Board members present at the time of the elections. Each person elected to serve as an officer shall serve in that particular office for no more than 2 years consecutively.

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

Filed with the Office of the Secretary of State on April 22, 2016.

TRD-201601911

Jessica Escobar

Assistant General Counsel, Texas Department of Agriculture
Texas Grain Producer Indemnity Board

Effective date: May 12, 2016

Proposal publication date: March 4, 2016

For further information, please call: (512) 463-4075



SUBCHAPTER D. CLAIMS

4 TAC §90.43

The amendments are adopted pursuant to §41.202 of the Agriculture Code, which provides the Board with the authority to adopt rules to administer its duties under the Code.

The code affected by the adoption is Texas Agriculture Code, Chapter 41.

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

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TRD-201601912

Jessica Escobar

Assistant General Counsel
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Proposal publication date: March 4, 2016

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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 307. PROCEEDINGS BEFORE THE COMMISSION

SUBCHAPTER C. PROCEEDINGS BY STEWARDS AND RACING JUDGES

16 TAC §307.62

The Texas Racing Commission adopts an amendment to 16 TAC §307.62, concerning disciplinary actions against occupational licensees, without changes to the proposed text as published in the January 1, 2016, issue of the *Texas Register* (41 TexReg 64). The rule will not be republished.

The amendment extends the period of time in which a summary suspension hearing may be held from three days to seven days. The rule authorizes boards of stewards or racing judges to summarily suspend a license if a licensee's actions constitute an immediate danger to the public health, safety or welfare. The rule also provides that the licensee is entitled to a hearing on the suspension not later than three calendar days after the license is suspended. However, current racing schedules, which may call for a little as two race days in a week, are so limited as to make the three-day requirement impractical. Extending the three-day period for a summary suspension hearing to seven days will ensure that the licensee has an adequate opportunity to request a hearing and that both the Commission and the licensee have an adequate opportunity to prepare for the hearing.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to adopt rules to administer the Act, and §3.16, which authorizes the stewards or judges to summarily suspend a licensee.

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

Filed with the Office of the Secretary of State on April 18, 2016.

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Mark Fenner

General Counsel

Texas Racing Commission

Effective date: May 8, 2016

Proposal publication date: January 1, 2016

For further information, please call: (512) 833-6699



CHAPTER 309. RACETRACK LICENSES AND OPERATIONS

SUBCHAPTER B. OPERATIONS OF RACETRACKS

DIVISION 2. FACILITIES AND EQUIPMENT

16 TAC §309.126, §309.127

The Texas Racing Commission adopts amendments to 16 TAC §309.126, relating to videotape equipment, and §309.127, relating to the maintenance of negatives and videotapes, without changes to the proposed text as published in the January 1, 2016, issue of the *Texas Register* (41 TexReg 66). The rules will not be republished.

The adopted amendments update the rules to reflect current digital technology in use at the racetracks. The amendment to §309.126 replaces the word "videotape" with "video recording" in several instances. The amendment to §309.127 also replaces the word "videotape" with "video recording" in several instances, and in addition allows an association to provide a digital image, instead of a print, from a negative.

No comments were received regarding adoption of the amendments.

The amendments are adopted under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse racing and to adopt other rules to administer the Act.

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

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Mark Fenner

General Counsel

Texas Racing Commission

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CHAPTER 311. OTHER LICENSES

SUBCHAPTER A. LICENSING PROVISIONS

DIVISION 1. OCCUPATIONAL LICENSES

16 TAC §311.2

The Texas Racing Commission adopts an amendment to 16 TAC §311.2, relating to application procedures for occupational licenses, without changes to the proposed text as published in the January 1, 2016, issue of the *Texas Register* (41 TexReg 67). The rule will not be republished.

The adopted amendment modifies the procedures by which certain individuals apply for occupational licenses. The changes are adopted to address the requirements of Senate Bills 807 and 1307, 84th Texas Legislative Session, which require occupational licensing agencies to waive certain education and examination requirements as well as licensure fees for military members, veterans, and military spouses. The amendment allows these persons to apply to have those educational and examination requirements and fees waived.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to adopt rules to administer the Act, and §7.02, which requires the Commission to specify the qualifications and experi-

ence required for licensing in each category of license that requires qualifications or experience.

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

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Mark Fenner

General Counsel

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CHAPTER 313. OFFICIALS AND RULES OF HORSE RACING

SUBCHAPTER C. CLAIMING RACES

16 TAC §313.310

The Texas Racing Commission adopts an amendment to 16 TAC §313.310, relating to restrictions on claims for horses entered into claiming races, without changes to the proposed text as published in the January 1, 2016, issue of the *Texas Register* (41 TexReg 68). The rule will not be republished.

The adoption amends the claiming rules to more closely follow the Association of Racing Commissioners International's model rules regarding restrictions on claims. The amendment is made in response to a recent incident in which the stewards voided a trainer's claim on the basis that it was a "protection claim," although that term is not defined anywhere in the Act or the Rules. Instead of using this term, the model rules enumerate the specific relationships and circumstances that prevent a claim from being allowed.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse racing and to adopt other rules to administer the Act.

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

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TITLE 19. EDUCATION

PART 7. STATE BOARD FOR EDUCATOR CERTIFICATION

CHAPTER 231. REQUIREMENTS FOR PUBLIC SCHOOL PERSONNEL ASSIGNMENTS

The State Board for Educator Certification (SBEC) adopts amendments to 19 TAC §§231.5, 231.11, 231.77, 231.91, 231.209, 231.253, 231.257, 231.333, 231.335, 231.337, 231.481, 231.483, 231.489, and 231.579, concerning requirements for public school personnel assignments. The amendments to §§231.5, 231.77, 231.91, 231.209, 231.253, 231.257, 231.333, 231.335, 231.337, 231.481, 231.483, 231.489, and 231.579 are adopted without changes to the proposed text as published in the January 1, 2016 issue of the *Texas Register* (41 TexReg 74) and will not be republished. The amendment to §231.11 is adopted with changes to the proposed text as published in the January 1, 2016 issue of the *Texas Register* (41 TexReg 74). The adopted amendments clarify the appropriate credential for placement in a particular teaching assignment and implement applicable requirements from the 84th Texas Legislature, Regular Session, 2015.

