



Long-Term Care Regulatory Provider Letter

Number: PL 20-55

Title: Administrative Penalty Process for Home and Community-based Services (HCS) and Texas Home Living (TxHmL) Program Providers

Provider Types: HCS and TxHmL Program Providers

Date Issued: November 24, 2020

1.0 Subject and Purpose

This provider letter provides guidance for HCS and TxHmL program providers on the rules regarding administrative penalties that HHSC adopted on April 28, 2020. The rules can be found in the Texas Administrative Code, Title 40, Part 1, Chapter 9 and Chapter 49. These rules become effective March 1, 2021.

2.0 Policy Details & Provider Responsibilities

2.1 Criteria for an Administrative Penalty

HHSC can impose and collect an administrative penalty from a program provider for a violation of a certification principle or for willfully interfering with the work of a representative of HHSC, such as falsifying documentation. HHSC also can impose a second administrative penalty for failure to pay the first administrative penalty within 10 calendar days after the date the assessment of the administrative penalty becomes final.

2.2 Violations

HHSC Waiver Survey, and Certification (WSC) conducts surveys and identifies rule violations of non-compliance. Violations fall into two categories: critical and non-critical.

Critical Violations

When HHSC determines that a violation is critical, the program provider is not given the opportunity to correct the violation before the administrative penalty begins to accrue. Therefore, the administrative penalty begins to accrue the day HHSC identifies the violation, and it stops accruing when HHSC determines the program provider has corrected the violation. If the program provider corrects a critical violation the same day it is identified, the administrative penalty is imposed for one day.

Non-Critical Violations

When HHSC determines that a violation is non-critical, the program provider is given the opportunity to correct the violation to avoid an administrative penalty. If the violation is not corrected by the date of the exit conference for the post 45-day follow-up survey, the administrative penalty begins accruing on that date. If corrective action has been completed by this date, no administrative penalty is imposed for the violation.

2.2.1 Plan of Correction

Within 14 calendar days after receiving the final survey report, the program provider must submit a plan of correction to address each violation that was identified during the survey. This applies even if the provider disagrees with the findings of violations or requests informal dispute resolution (IDR).

For violations that are critical, the plan of correction must ensure all violations are corrected within 30 calendar days from the survey exit conference.

For violations that are non-critical, the plan of correction must ensure the violations are corrected within 45 calendar days after the survey exit conference.

HHSC will review the plan of correction, and the program provider will be notified in writing whether the plan has been approved or denied. If the plan is denied, the program provider must submit a revised plan within five business days. Once the plan is approved, HHSC will request that the

program provider submit evidence of the correction to HHSC, and HHSC can conduct a follow-up survey to verify the corrections.

2.2.2 Informal Dispute Resolution (IDR)

If a program provider does not agree with a violation cited by HHSC, the program provider can dispute the violation through the IDR process. The IDR process is an informal process by which a program provider can dispute, before an independent third party, the findings on which a violation is based. The outcome of the IDR serves as the independent third party's recommendation to HHSC with regards to the program provider's compliance or noncompliance with program rules.

To request an IDR, the program provider must submit a fully executed IDR request form, along with the final report received from HHSC, to the HHSC IDR Department within 10 calendar days of receiving the final report from HHSC (if the tenth calendar day falls on a Saturday, Sunday, or legal holiday, the due date becomes the next business day). The IDR request form will be provided to the program provider along with the final report. After submitting the IDR request form and final report, the provider will have five calendar days to submit its rebuttal letter and supporting documentation to the HHSC IDR Department (if the fifth calendar day falls on a Saturday, Sunday, or legal holiday, the due date becomes the next business day).

For more information on the IDR process, see the [IDR website](#).

The recommendation of the independent third-party IDR review is sent to HHSC Regulatory Enforcement for review. HHSC Regulatory Enforcement makes the final IDR decision and can agree, disagree, or change the independent third-party's recommendation. .

2.3 Determination of the Amount

Once a violation is final and the IDR process is complete, HHSC WSC will refer the case to HHSC Regulatory Enforcement. During the enforcement review meeting, administrative penalties can be recommended. In determining the amount of an administrative penalty, HHSC Regulatory Enforcement considers:

- (1) the seriousness of the violation, including: the nature, circumstances, extent, and gravity of the violation and the hazard to the health or safety of individuals resulting from the violation;
- (2) the program provider's history of previous violations;
- (3) whether the program provider had prior knowledge of the violation, including whether the program provider identified the violation through the program provider's internal quality assurance process and made any efforts to mitigate or correct the identified violation;
- (4) the penalty amount necessary to deter future violations; and
- (5) any other matter that justice might require.

2.3.1 Violation of Certification Principles

If the violation is of a Medicaid certification principle, HHSC Regulatory Enforcement will impose penalties according to the following breakdown:

Immediate Threat

Depending on the frequency and scope of the violation, the administrative penalty for an Immediate Threat ranges from \$400 - \$5,000 per day. All Immediate Threat violations are considered critical, and amelioration in lieu of a penalty is not allowed.

Actual Harm

Depending on the frequency and scope of the violation, the administrative penalty for a violation that causes actual harm ranges from \$100 - \$3,000 per day. Violations that meet the definition of actual harm can be critical or non-critical.

Potential for Actual Harm

Depending on the frequency and scope of the violation, the administrative penalty for a violation that has the potential for actual harm ranges from \$0 - \$1,000 per day. Violations that have the potential to cause actual harm can be critical or non-critical.

