

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 10. COMMUNITY DEVELOPMENT

PART 1. TEXAS DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

CHAPTER 2. ENFORCEMENT

The Texas Department of Housing and Community Affairs (the Department) proposes the repeal of 10 TAC Chapter 2 Enforcement, Subchapter A General, Subchapter C Administrative Penalties, and Subchapter D Debarment from Participation in Programs Administered by the Department. The purpose of the proposed repeal is to eliminate an outdated rule while adopting a new updated rule under separate action.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

1. Mr. Bobby Wilkinson has determined that, for the first five years the proposed repeal would be in effect, the proposed repeal does not create or eliminate a government program, but relates to the repeal, and simultaneous re-adoption, making changes to the Department's Enforcement activities.
2. The proposed repeal does not require a change in work that would require the creation of new employee positions, nor is the proposed repeal significant enough to reduce work load to a degree that any existing employee positions are eliminated.
3. The proposed repeal does not require additional future legislative appropriations.
4. The proposed repeal does not result in an increase in fees paid to the Department nor in a decrease in fees paid to the Department.
5. The proposed repeal is not creating a new regulation, except that it is being replaced by a new rule simultaneously to provide for revisions.
6. The proposed action will repeal an existing regulation, but is associated with a simultaneous re-adoption making changes to an existing activity, the Department's Enforcement activities.
7. The proposed repeal will not increase or decrease the number of individuals subject to the rule's applicability.
8. The proposed repeal will not negatively or positively affect this state's economy.

b. ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REG-

ULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.

The Department has evaluated this proposed repeal and determined that the proposed repeal will not create an economic effect on small or micro-businesses or rural communities.

c. TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043. The proposed repeal does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).

The Department has evaluated the proposed repeal as to its possible effects on local economies and has determined that for the first five years the proposed repeal would be in effect there would be no economic effect on local employment; therefore, no local employment impact statement is required to be prepared for the rule.

e. PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5). Mr. Bobby Wilkinson, Executive Director, has determined that, for each year of the first five years the proposed repeal is in effect, the public benefit anticipated as a result of the repealed section would be an updated and more germane rule. There will not be economic costs to individuals required to comply with the repealed section.

f. FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4). Mr. Wilkinson, also has determined that for each year of the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have any foreseeable implications related to costs or revenues of the state or local governments.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held November 20, 2020, to December 21, 2020, to receive input on the proposed repealed section. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Wendy Quackenbush, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941 or email wendy.quackenbush@tdhca.state.tx.us. ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, DECEMBER 21, 2020.

SUBCHAPTER A. GENERAL

10 TAC §§2.101 - 2.104

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed repealed sections affect no other code, article, or statute.

§2.101. *Policy and Purpose.*

§2.102. *Definitions.*

§2.103. *General.*

§2.104. *Enforcement Mechanisms.*

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

Filed with the Office of the Secretary of State on November 6, 2020.

TRD-202004691

Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 475-1762



SUBCHAPTER C. ADMINISTRATIVE PENALTIES

10 TAC §2.301, §2.302

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed repealed sections affect no other code, article, or statute.

§2.301. *General.*

§2.302. *Administrative Penalty Process.*

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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Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

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For further information, please call: (512) 475-1762



SUBCHAPTER D. DEBARMENT FROM PARTICIPATION IN PROGRAMS ADMINISTERED BY THE DEPARTMENT

10 TAC §2.401

STATUTORY AUTHORITY. The proposed repeal is made pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed repealed sections affect no other code, article, or statute.

§2.401. *General.*

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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Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 475-1762



CHAPTER 2. ENFORCEMENT

The Texas Department of Housing and Community Affairs (the Department) proposes new 10 TAC Chapter 2 Enforcement, Subchapter A General, Subchapter C Administrative Penalties, and Subchapter D Debarment. The purpose of the proposed new sections is to provide compliance with Tex. Gov't Code §2306.041 and §2306.0504 and to update the rule to: include a definition of "Actively Monitored Development," clarify membership of the Enforcement Committee ensuring that there are no conflicts of interest, align the rule with the Department's current administrative penalties process, update the administrative penalty table to include new Department programs (e.g., Section 811 PRA), clarify standards for increased penalty amounts for responsible parties that have previously paid a penalty for the same finding type, propose changes redefining material and repeated violations for multifamily developments, require that a party undergoing debarment may not participate in new Department financing and assistance opportunities until such debarment is fully resolved, and reclassify some events of noncompliance from "shall debar" to "may debar."