REASONED JUSTIFICATION. Current 19 TAC Chapter 231, Requirements for Public School Personnel Assignments, provides guidance to school districts with regard to the certificates required for specific assignments of public school educators with corresponding certificates for each assignment for ease of use by school district personnel.

The adopted amendments to 19 TAC Chapter 231, Subchapters B-E, identify the appropriate certificates for placement in particular Prekindergarten-Grade 6, Grades 6-8, Grades 6-12, and Grades 9-12 classroom assignments.

Subchapter B, Prekindergarten-Grade 6 Assignments

As a result of House Bill (HB) 218, 84th Texas Legislature, Regular Session, 2015, language in 19 TAC §231.5, Bilingual, Prekindergarten, and §231.11, Bilingual, Kindergarten-Grade 6, was amended to ensure individuals are appropriately certified in bilingual education or English as a second language if teaching the English component only of a dual language immersion/one-way or two-way program model in Prekindergarten-Grade 6. The adopted amendments to §231.5 and §231.11 also specify that a valid classroom teaching certificate appropriate for the grade level and subject areas taught plus any bilingual education certificate or endorsement will also be an acceptable combination of credentials to teach in the respective bilingual assignments. The adopted amendments allow broader application of all bilingual certificates in combination with the valid classroom teaching certificate appropriate for the grade level and subject areas taught, provide clarity for assigning individuals into bilingual assignments, and eliminate some of the confusion that currently exists about the various names of bilingual certificates issued over the years.

In response to public comment, language in 19 TAC §231.11(b) was amended to update the grade level to Kindergarten-Grade 6 since the assignment is for Bilingual, Kindergarten-Grade 6.

Subchapter C, Grades 6-8 Assignments

Language in 19 TAC §231.77 was amended to delete Technology Applications: Grades 7-12 from the list of certificates appropriate for the Technology Applications, Grades 6-8 assignment because SBEC approved deletion of the Technology Applica-

tions: Grades 7-12 certificate in another section of the SBEC rules. Remaining paragraphs were renumbered accordingly.

Subchapter D, Electives, Disciplinary Courses, Local Credit Courses, and Innovative Courses, Grades 6-12 Assignments

As a result of SB 1309, 84th Texas Legislature, Regular Session, 2015, language in 19 TAC §231.91 was amended to add the new standard Junior Reserve Officer Training Corps: Grades 6-12 certificate to the list of credentials appropriate to teach Reserve Officer Training Corps (ROTC). The SBEC established the Junior Reserve Officer Training Corps: Grades 6-12 certificate in another chapter of its rules. The adopted amendment to §231.91 also changes the grade level reference for the ROTC assignment from Grades 9-12 to Grades 6-12 to ensure that districts providing ROTC courses at the middle school level have guidance on placement of teachers into that assignment. Remaining subsections were relettered accordingly.

Subchapter E, Grades 9-12 Assignments

Language in 19 TAC §231.209 was amended to delete the reference to TEA-approved training to match wording adopted effective May 17, 2015, by the SBEC in an earlier rule change for the same course in 19 TAC §231.573, Principles of Technology, Grades 9-12. References to Technology Applications: Grades 7-12 were deleted from the list of certificates appropriate for the various assignments for Grades 9-12 specified in 19 TAC §§231.253, 231.257, 231.333, 231.335, 231.337, 231.481, 231.483, and 231.489 because the SBEC deleted the Technology Applications: Grades 7-12 certificate. Remaining paragraphs in those sections were renumbered accordingly. In addition, language was amended in 19 TAC §231.579, Principles of Engineering, Grades 9-12, to delete the reference to required hours of physics to be eligible to teach the course.

SUMMARY OF COMMENTS AND BOARD RESPONSES. The public comment period on the proposal began January 1, 2016, and ended February 1, 2016. The SBEC also provided an opportunity for registered oral and written comments at the February 12, 2016 meeting in accordance with the SBEC board operating policies and procedures. Following is a summary of the public comments received and corresponding board responses regarding the proposed amendments to 19 TAC §§231.5, 231.11, 231.77, 231.91, 231.209, 231.253, 231.257, 231.333, 231.335, 231.337, 231.481, 231.483, 231.489, and 231.579.

Comment: An individual commented that prior to Principles of Engineering becoming a Texas Essential Knowledge and Skills (TEKS)-based course, it was taught as an innovative course through Project Lead the Way (PLTW). Because it was an innovative course, there were no certification requirements other than being a certified secondary Texas teacher and successfully completing the PLTW training that was in place. The commenter is asking the SBEC to consider adding a grandfather clause for those teachers that were teaching the course prior to the 2014-2015 school year when it was still an innovative course.

Board Response: The SBEC disagreed that individuals should be grandfathered into the teaching assignment for Principles of Engineering. The State Board of Education (SBOE) approved the Principles of Engineering course beginning with the 2014-2015 school year with specific requirements. The TEA Educator Leadership and Quality staff collaborated with the TEA Curriculum Division staff to confirm that the certificates approved for placement into the assignment would align with the specific requirements. The SBEC adopted the list of certificates

approved to teach Principles of Engineering, Grades 9-12, in 19 TAC §231.579 effective October 8, 2015.

Comment: A representative from Project Lead the Way, Inc., commented that Plano ISD has three teachers teaching Principles of Engineering with a mathematics certification. Although the certification is not listed in the proposed rule, the commenter has stated that Plano ISD would like these teachers grandfathered in.

Board Response: The SBEC disagreed that individuals should be grandfathered into the teaching assignment for Principles of Engineering. The SBOE approved the Principles of Engineering course beginning with the 2014-2015 school year with specific requirements. The TEA Educator Leadership and Quality staff collaborated with the TEA Curriculum Division staff to confirm that the certificates approved for placement into the assignment would align with the specific requirements. The SBEC adopted the list of certificates approved to teach Principles of Engineering, Grades 9-12, in §231.579 effective October 8, 2015.

Comment: A representative from Texas Association of School Personnel Administrators (TASPA) commented that the grade level range is incorrect as currently stated in §231.11(b). The commenter asked if the grade reference should be Kindergarten-Grade 6 instead of Prekindergarten.

Board Response: The SBEC agreed and took action to update the grade level to Kindergarten-Grade 6 in §231.11(b) since the assignment is for Bilingual, Kindergarten-Grade 6.

The SBOE took no action on the review of the proposed amendments to 19 TAC Chapter 231, Subchapters B-E, at the April 8, 2016 SBOE meeting.