No Potential for Actual Harm

Depending on the frequency and scope of the violation, the administrative penalty for a violation that poses no potential for actual harm ranges from \$0 - \$500 per day. Violations that do not pose any potential for actual harm are always non-critical.

2.3.2 Willful Interference

If HHSC determines that a program provider willfully interfered with the work of an HHSC representative, it can impose a one-time \$1,000 penalty. Such interference would include a program provider making statements that he or she knows or should know are false with respect to a matter under investigation by HHSC, as well as falsifying documentation, including documenting the provision of a service before the service has been provided. This administrative penalty is imposed only once per survey and cannot be corrected before the penalty is imposed.

2.3.3 Late Payment

If the program provider fails to pay the administrative penalty within 10 calendar days of the penalty becoming final, HHSC Regulatory Enforcement can impose a one-time \$1,000 penalty. This penalty is imposed only once per survey and cannot be corrected before the administrative penalty is imposed.

2.4 Penalty Timeline

For violations that are critical, the administrative penalty begins to accrue at the time HHSC identifies the critical violation. For non-critical violations, the administrative penalty begins to accrue at the exit conference of the post 45-day follow-up survey if the violation has not been corrected. Once HHSC administers the penalty, it continues accruing until one of the following occurs:

- (1) the program provider completes corrective action for that violation, as determined by HHSC;
- (2) HHSC imposes a vendor hold for that violation; or
- (3) HHSC withholds payments as the result of a proposed contract termination.

WSC staff do not impose administrative penalties or determine penalty amounts. HHSC Regulatory Enforcement separately reviews each case to determine administrative penalty amounts. Therefore, the on-site surveyor will not know the specific amount of any given penalty.

HHSC issues a notice letter that imposes the administrative penalty and provides the opportunity to appeal or accept the penalty. This notice letter also provides amelioration information.

2.5 Special Note

If HHSC imposes an administrative penalty on a program provider for a violation of a certification principle, willfully interfering with the work of an HHSC representative, or failing to pay an administrative penalty within the 10-day timeframe, HHSC does not, at the same time, impose a vendor hold or otherwise withhold contract payments from the program provider for the same violation, action, or failure to act.

2.6 Amelioration

Once the penalty is administered, the program provider can choose amelioration in lieu of paying the penalty for non-critical violations. The program provider must notify HHSC in writing within 10 business days of receiving notice for the administrative penalty or penalties or the program provider forfeits this opportunity. After the program provider notifies HHSC it is pursuing amelioration, the program provider must create and submit to HHSC a written plan for amelioration within 45 calendar days of the original penalty notice. The plan for amelioration must include the following:

- (1) proposed changes to the management or operation of the program provider that will improve services or the quality of care for the individuals;
- (2) the ways in which and the extent to which the proposed changes will improve services or quality of care for the individuals through measurable outcomes;
- (3) clear goals to be achieved through the proposed changes;
- (4) a timeline for implementing the proposed changes;

- (5) specific actions necessary to implement the proposed changes;
- (6) the cost of the proposed changes; and
- (7) an agreement to waive the program provider's right to appeal the imposition of the administrative penalty if HHSC approves the plan for amelioration.

The program provider is responsible for the cost of these changes after HHSC approves the plan for amelioration. If HHSC approves the plan and the cost of the proposed changes is less than the amount of the administrative penalty, HHSC requires the program provider to pay the difference between the cost of the proposed changes and the administrative penalty.

HHSC has 45 days from the day the plan for amelioration is received to approve or deny the plan. During this 45-day period, HHSC can allow the program provider to revise the plan. HHSC also can contact the program provider if clarification or additional information is needed.

If HHSC denies the plan for amelioration or HHSC determines the program provider did not implement the plan as approved, the program provider is required to pay the administrative penalty.

2.6.1 Prohibition to Amelioration

HHSC will not give a program provider the opportunity for amelioration:

- (1) more than three times in a two-year period;
- (2) more than one time in a two-year period for the same or similar violation;
- (3) for a critical violation that is an immediate threat;
- (4) for willful interference; or
- (5) late payment.

Once a plan is approved, HHSC can require proof of the plan's progress and/or completion, such as documentation or an onsite visit by HHSC.

3.0 Background/History

Human Resources Code (HRC), Sections 161.089, 161.0891, and 161.0892, added by House Bill 2590, 85th Legislature, Regular Session, 2017, and HRC, Section 161.088, added by Senate Bill 1385, 84th Legislature, Regular Session, 2015 require HHSC to develop a process to administer administrative penalties, as well as create an informal dispute resolution process for HCS and TxHmL waiver program providers.

4.0 Resources

For additional information on the administrative penalty scope and severity, see [graphic](#) from 40 TAC §9.181. For the TAC references on Administrative Penalties and the process, see the below links:

- [40 TAC §9.181](#) – Administrative Penalties for HCS
- [40 TAC §9.182](#) – Amelioration for HCS
- [40 TAC §9.183](#) - Program Provider Compliance and Corrective Action for HCS
- [40 TAC §9.581](#) – Administrative Penalties for TxHmL
- [40 TAC §9.586](#) – Amelioration for TxHmL
- [40 TAC §9.587](#) - Program Provider Compliance and Corrective Action for TxHmL
- [40 TAC §49.535](#) - Administrative Penalties in the HCS and TxHmL Programs

5.0 Contact Information

If you have any questions about this letter, please contact the Policy, Rules and Training Section by email at PolicyRulesTraining@hhsc.state.tx.us or call (512) 438-3161.