Tex. Gov't Code §2001.0045(b) does not apply to the rule proposed for action. Several revisions do have potential financial costs to a party undergoing enforcement proceedings, however property owners and subrecipients remaining in good standing do not incur these costs and the rule is only selectively applicable to those performing poorly. Such changes include adding findings for new Department programs (e.g., Section 811 PRA), aligning penalty amounts as incentives for resolution, subdividing certain penalty types, and increasing penalty amounts for responsible parties that have previously paid a penalty for the same finding type. Because it is determined that compliance with the rule does not require additional costs and the adjustment of potential penalty amounts is expected to incentivize compliance rather than increase the amount of fines collected, no costs to the rule warrant being offset.

The Department has analyzed this proposed rulemaking and the analysis is described below for each category of analysis performed.

a. GOVERNMENT GROWTH IMPACT STATEMENT REQUIRED BY TEX. GOV'T CODE §2001.0221.

Mr. Wilkinson has determined that, for the first five years the proposed new rule would be in effect:

1. The proposed rule does not create or eliminate a government program. This rule updates definitions, Enforcement Committee membership, the Department's administrative penalties process, and the administrative penalty table. This rule also clarifies standards for increased penalty amounts, stipulates that debarment does not relieve existing Department obligations, and reclassifies some events of noncompliance from "shall debar" to "may debar."

2. The proposed new rule does not require a change in work that would require the creation of new employee positions, nor

are the rule changes significant enough to reduce work load to a degree that eliminates any existing employee positions.

3. The proposed rule changes do not require additional future legislative appropriations.

4. The proposed rule changes will not result in an increase in fees paid to the Department, nor in a decrease in fees paid to the Department.

5. The proposed rule is not creating a new regulation, except that it is replacing a rule being repealed simultaneously to provide for revisions.

6. The proposed rule will not expand, limit, or repeal an existing regulation.

7. The proposed rule will not increase or decrease the number of individuals subject to the rule's applicability; and

8. The proposed rule will not negatively or positively affect the state's economy.

b. **ADVERSE ECONOMIC IMPACT ON SMALL OR MICRO-BUSINESSES OR RURAL COMMUNITIES AND REGULATORY FLEXIBILITY REQUIRED BY TEX. GOV'T CODE §2006.002.** The Department, in drafting this proposed rule, has attempted to reduce any adverse economic effect on small or micro-business or rural communities while remaining consistent with the statutory requirements of Tex. Gov't Code §2306.041 and §2306.0504.

1. The Department has evaluated this rule and determined that none of the adverse affect strategies outlined in Tex. Gov't Code §2006.002(b) are applicable.

2. This rule relates to the procedures in place for owners and managers of developments participating in Department programs. Other than in the case of a small or micro-business that participates in the Department's programs covered by this rule, no small or microbusinesses are subject to the rule. If a small or micro-business does participate in the program, the rule provides a clear set of regulations for doing so.

3. The Department has determined that because all potential penalties can be avoided by adhering to program rules, there will be no economic effect on small or micro-businesses or rural communities.

c. **TAKINGS IMPACT ASSESSMENT REQUIRED BY TEX. GOV'T CODE §2007.043.** The proposed rule does not contemplate or authorize a taking by the Department; therefore, no Takings Impact Assessment is required.

d. **LOCAL EMPLOYMENT IMPACT STATEMENTS REQUIRED BY TEX. GOV'T CODE §2001.024(a)(6).**

The Department has evaluated the rule as to its possible effects on local economies and has determined that for the first five years the rule will be in effect the proposed rule has no economic effect on local employment. Therefore, no local employment impact statement is required to be prepared for this rule.

Tex. Gov't Code §2001.022(a) states that this "impact statement must describe in detail the probable effect of the rule on employment in each geographic region affected by this rule..." Considering that the proposed rule has not economic impact on local employment there are no "probable" effects of the new rule on particular geographic regions.

e. **PUBLIC BENEFIT/COST NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(5).** Mr. Bobby Wilkinson, Executive Direc-

tor, has determined that, for each year of the first five years the new sections are in effect, the public benefit anticipated as a result of the new sections will be an updated and more germane rule. There will not be any economic cost, other than that described above, to any individuals required to comply with the new section because the processes described by the rule have already been in place through the rule found at this section being repealed.

f. **FISCAL NOTE REQUIRED BY TEX. GOV'T CODE §2001.024(a)(4).** Mr. Wilkinson also has determined that for each year of the first five years the new section is in effect, enforcing or administering the new section does not have any foreseeable implications related to costs or revenues of the state or local governments based on the Department's history and past experience with penalty collections.