SUBCHAPTER B. PREKINDERGARTEN- GRADE 6 ASSIGNMENTS

19 TAC §231.5, §231.11

STATUTORY AUTHORITY. The amendments are adopted under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates.

CROSS REFERENCE TO STATUTE. The adopted amendments implement the TEC, §21.031(a) and §21.041(b)(2).

§231.11. *Bilingual, Kindergarten-Grade 6.*

(a) An assignment for Bilingual, Kindergarten-Grade 6, is allowed with one of the following certificates.

- (1) Bilingual Generalist: Early Childhood-Grade 4 (Kindergarten-Grade 4 only).
- (2) Bilingual Generalist: Early Childhood-Grade 6.
- (3) Bilingual Generalist: Grades 4-8 (Grades 4-6 only).
- (4) A valid classroom teaching certificate appropriate for the grade level and subject areas taught plus any bilingual education certificate or endorsement.
- (5) Prekindergarten-Grade 5--Bilingual/English as a Second Language (Prekindergarten-Grade 5 only).
- (6) Prekindergarten-Grade 6--Bilingual/English as a Second Language.

(7) Prekindergarten-Grade 12--Bilingual/English as a Second Language.

(b) An assignment for the English component only of a dual language immersion/one-way or two-way bilingual education program model for Kindergarten-Grade 6 is allowed with a valid classroom teaching certificate appropriate for the grade level and subject areas taught plus a bilingual education certificate or endorsement or an English as a Second Language certificate or endorsement.

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

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Cristina De La Fuente-Valadez

Director, Rulemaking, Texas Education Agency

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SUBCHAPTER C. GRADES 6-8 ASSIGNMENTS

19 TAC §231.77

STATUTORY AUTHORITY. The amendment is adopted under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and §21.0486, which allows one with a technology applications certificate to teach principles of arts, audio/video technology, and communications, and to teach principles of information technology, in addition to teaching technology applications courses.

CROSS REFERENCE TO STATUTE. The adopted amendment implements the TEC, §§21.031(a), 21.041(b)(2), and 21.0486.

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SUBCHAPTER D. ELECTIVES, DISCIPLINARY COURSES, LOCAL CREDIT

COURSES, AND INNOVATIVE COURSES, GRADES 6-12 ASSIGNMENTS

19 TAC §231.91

STATUTORY AUTHORITY. The amendment is adopted under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and §21.0487, as added by Senate Bill (SB) 1309, 84th Texas Legislature, Regular Session, 2015, which requires the SBEC to establish a standard Junior Reserve Officer Training Corps (JROTC) teaching certificate to provide JROTC instruction; however, a person is not required to hold a JROTC certificate to be employed by a school district as a JROTC instructor.

CROSS REFERENCE TO STATUTE. The adopted amendment implements the TEC, §§21.031(a), 21.041(b)(2), and 21.0487, as added by SB 1309, 84th Texas Legislature, Regular Session, 2015.

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

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SUBCHAPTER E. GRADES 9-12 ASSIGNMENTS

DIVISION 5. SCIENCE, GRADES 9-12 ASSIGNMENTS

19 TAC §231.209

STATUTORY AUTHORITY. The amendment is adopted under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates.

CROSS REFERENCE TO STATUTE. The adopted amendment implements the TEC, §21.031(a) and §21.041(b)(2).

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DIVISION 8. TECHNOLOGY APPLICATIONS, GRADES 9-12 ASSIGNMENTS

19 TAC §231.253, §231.257

STATUTORY AUTHORITY. The amendments are adopted under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and §21.0486, which allows one with a technology applications certificate to teach principles of arts, audio/video technology, and communications, and to teach principles of information technology, in addition to teaching technology applications courses.

CROSS REFERENCE TO STATUTE. The adopted amendments implement the TEC, §§21.031(a), 21.041(b)(2), and 21.0486.

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

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DIVISION 12. ARTS, AUDIO VIDEO TECHNOLOGY, AND COMMUNICATIONS, GRADES 9-12 ASSIGNMENTS

19 TAC §§231.333, 231.335, 231.337

STATUTORY AUTHORITY. The amendments are adopted under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and §21.0486, which allows one with a technology applications certificate to teach principles of arts, audio/video technology, and communications, and to teach principles of information technology, in addition to teaching technology applications courses.

CROSS REFERENCE TO STATUTE. The adopted amendments implement the TEC, §§21.031(a), 21.041(b)(2), and 21.0486.

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

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DIVISION 20. INFORMATION TECHNOLOGY, GRADES 9-12 ASSIGNMENTS

19 TAC §§231.481, 231.483, 231.489

STATUTORY AUTHORITY. The amendments are adopted under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; and §21.0486, which allows one with a technology applications certificate to teach principles of arts, audio/video technology, and communications, and to teach principles of information technology, in addition to teaching technology applications courses.

CROSS REFERENCE TO STATUTE. The adopted amendments implement the TEC, §§21.031(a); 21.041(b)(2); and 21.0486.

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

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DIVISION 24. SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS, GRADES 9-12 ASSIGNMENTS

19 TAC §231.579

STATUTORY AUTHORITY. The amendment is adopted under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; and

§21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates.

CROSS REFERENCE TO STATUTE. The adopted amendment implements the TEC, §21.031(a) and §21.041(b)(2).

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

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CHAPTER 233. CATEGORIES OF CLASSROOM TEACHING CERTIFICATES

19 TAC §§233.1, 233.3 - 233.5, 233.7, 233.10, 233.14, 233.15, 233.17

The State Board for Educator Certification (SBEC) adopts amendments to 19 TAC §§233.1, 233.3 - 233.5, 233.7, 233.10, 233.14, and 233.15 and new §233.17, concerning categories of classroom teaching certificates. The amendments to §§233.1, 233.3 - 233.5, 233.7, 233.10, 233.14, and 233.15 and new §233.17 are adopted without changes to the proposed text as published in the January 1, 2016 issue of the *Texas Register* (41 TexReg 82) and will not be republished. The adopted amendments update the list of classroom certificates that either are eligible for issuance or that continue to be recognized if they were issued prior to being phased out. New 19 TAC §233.17 establishes a new Junior Reserve Officer Training Corps: Grades 6-12 certificate.

