



*promoting progressive public policy for Texans with disabilities*

*Email: [HHS\\_Transformation@hhsc.state.tx.us](mailto:HHS_Transformation@hhsc.state.tx.us)*

April 15, 2016

Re: HHS Rules Process

To Whom It May Concern:

Thank you for addressing the accessibility of HHSC's rulemaking process to the public and other stakeholders. This is especially important given the consolidation and reorganization of health and human services functions, including the centralization of policy- and decision-making, and the changing role of public advisory committees in guiding those processes.

Texas Disability Policy Consortium (DPC) is an independent group of disability advocacy organizations committed to promoting the rights, inclusion, integration and independence of Texans with disabilities. DPC is made up of 21 members of statewide and local disability organizations. The Consortium provides an ongoing forum for analysis and discussion on important disability issues in Texas. Consortium members may take independent positions, as appropriate, on specific policies as they develop. DPC has a longstanding interest and priority supporting meaningful input by individuals with disabilities regarding how services are designed: "Nothing about us without us."

Rulemaking is often regarded by staff as a pro forma exercise. The reality is that rulemaking can be a powerful public relations tool through which an agency can engage its most interested stakeholders in working together toward a common cause. These stakeholders include employees. The approach an agency takes to rulemaking can strengthen an agency's public

profile and can also lend stability to its internal landscape. This is especially true in times of transformation.

The extent to which the rulemaking processes of HHSC are transparent and accessible will facilitate its productive and timely transition. Clearly articulated policies and procedures governing rulemaking will benefit not only the public at large, but also HHSC employees who are charged with implementing and monitoring rules. **To help achieve that goal, DPC strongly recommends that HHSC convene a broad-based stakeholder group to provide advice concerning the design of its agency-wide rulemaking system.**

In response to HHSC's request for stakeholder input, the following balanced analysis and technical recommendations on behalf of the Disability Policy Consortium are based on provisions of the Government Code as well as our combined experiences as human services professionals and advocates:

**HHSC Proposal: Establish an informal period during which draft rules are made available to stakeholders for review and comment prior to Executive Council meetings and posting of proposed rules in the *Texas Register*. This informal review period should allow sufficient time for staff to respond to stakeholders. The informal review period can consist of face to face or electronic communications between agency staff and stakeholders. Programs may also choose to solicit feedback from stakeholders prior to drafting rules.**

- Programs should be **encouraged**, and **required in most circumstances**, to solicit feedback from stakeholders prior to drafting rules. After a rule is drafted, the conceptual framework is set and very difficult to change except in relatively perfunctory ways. Understanding issues that prompt consideration of rule changes should be discussed with stakeholders prior to initial drafting in order to glean full knowledge of creative options that may already exist or could be developed. Information and opinions on rules that directly affect the quality of life of people receiving services merit discussion with stakeholders prior to rule drafting except in very limited emergency situations.
- Given the range in education and experience of individuals leading rulemaking activities, some formalization of the consideration of pre-draft stakeholder input needs to occur in the form of an agency-wide policy. Formal training may also be needed.

- In reviewing and responding to stakeholder input on draft rules, the same level of professionalism and attention needs to be paid to formulating a response to commenters as is taken in responding to comments on rule proposals.
- Ideally, the formulation of rules should involve stakeholders representing a balanced range of legitimate interests **at the table** as rules are being developed.
- Rules generally apply statewide and greater effort is needed to involve people who are not located in or near Austin in rulemaking processes. Consider using webinars for rules development and remote livestream to accept public comments. This will enable greater statewide participation, including rural areas.

**HHSC Proposal: Modify the existing rules web page on the HHSC website to allow stakeholders to view draft rules and submit comments electronically. The web page may also contain a continuously updated list of rules that are in the drafting stage, so that stakeholders will be aware of draft rules to be posted for review at a later date.**

- Maintain public listing of stakeholders for each subchapter that is continuously (and automatically) updated so that they can be personally notified of impending changes to rules in which they have expressed interest. Any person or organization who requests placement on the list will be placed on the list with no further qualification required. The request can be made online, by mail, or by phone call.
- Continue to maintain a continuously updated online public index of all subchapters as required by the APTRA. The list should be formatted so that it can be printed out. Subchapter titles should link to subchapter content in the Texas Administrative Code.
- Continue and expand broad use of govdelivery.com to provide notices of rule or policy development at each stage.
- The public index of subchapters should include:
  - the effective date of the current subchapter, if applicable (new subchapters would not have effective dates)
  - whether the subchapter is currently being initiated, amended, or repealed