REQUEST FOR PUBLIC COMMENT. The public comment period will be held November 20, 2020, to December 21, 2020, to receive input on the new proposed sections. Written comments may be submitted to the Texas Department of Housing and Community Affairs, Attn: Wendy Quackenbush, Rule Comments, P.O. Box 13941, Austin, Texas 78711-3941, by fax to (512) 475-3359, or email wendy.quackenbush@tdhca.state.tx.us. **ALL COMMENTS MUST BE RECEIVED BY 5:00 p.m., Austin local time, December 21, 2020.**

SUBCHAPTER A. GENERAL

10 TAC §§2.101 - 2.104

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§2.101. Policy and Purpose.

This chapter sets forth the enforcement mechanisms that the Department may use to bring about compliant administration of Department funded programs, state or federal, and exclude or remove from Department programs, Persons who have established, through certain non-compliant behavior that they are either unwilling to act in a compliant manner, or are unable to do so. These enforcement mechanisms are in addition to any available contractual remedies under program agreements.

§2.102. Definitions.

The words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Capitalized words used herein have the meaning assigned in the specific chapters of this title that govern the program associated with the request, in Chapter 1 of this title (relating to Administration), or assigned by federal or state law.

(1) Actively Monitored Development--A Development that within the last three years has been monitored by the Department, either through a Uniform Physical Condition Standards (UPCS) inspection, an onsite or desk file monitoring review, an Affirmative Marketing Plan review, or a Written Policies and Procedures Review. UPCS inspections include inspections completed by Department staff, Department contractors and inspectors from the Real Estate Assessment Center through federal alignment efforts.

(2) Consultant--A Person who provides services or advice for a fee in a capacity other than as an employee and does not have Control.

(3) Control (including the terms Controlled and Controlling)--"Control" is defined in §11.1 of this title (relating to General) or as identified in the specific Program rule.

(4) Debarment--A prohibition from future participation in some or all Programs administered by the Department. Except as otherwise stated in the Order, Debarment does not impact existing or ongoing participation in Department Programs, prior to the date of the Debarment, nor does it affect any continuing responsibilities or duties thereunder.

(5) Enforcement Committee ("Committee")--A Committee of employees of the Department appointed by the Executive Director. The voting members of that Committee shall be no fewer than five and no more than nine. Additionally, each voting member shall have an alternate member, also appointed by the Executive Director, in the event that the primary voting member is unavailable. The Committee may be composed of any member of any Department division, but members from the referring division may not be present during deliberations. Alternate members may serve on behalf of any voting member for purposes of assuring a quorum. The Legal Division will designate person(s) to attend meetings and advise the Committee. A Legal Division designee will serve as Secretary to the Committee.

(6) Event of Noncompliance (including the alternate term "Finding of Noncompliance")--Any event for which a Person may be found to be in noncompliance with Texas Government Code Chapters 2105 or 2306, any rule adopted thereunder, any Program Agreement requirement, or federal program requirements.

(7) Legal Requirements--All requirements, as it relates to the particular Department Program, of state, federal, or local statutes, rules, regulations, ordinances, orders, court opinions, official interpretations, policy issuances, OMB Circulars, representations to secure awards, or any similar memorialization of requirement, including contract requirements.

(8) Monitoring Event--An onsite or desk monitoring review, a Uniform Physical Condition Standards inspection, the submission of the Annual Owner's Compliance Report, Final Construction Inspection, a Written Policies and Procedures Review, or any other instance when the Department's Compliance Division or other reviewing area provides written notice to an Owner or Contact Person requesting a response by a certain date. This would include, but not be limited to, responding to a tenant complaint.

(9) Person--A legal entity including, without limitation, any natural person, corporation, partnership, limited partnership, joint venture, limited liability corporation, trust, estate, association, cooperative, government, political subdivision, agency or instrumentality or other organization or entity of any nature whatsoever, and shall include any group of Persons acting in concert toward a common goal, including individual members of the group.

(10) Program--Includes any activity performed by a Subrecipient, Administrator, Contractor, Development Owner, or other Person under a Program Agreement or activities performed by a third party under a Program Agreement, including but not limited to a Subgrantee or Subcontractor.