REASONED JUSTIFICATION. The Texas Education Code, §21.041(b)(2), authorizes the SBEC to adopt rules that specify the classes of educator certificates to be issued, including emergency certificates. The SBEC rules in 19 TAC Chapter 233 are organized by subsection and establish the general categories of classroom teaching certificates, specific grade levels and subject areas of classroom certificates, and the general area(s) of assignments that may be taught by the holder of each certificate.

The adopted revisions to 19 TAC Chapter 233 amend language relating to certificates that no longer are issued and establish a new standard Junior Reserve Officer Training Corps: Grades 6-12 certificate.

§233.1. *General Authority*

Language was amended to expand subsection (e) to include "oral or communication proficiency examination in the target language" to clarify all testing requirements needed for certificate areas such as bilingual, visually impaired, and deaf and hard of hearing.

§233.3. *English Language Arts and Reading; Social Studies*

Language was amended in subsections (d), (f), and (h), which reference the certificates for English Language Arts and Reading: Grades 8-12, Social Studies: Grades 8-12, and History: Grades 8-12, that were issued for the last time in 2015. The Grades 7-12 certificates replace each of these certificate areas, and the individuals issued these Grades 8-12 certificates are still eligible to teach with that credential. Remaining subsections were relettered accordingly.

§233.4. Mathematics; Science

Language was amended in subsections (d), (f), (h), (j), and (p), which reference the certificates for Mathematics: Grades 8-12, Science: Grades 8-12, Life Science: Grades 8-12, Physical Science: Grades 8-12, and Chemistry: Grades 8-12, that were issued for the last time in 2015. A Grades 7-12 or Grades 6-12 certificate replaces each of these certificate areas, and the individuals issued these Grades 8-12 certificates are still eligible to teach with that credential. Remaining subsections were relettered accordingly.

§233.5. Technology Applications and Computer Science

Language was amended in subsection (b), Technology Applications: Grades 7-12, since the majority of educator preparation programs (EPPs) already offer the Technology Applications: Early Childhood-Grade 12 certificate. When the current Technology Applications: Grades 8-12 certificate is no longer issued, the one remaining technology applications certificate covering all grade levels should be sufficient for classroom assignment coverage. The individuals issued these Grades 8-12 certificates are still eligible to teach with that credential. Remaining subsections were relettered accordingly.

§233.7. English as a Second Language

As a result of House Bill 218, 84th Texas Legislature, Regular Session, 2015, language was amended to address certification requirements for teachers assigned to provide only the English component of a dual language immersion/one-way or two-way bilingual education program model for prekindergarten-Grade 6.

§233.10. Fine Arts

Language was amended in subsection (c) to specify that Musical Theatre may be taught by the holder of a Theatre: Early Childhood-Grade 12 certificate. Language was also amended in subsection (d) to specify that Dance, Middle School 1-3 courses for Grades 6-8 may be taught by the holder of a Dance: Grades 8-12 certificate. These adopted changes have already been incorporated into 19 TAC Chapter 231, Requirements for Public School Personnel Assignments, to ensure courses approved by the State Board of Education (SBOE) are included in SBEC rules and that the rules identify the appropriate teaching certificate needed for these course assignments. The Dance: Grades 8-12 certificate satisfies the requirement to teach Dance, Middle School 1-3 courses for Grades 6-8. It also ensures that all levels of middle school dance can be taught by certified dance instructors.

§233.14. Career and Technical Education (Certificates requiring experience and preparation in a skill area)

Language was amended in subsections (f) and (g) to align required years of full-time, wage-earning experience for the Trade and Industrial Education: Grades 8-12 and Trade and Industrial Education: Grades 6-12 certificates. In October 2015, staff presented a discussion item with a new option for individuals with a bachelor's degree only in a specific work approval area to be

eligible for admission into an approved EPP for Trade and Industrial Education certification. Texas Education Agency (TEA) staff has not included this option in the adopted amendment to 19 TAC §233.14 at this time to give further review of this issue, implications of this change, and the possible impact on other career and technical education areas. TEA staff will work with the Texas Higher Education Coordinating Board, TEA Curriculum staff, and other key stakeholders to fully vet these issues and will present proposed changes for further discussion and possible rule changes at a future meeting.

§233.15. Languages Other Than English

Language was amended to delete subsection (k) that references the Secondary Latin certificate issued for the last time in 2012. Language was also amended to add two new certificate areas for Korean: Early Childhood-Grade 12 and Portuguese: Early Childhood-Grade 12 in response to stakeholder feedback. Remaining subsections were relettered accordingly.

§233.17. Junior Reserve Officer Training Corps

As a result of Senate Bill 1309, 84th Texas Legislature, Regular Session, 2015, new 19 TAC §233.17 was added to establish certification requirements for the new five-year standard certificate for Junior Reserve Officer Training Corps: Grades 6-12.

SUMMARY OF COMMENTS AND BOARD RESPONSES. The public comment period on the proposal began January 1, 2016, and ended February 1, 2016. The SBEC also provided an opportunity for registered oral and written comments at the February 12, 2016 meeting in accordance with the SBEC board operating policies and procedures. No comments were received regarding the proposed amendments to §§233.1, 233.3-233.5, 233.7, 233.10, 233.14, and 233.15 and proposed new §233.17.

The SBOE took no action on the review of the proposed revisions to 19 TAC Chapter 233 at the April 8, 2016 SBOE meeting.

STATUTORY AUTHORITY. The amendments and new section are adopted under the Texas Education Code (TEC), §21.003(a), which states that a person may not be employed as a teacher, teacher intern or teacher trainee, librarian, educational aide, administrator, educational diagnostician, or school counselor by a school district unless the person holds an appropriate certificate or permit issued as provided by the TEC, Chapter 21, Subchapter B; §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.031(b), which states that in proposing rules under the TEC, Chapter 21, Subchapter B, the SBEC shall ensure that all candidates for certification or renewal of certification demonstrate the knowledge and skills necessary to improve the performance of the diverse student population of this state; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; §21.041(b)(2), which requires the SBEC to propose rules that specify the classes of educator certificates to be issued, including emergency certificates; §21.041(b)(3), which requires the SBEC to propose rules that specify the period for which each class of educator certificate is valid; §21.041(b)(4), which requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; §21.041(b)(6), which requires the SBEC to propose rules that provide for special or restricted certification of educators, including certification of instructors