- the stage of modification:
    - preliminary drafting
    - proposal, indicating the date and page reference in the *Texas Register*, and a link to the content
    - if a public hearing is being held, the date, time, and place of the hearing
    - if recently adopted, the date and page reference in the *Texas Register*, with a link to the content
  - if a pending action is in response to federal or state legislation, a notation of the statutory reference(s) and link to the pertinent law(s)
  - if a pending action supports access to services in the most integrated setting
  - the name, office, and phone number of a contact for programmatic questions
  - the name, office, and phone number of a contact for legal questions
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- Internal policies, procedural guidelines, handbooks, and manuals should also be listed, available online, and up-to-date. Rules should be cross-linked to these documents so that HHSC staff as well as external stakeholders can determine when a requirement is an administrative law (a rule) versus an internal procedure.
  - Consider developing a way for individuals and employees to easily identify the rules governing programs in which they have an interest, which minimally would provide a keyword search across chapter, subchapter, and rule titles. Given the complexity of how rules are created and titled, it may also be of benefit to provide groupings of rules by service setting, service recipient, or other descriptor that enables individuals to easily identify all pertinent provisions.

**HHSC Proposal: Use agency advisory committees for feedback on rules, during public meetings or through electronic communications. This is not a proposed requirement to take all rules to an advisory committee (unless there is a statutory requirement to do so), but relevant advisory committees could be identified at the initiation of new rules projects as a valuable sounding board for rules development.**

The larger issue is determining whether all relevant stakeholders have been identified and given a reasonable opportunity to provide comments on draft and proposed rules. Even if not statutorily required, advisory committees

with responsibilities in an area under consideration for rulemaking should be invited to comment or invited to send a representative to participate in rulemaking activities. Given the change in the role of most advisory committees away from decision making, advisory committee recommendations that are made generally are not required to be followed but should be invited and considered in the course of normal business.

**HHSC Proposal: Allow public testimony on rules at meetings of the new HHS Executive Council, as established under Government Code Section 531.0051.**

- A pragmatic way to meet this requirement is needed. The volume of rulemaking by HHSC exceeds the capacity of the Executive Council to entertain comment on all rules being proposed and/or adopted.
- One way to provide a public forum for stakeholders to deliver public comments is through public hearings. These hearings can be transcribed by court reporters for accuracy and the comments can be summarized by staff. Hearings regarding rules that directly affect the quality of life of people receiving services need to be routinely held without requiring a request to do so. Certainly issues in controversy should allow for the broadest public participation and a public hearing provides this opportunity.
- Public comments should be taken on each agenda action item prior to the vote on the action and informational items that are considered emergency should be kept to a minimum so that assigned advisory committees and the public have a meaningful role in rulemaking.

**Other considerations....**

- The hallmarks of quality rulemaking are not limited to the legal requirements contained in APTRA. The responsibilities of HHSC are sufficiently broad, and the numbers of programmatic and legal staff sufficiently varied, that some common ground agency-wide needs to be found for how rulemaking is to meet minimum standards as being both rational and responsive to stakeholder interests and concerns. For example, in responding to public comment, both informally and especially in the *Texas Register*, HHSC should require all programs to specify the reason(s) why a suggested change is or is not being accepted.

- Agency-wide procedures are needed to make rules and related documents easily retrievable. For example, rule requirements found in policies (such as State Supported Living Center facility policies), procedures, standards, etc., as well as letters of interpretation, should be indexed, updated, and made available in the same way that rules are made available. HHSC should develop criteria that staff can use to determine when policies and procedures are internal versus public, i.e., affecting private rights and procedures and requiring rulemaking. These suggestions are for the benefit of both the public and staff. We urge formal rulemaking for facilities such as SSLCs rather than “facility policies.”
- To the extent that the decisions that HHSC makes about its rulemaking processes affect private rights and interests, those decisions should be reflected in rules about how HHSC makes rules.

These recommendations are not comprehensive but provide a measure of the importance that rulemaking holds for public entities and are intended to help HHSC develop and maintain its profile as a publicly accountable and responsive agency. Attention to details of process and content like these will save employees, stakeholders, and the general public time and confusion. Now is the time to provide a groundwork for transparent, productive interaction around issues that directly affect the lives of Texans who both deliver and receive health and human services.

We look forward to continuing as external stakeholders in partnership with the health and human services system throughout the decision making process to create informed and effective policies.

*For additional information, please contact:*

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