of American Sign Language; §21.044(e), which provides the requirements that SBEC rules must specify for a person to obtain a certificate to teach a health science technology education course; §21.044(f), which provides that SBEC rules for a person to obtain a certificate to teach a health science technology education course shall not specify that a person must have a bachelor's degree or establish any other credential or teaching experience requirements that exceed the requirements under §21.044(e); §21.048(a), which specifies that the board shall propose rules prescribing comprehensive examinations for each class of certificate issued by the board; §21.0487, as added by Senate Bill (SB) 1309, 84th Texas Legislature, Regular Session, 2015, which requires the SBEC to establish a standard Junior Reserve Officer Training Corps (JROTC) teaching certificate to provide JROTC instruction; however, a person is not required to hold a JROTC certificate to be employed by a school district as a JROTC instructor; §21.050(a), which states that a person who applies for a teaching certificate for which SBEC rules require a bachelor's degree must possess a bachelor's degree received with an academic major or interdisciplinary academic major, including reading, other than education, that is related to the curriculum as prescribed under TEC, Chapter 28, Subchapter A; §21.050(b), which states that the SBEC may not require more than 18 semester credit hours of education courses at the baccalaureate level for the granting of a teaching certificate; §21.050(c), which states that a person who receives a bachelor's degree required for a teaching certificate on the basis of higher education coursework completed while receiving an exemption from tuition and fees under the TEC, §54.363, may not be required to participate in any field experience or internship consisting of student teaching to receive a teaching certificate; §22.0831(f), which authorizes the SBEC to propose rules to implement the national criminal history record information review of certified educators; §29.061(b-1), as added by House Bill (HB) 218, 84th Texas Legislature, Regular Session, 2015, which requires that a teacher assigned to a bilingual education program using a dual language immersion/one-way or two-way program model be appropriately certified by the SBEC; and §29.061(b-2), as added by HB 218, 84th Texas Legislature, Regular Session, 2015, which specifies the assignment of teachers in a school district that provides bilingual education programs using a dual language immersion/one-way or two-way program model.

CROSS REFERENCE TO STATUTE. The adopted amendments and new section implement the TEC, §§21.003(a), 21.031, 21.041(b)(1)-(4) and (6), 21.044(e) and (f), 21.048(a), 21.0487, as added by SB 1309, 84th Texas Legislature, Regular Session, 2015, 21.050, 22.0831(f), and 29.061(b-1) and (b-2), as added by HB 218, 84th Texas Legislature, Regular Session, 2015.

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

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Cristina De La Fuente-Valadez

Director, Rulemaking, Texas Education Agency

State Board of Educator Certification

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For further information, please call: (512) 475-1497

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CHAPTER 249. DISCIPLINARY PROCEEDINGS, SANCTIONS, AND CONTESTED CASES

The State Board for Educator Certification (SBEC) adopts amendments to 19 TAC §§249.5, 249.15, 249.17, and 249.35, concerning disciplinary proceedings, sanctions, and contested cases. The amendments to §§249.5, 249.15, 249.17, and 249.35 are adopted without changes to the proposed text as published in the January 1, 2016 issue of the *Texas Register* (41 TexReg 90) and will not be republished. The adopted amendments create more specific penalty guidelines for Texas Education Agency (TEA) staff to follow in settling or prosecuting educator discipline cases. In addition, the adopted amendments set out the process that the SBEC will use when the State Office of Administrative Hearings (SOAH) dismisses and remands a case in accordance with Texas Government Code, §2001.058(d-1), as amended by House Bill (HB) 2154, 84th Texas Legislature, Regular Session, 2015, after a respondent fails to appear for a contested case hearing.

REASONED JUSTIFICATION. On March 27, 2015, the SBEC established a Committee on Educator Discipline (Committee), and on August 7, 2015, the SBEC charged the Committee with creating more specific penalty guidelines for TEA staff to follow in settling or prosecuting educator discipline cases. The Committee met on October 15, 2015, and developed recommendations for penalty guidance. The adopted amendments to 19 TAC §249.5 and §249.17 reflect the recommendations of the Committee on how to improve and clarify the SBEC's rules regarding penalties for certified educators subject to discipline.

The adopted amendment to 19 TAC §249.5 allows the SBEC to impose higher sanctions for certified administrators subject to discipline than for teachers and paraprofessionals because administrators have, as a result of their positions of authority over both students and other educators, an even greater obligation to maintain good moral character than teachers and paraprofessionals.

The adopted amendment to 19 TAC §249.15 allows the SBEC a clearer and more efficient means to discipline educators who violate SBEC disciplinary orders.

The adopted amendment to 19 TAC §249.17 clarifies the factors that the SBEC considers as mitigating or enhancing factors in making sanctioning decisions for educators subject to discipline; sets minimum sanctions for contract abandonment, felony-level conduct, misdemeanor-level conduct, and test security violations to achieve more consistency in sanctions; and clarifies the factors that SBEC considers as good cause for contract abandonment.

With regard to contract abandonment, if an educator has worked at a school district after abandoning a contract at another school district, the educator's suspension will begin at the start of the next school year so as to neither harm the students the educator is instructing nor to allow the educator to use summer months to count as suspension time.

For educators who have not worked as educators while on felony community supervision or deferred adjudication, the suspension sanction in an agreed settlement order will run concurrently with the period the individual is on felony community supervision or deferred adjudication, because an educator on felony commu-

nity supervision or deferred adjudication is not an appropriate role model worthy to instruct the students of Texas. For individuals who continue to work while on felony community supervision or deferred adjudication, the period of the suspension sanction in an agreed settlement order will be equal to the court-ordered term of felony community supervision or deferred adjudication, but would begin from the effective date of the agreed order so that the educator serves the same length of suspension as for an individual who had not worked as an educator while on felony community supervision or deferred adjudication.

If the educator has completed felony community supervision or deferred adjudication before the SBEC disciplines the educator, the educator's suspension sanction in an agreed final order will be at least half as long as the initial court-ordered term of felony community supervision or deferred adjudication to prevent inequities that could be caused by the length of time required for the SBEC disciplinary process to run its course, while still requiring the educator to serve a suspension as a deterrent punishment for the educator's misconduct.

In accordance with Texas Government Code, §2001.058(d-1), as amended by HB 2154, 84th Texas Legislature, Regular Session, 2015, the adopted amendment to 19 TAC §249.35 allows an administrative law judge to dismiss and remand a contested case to the SBEC without issuing a proposal for decision when a licensee defaults by failing to appear at a contested case hearing before the SOAH. The adopted amendment creates procedures for the SBEC to issue a default order in such situations.

SUMMARY OF COMMENTS AND BOARD RESPONSES. The public comment period on the proposal began January 1, 2016, and ended February 1, 2016. The SBEC also provided an opportunity for registered oral and written comments at the February 12, 2016 meeting in accordance with the SBEC board operating policies and procedures. Following is a summary of the public comments received and corresponding board responses regarding the proposed amendments to 19 TAC §§249.5, 249.15, 249.17, and 249.35.

Comment: The Association of Texas Professional Educators (ATPE) commented that the language added in §249.15(b)(14) does not allow an exception for an educator who cannot comply with the terms of an SBEC order because the SBEC order includes conditions that impose a significant financial burden on the educator, such as ordering an educator to attend a class or program that is not available in the educator's local area. ATPE recommended that §249.15(a)(5) be amended to include the sentence, "The additional conditions or restrictions imposed shall include at least one option that does not place significant financial burden on the educator."

ATPE also commented that the proposed language in §249.17(d)(1), defining "good cause" for contract abandonment by educators, is too limiting. ATPE stated that other circumstances not addressed in the proposed amendment present good cause for an educator to abandon a contract, such as when an educator is reassigned to a distant school that requires a much longer commute, or when an educator receives a significant salary reduction after the educator can no longer unilaterally resign from the contract. ATPE recommended that §249.17(d)(1) should include as "good cause" for contract abandonment "educator suffered a significant change in working conditions that caused reasonable hardship."

ATPE further commented that §249.17(f) is unfair because it sets minimum penalties for misdemeanor conduct based on the sen-

tence imposed by a judge. ATPE pointed out that criminal penalties can vary significantly based on whether a defendant accepts a plea agreement based on the discretion of the judge and prosecutor. ATPE further commented that creating a minimum penalty for misdemeanors makes an educator unfairly subject to sanction based on the criminal judgment, rather than the severity of the educator's actual conduct.

Board Response: The SBEC respectfully disagreed that "an affordability exception" is appropriate for a condition or restriction imposed by the SBEC in a disciplinary or licensure order. The SBEC determined that the exception ATPE proposed could effectively eliminate the option of imposing a condition that is imperative to the rehabilitation of an educator prior to return to the classroom. Furthermore, the term "significant financial burden" is subject to a wide range of interpretations and is not an appropriate definition for use in determination of action necessary to rehabilitate an educator to return to the classroom. Moreover, in many instances, such as educators battling drug addiction or mental health problems, educators with anger-management problems, and educators who resort to violence in lieu of using appropriate classroom management techniques, the additional treatment, therapy, or classes the educator needs may impose a significant financial burden on the educator, but are absolutely essential and irreplaceable in facilitating the rehabilitation of the educator or in protecting students, parents of students, school personnel, and school officials. In these instances, requiring the SBEC to find an option that "does not place a significant financial burden" on the educator would eviscerate the SBEC's ability to ensure that each educator who is in a classroom is worthy to instruct and properly rehabilitated. In such a case, there may be no alternative to accomplish that objective at less expense to an educator.

With regard to ATPE's suggestion to add another element to "good cause" in §249.17(d)(1), the SBEC respectfully disagreed. The intent of the Texas Legislature in making educators subject to discipline for contract abandonment was to keep educators working in Texas schools even when the educators' working conditions in mid-year turned out to be more challenging than expected. Allowing an educator to avoid his or her contractual obligation due to a "reasonable hardship" would cause much more mid-year turnover in Texas public schools, exacerbating teacher shortages and leaving students to be taught by substitutes--precisely the outcomes that the Texas Legislature designed the contract abandonment statutes to prevent.

With regard to mandatory minimum sanctions for misdemeanor conduct under §249.17(f), the SBEC respectfully disagreed that setting a minimum sanction removes the SBEC's ability to tailor a sanction to fit the educator's conduct. First, the proposed minimum is just that--a lower limit above which the SBEC may choose to increase the penalty based on the factors listed in §249.17(c). Moreover, the inclusion of the language "[i]f an educator is subject to sanction" in §249.17(f) is intended to clarify that the provision does not require the SBEC to investigate or prosecute all misdemeanors that educators commit, preserving the SBEC's discretion to determine whether an educator's conduct is worthy of discipline.

The State Board of Education (SBOE) took no action on the review of the proposed amendments to 19 TAC §§249.5, 249.15, 249.17, and 249.35 at the April 8, 2016 SBOE meeting.

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §249.5

STATUTORY AUTHORITY. The amendment is adopted under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.040(6), which allows the SBEC authority to develop and implement policies that define responsibilities of the SBEC; §21.041(a), which allows the SBEC to adopt rules as necessary for its own procedures; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; §21.041(b)(4), which requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; §21.041(b)(7), which requires the SBEC to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by the Texas Government Code, Chapter 2001; §21.041(b)(8), which requires the SBEC to propose rules that provide for the enforcement of an educator's code of ethics; §21.044(a), which authorizes the SBEC to propose rules establishing the training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program and specify the minimum academic qualifications required for a certificate; §21.058, which provides for the revocation of educator certificates based on conviction of certain offenses; §21.060, which allows the SBEC to suspend or revoke educator certificates based on conviction for certain offenses related to the duties and responsibilities of the education profession; §22.082, which states that the SBEC shall subscribe to the criminal history clearinghouse as provided by the Texas Government Code, §411.0845, and may obtain from any law enforcement or criminal justice agency all criminal history record information and all records contained in any closed criminal investigation file that relate to a specific applicant for or holder of a certificate issued under the TEC, Chapter 21, Subchapter B; §22.0831, which requires the SBEC to conduct a national criminal history record information review of all applicants for or holders of educator certificates who are employed in Texas schools; §22.085, which allows the SBEC to impose a sanction on an educator who does not discharge an employee or refuse to hire an applicant if the educator knows or should have known, through a criminal history record information review, that the employee or applicant has been convicted of a criminal offense, and requires that school district superintendents and chief operating officers of open-enrollment charter schools certify to the commissioner that the district or school has not failed to discharge or refused to hire any individuals with criminal history; and §22.087, as amended by House Bill (HB) 1783, 84th Texas Legislature, Regular Session, 2015, which requires superintendents to notify the SBEC whenever they obtain knowledge that an applicant for or holder of an educator certificate has a reported criminal history; the Texas Government Code, §411.087, as amended by Senate Bill (SB) 1902, 84th Texas Legislature, Regular Session, 2015, which authorizes the SBEC to receive criminal history record information from the Federal Bureau of Investigation; and §411.090, which allows the SBEC to obtain criminal history record information from the Department of Public Safety of the State of Texas; and the Texas Occupations Code, §53.021(a), as amended by HB 2299, 84th Texas Legislature, Regular Session, 2015, effective January 1, 2017, which provides that a licensing agency may suspend, revoke, or deny a license to a person convicted of an offense related to the duties and responsibilities

of the education profession and certain other offenses; §53.022, which provides the factors to be considered by the SBEC in determining whether a criminal conviction relates to the duties and responsibilities of the education profession; §53.023, which provides additional factors to be considered by the SBEC in determining the fitness of a person convicted of a crime to hold an educator certificate; §53.024, which provides that licensing proceedings brought pursuant to Chapter 53 are governed by the Administrative Procedure Act; §53.025, which requires the SBEC to issue guidelines providing the reasons for determinations made by the SBEC pursuant to Chapter 53; §53.051, which requires the SBEC to notify a person in writing of the reasons for a denial, suspension, or revocation of a certificate because of a prior conviction of a crime and the procedures for appeal of that decision; and §53.052, which allows a person who has exhausted administrative remedies to file an action for judicial review within 30 days after the SBEC decision becomes final and appealable.

CROSS REFERENCE TO STATUTE. The adopted amendment implements the TEC, §§21.031(a); 21.040(6); 21.041(a) and (b)(1), (4), (7), and (8); 21.044(a); 21.058; 21.060; 22.082; 22.0831; 22.085; and 22.087, as amended by HB 1783, 84th Texas Legislature, Regular Session, 2015; the Texas Government Code, §411.087, as amended by SB 1902, 84th Texas Legislature, Regular Session, 2015; and §411.090; and Texas Occupations Code, §§53.021(a), as amended by HB 2299, 84th Texas Legislature, Regular Session, 2015, effective January 1, 2017; 53.022-53.025; 53.051; and 53.052.

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

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Cristina De La Fuente-Valadez

Director, Rulemaking, Texas Education Agency

State Board for Educator Certification

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For further information, please call: (512) 475-1497

SUBCHAPTER B. ENFORCEMENT ACTIONS AND GUIDELINES

19 TAC §249.15, §249.17

STATUTORY AUTHORITY. The amendments are adopted under the Texas Education Code (TEC), §21.006(c), as amended by House Bill (HB) 1783, 84th Texas Legislature, Regular Session, 2015, and (g), which require the State Board for Educator Certification (SBEC) to propose rules that require the reporting of educator misconduct; §21.007, which requires the SBEC to propose rules that provide for a procedure for placing a notice of investigation of certain alleged misconduct on an educator's public certification records; §21.031(a), which states that the SBEC shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.035, as amended by HB 2205, 84th Texas Legislature, Regular Session, 2015, which allows the SBEC to delegate authority to the Commissioner of Education or Texas Education Agency (TEA) staff to settle contested cases involving

educator certification and directs the TEA to provide the administrative functions and services of the SBEC; §21.040(6), which allows the SBEC authority to develop and implement policies that define responsibilities of the SBEC; §21.040(7), which requires the SBEC to execute contracts as necessary for the performance of its administrative functions; §21.041(a), which allows the SBEC to adopt rules as necessary for its own procedures; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; §21.041(b)(4), which requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; §21.041(b)(7), which requires the SBEC to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by the Texas Government Code, Chapter 2001; §21.041(b)(8), which requires the SBEC to propose rules that provide for the enforcement of an educator's code of ethics; §21.044(a), which authorizes the SBEC to propose rules establishing the training requirements a person must accomplish to obtain a certificate, enter an internship, or enter an induction-year program and specify the minimum academic qualifications required for a certificate; §21.058, which provides for the revocation of educator certificates based on conviction of certain offenses; §21.060, which allows the SBEC to suspend or revoke educator certificates based on conviction for certain offenses related to the duties and responsibilities of the education profession; §21.105(c), which allows the SBEC to impose contract abandonment sanctions against a teacher employed under a probationary contract; §21.160(c), which allows the SBEC to impose contract abandonment sanctions against a teacher employed under a continuing contract; §21.210(c), which allows the SBEC to impose contract abandonment sanctions against a teacher employed under a term contract; §22.082, which states that the SBEC shall subscribe to the criminal history clearinghouse as provided by the Texas Government Code, §411.0845, and may obtain from any law enforcement or criminal justice agency all criminal history record information and all records contained in any closed criminal investigation file that relate to a specific applicant for or holder of a certificate issued under the TEC, Chapter 21, Subchapter B; §22.0831, which requires the SBEC to conduct a national criminal history record information review of all applicants for or holders of educator certificates who are employed in Texas schools; §22.085, which allows the SBEC to impose a sanction on an educator who does not discharge an employee or refuse to hire an applicant if the educator knows or should have known, through a criminal history record information review, that the employee or applicant has been convicted of a criminal offense, and requires that school district superintendents and chief operating officers of open-enrollment charter schools certify to the commissioner that the district or school has not failed to discharge or refused to hire any individuals with criminal history; §22.087, as amended by HB 1783, 84th Texas Legislature, Regular Session, 2015, which requires superintendents to notify the SBEC whenever they obtain knowledge that an applicant for or holder of an educator certificate has a reported criminal history; and §57.491(g), which requires the SBEC to not renew a certificate due to loan default on a guaranteed student loan; the Texas Government Code, §411.087, as amended by Senate Bill (SB) 1902, 84th Texas Legislature, Regular Session, 2015, which authorizes the SBEC to receive criminal history record information from the Federal Bureau of Investigation; §411.090,

which allows the SBEC to obtain criminal history record information from the Department of Public Safety of the State of Texas; and §2001.058(e), which allows the SBEC to vacate or modify an order issued by an administrative law judge, or change a finding of fact or conclusion of law made by an administrative law judge, only when the SBEC determines that the administrative law judge did not properly apply or interpret law, rules, written policies or a prior administrative decision; that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or made a technical error in a finding of fact; the Texas Family Code, §261.308(d), which, under certain circumstances, requires the Texas Department of Family and Protective Services (DFPS) to provide information to the SBEC regarding a person alleged to have committed child abuse or neglect; §261.308(e), which requires DFPS to release information that the SBEC has a reasonable basis for believing is necessary to assist the SBEC in protecting children from a person alleged to have committed abuse or neglect; §261.406(a), which requires the DFPS to investigate reports of possible abuse of a child in a public school; and §261.406(b), as amended by SB 206, 84th Texas Legislature, Regular Session, 2015, which requires the DFPS to send a written report to the SBEC on investigations in schools for appropriate action; and the Texas Occupations Code, §53.021(a), as amended by HB 2299, 84th Texas Legislature, Regular Session, 2015, effective January 1, 2017, which provides that a licensing agency may suspend, revoke, or deny a license to a person convicted of an offense related to the duties and responsibilities of the education profession and certain other offenses; §53.022, which provides the factors to be considered by the SBEC in determining whether a criminal conviction relates to the duties and responsibilities of the education profession; §53.023, which provides additional factors to be considered by the SBEC in determining the fitness of a person convicted of a crime to hold an educator certificate; §53.024, which provides that licensing proceedings brought pursuant to Chapter 53 are governed by the Administrative Procedure Act; §53.025, which requires the SBEC to issue guidelines providing the reasons for determinations made by the SBEC pursuant to Chapter 53; §53.051, which requires the SBEC to notify a person in writing of the reasons for a denial, suspension, or revocation of a certificate because of a prior conviction of a crime and the procedures for appeal of that decision; and §53.052, which allows a person who has exhausted administrative remedies to file an action for judicial review within 30 days after the SBEC decision becomes final and appealable.

CROSS REFERENCE TO STATUTE. The adopted amendments implement the TEC, §§21.006(c), as amended by HB 1783, 84th Texas Legislature, Regular Session, 2015, and (g); 21.007; 21.031(a); 21.035, as amended by HB 2205, 84th Texas Legislature, Regular Session, 2015; 21.040(6) and (7); 21.041(a) and (b)(1), (4), (7), and (8); 21.044(a); 21.058; 21.060; 21.105(c); 21.160(c); 21.210(c); 22.082; 22.0831; 22.085; 22.087, as amended by HB 1783, 84th Texas Legislature, Regular Session, 2015; and 57.491(g); the Texas Government Code, §§411.087, as amended by SB 1902, 84th Texas Legislature, Regular Session, 2015; 411.090; and 2001.058(e); the Texas Family Code, §261.308(d) and (e) and §261.406(a) and (b), as amended by SB 206, 84th Texas Legislature, Regular Session, 2015; and the Texas Occupations Code, §§53.021(a), as amended by HB 2299, 84th Texas Legislature, Regular Session, 2015, effective January 1, 2017; 53.022-53.025; 53.051; and 53.052.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Cristina De La Fuente-Valadez

Director, Rulemaking, Texas Education Agency

State Board for Educator Certification

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For further information, please call: (512) 475-1497



SUBCHAPTER D. HEARING PROCEDURES

19 TAC §249.35

STATUTORY AUTHORITY. The amendment is adopted under the Texas Education Code (TEC), §21.031(a), which states that the State Board for Educator Certification (SBEC) shall regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators; §21.035, as amended by House Bill (HB) 2205, 84th Texas Legislature, Regular Session, 2015, which allows the SBEC to delegate authority to the Commissioner of Education or Texas Education Agency (TEA) staff to settle contested cases involving educator certification and directs the TEA to provide the administrative functions and services of the SBEC; §21.040(6), which allows the SBEC authority to develop and implement policies that define responsibilities of the SBEC; §21.040(7), which requires the SBEC to execute contracts as necessary for the performance of its administrative functions; §21.041(a), which allows the SBEC to adopt rules as necessary for its own procedures; §21.041(b)(1), which requires the SBEC to propose rules that provide for the regulation of educators and the general administration of the TEC, Chapter 21, Subchapter B, in a manner consistent with the TEC, Chapter 21, Subchapter B; §21.041(b)(4), which requires the SBEC to propose rules that specify the requirements for the issuance and renewal of an educator certificate; §21.041(b)(7), which requires the SBEC to propose rules that provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by the Texas Government Code, Chapter 2001; §21.041(b)(8), which requires the SBEC to propose rules that provide for the enforcement of an educator's code of ethics; and the Texas Government Code, §2001.058(d-1), as added by HB 2154, 84th Texas Legislature, Regular Session, 2015, which allows an administrative law judge at the State Office of Administrative Hearings to dismiss a case and remand it to the referring agency if a party defaults, and allows the agency to then informally dispose of the case; and §2001.058(e), which allows the SBEC to vacate or modify an order issued by an administrative law judge, or change a finding of fact or conclusion of law made by an administrative law judge, only when the SBEC determines that the administrative law judge did not properly apply or interpret law, rules, written policies or a prior administrative decision; that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or made a technical error in a finding of fact.

CROSS REFERENCE TO STATUTE. The adopted amendment implements the TEC, §§21.031(a); 21.035, as amended by HB

2205, 84th Texas Legislature, Regular Session, 2015; 21.040(6) and (7); and 21.041(a) and (b)(1), (4), (7), and (8); and the Texas Government Code, §2001.058(d-1), as added by HB 2154, 84th Texas Legislature, Regular Session, 2015, and (e).

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

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Cristina De La Fuente-Valadez

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For further information, please call: (512) 475-1497



TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 4. COMMERCIAL VEHICLE REGULATIONS AND ENFORCEMENT PROCEDURES

SUBCHAPTER A. REGULATIONS GOVERNING HAZARDOUS MATERIALS

37 TAC §4.1

The Texas Department of Public Safety (the department) adopts amendments to §4.1, concerning Transportation of Hazardous Materials, without changes to the proposed text as published in the March 11, 2016, issue of the *Texas Register* (41 TexReg 1824). The rule will not be republished.

These amendments are necessary to harmonize updates to Title 49, Code of Federal Regulations with those laws adopted by Texas.

No comments were received regarding the adoption of these amendments.

The amendments are adopted pursuant to Texas Transportation Code, §644.051, which authorizes the director to adopt rules regulating the safe transportation of hazardous materials and the safe operation of commercial motor vehicles; and authorizes the director to adopt all or part of the federal safety regulations, by reference.

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

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D. Phillip Adkins
General Counsel
Texas Department of Public Safety
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