(11) Program Agreements include:

(A) agreements between the Department and a Person setting forth Legal Requirements; and

(B) agreements between a Person subject to a Program Agreement and a third party to carry out one or more Legal Requirements.

(12) Responsible Party--Any Person subject to a Program Agreement.

(13) Vendor--A person who is procured by a subrecipient to provide goods or services in any way relating to a Department program or activity.

§2.103. General.

(a) A Responsible Party must comply with all applicable Legal Requirements.

(b) A failure by the Department to identify, address, or take action with respect to any one or more Events of Noncompliance does not constitute a waiver, ratification, or approval of, consent to, or agreement with such noncompliance. It is the responsibility of a Responsible Party to be familiar with the applicable Legal Requirements.

(c) Recordkeeping. Each referring division will keep records in accordance with the Department's record retention schedule and any other state or Federal requirements of all Events of Noncompliance.

(d) As provided for in Texas Government Code, §2306.6719, parties subject to certain compliance requirements must be afforded written notice and a reasonable period to correct identified Events of Noncompliance that are susceptible to being corrected. It is the responsibility of each division to provide any required cure, Corrective Action, or notice period(s) prior to referral of any matter to the Committee under this chapter. Matters should not be referred to the Committee until such cure, Corrective Action, or notice periods have been completed or expired.

(e) For each Event of Noncompliance, the Department will evaluate which Person or Persons had Control of the Development, Program, or activity at the time the Event of Noncompliance occurred. A Person will not be referred for Debarment or assessed a Administrative Penalty because they have newly acquired a Development that has existing Events of Noncompliance, provided that the findings are resolved by transferee within a reasonable timeframe after purchase, in accordance with a plan that is approved by the Department in an ownership transfer request under §10.406 of this title (relating to Ownership Transfers (§2306.6713)).

§2.104. Enforcement Mechanisms.

(a) The enforcement mechanisms referenced in this chapter are not the exclusive mechanisms whereby compliance may be obtained in any particular circumstance. Enforcement mechanisms related to Department programs may include, where applicable, those required or employed by other entities or agencies. With regard to the low-income housing tax credit program, if an identified Event of Noncompliance is required to be reported to the Internal Revenue Service, (IRS) it will be reported by the Compliance Division on form 8823. For federally funded Programs or activities the Department may recommend that a federal funding agency initiate a debarment proceeding under 2 CFR Part 180 or 2 CFR 2424, as applicable. Program Agreements may also include additional enforcement mechanisms, federal reporting, or penalties.

(b) Enforcement mechanisms available to the Department include but are not limited to:

(1) Enforcement of contractual provisions in the Program Agreements including, but not limited to, options to place a Development into receivership, and rights of suspension or termination, and placement on a cost reimbursement status as described in Subchapter B of this chapter (relating to Enforcement for Noncompliance with Program Requirements of Chapters 6 and 7);

(2) Consideration of a reasonable plan for correction, warning letter, informal conference, and assessment of administrative

penalties, as further described in Subchapter C of this chapter (relating to Administrative Penalties); or

(3) Debarment, as described in Subchapter D of this chapter (relating to Debarment from Participation in Programs Administered by the Department).

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

Filed with the Office of the Secretary of State on November 6, 2020.

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Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

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For further information, please call: (512) 475-1762



SUBCHAPTER C. ADMINISTRATIVE PENALTIES

10 TAC §2.301, §2.302

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules.

Except as described herein the proposed new sections affect no other code, article, or statute.

§2.301. General.

Department divisions will recommend to the Committee the initiation of proceedings to assess administrative penalties where the Responsible Party or Parties have violated Chapters 2105 or 2306 of the Texas Government Code or a rule or order adopted under Chapters 2105 or 2306 of the Texas Government Code and failed, despite written notice, to take appropriate and timely corrective action or seek and obtain for good cause an extension of the time to take corrective action. In addition, staff from the Compliance or Fair Housing Divisions may recommend to the Committee the initiation of proceedings to assess administrative penalties where the Responsible Party or Parties has an established pattern of repeated substantive and material violations, even if corrected within the applicable corrective action periods.

§2.302. Administrative Penalty Process.

(a) The Executive Director will appoint an Enforcement Committee, as defined in §2.102 of this chapter (relating to Definitions).

(b) This referring division will recommend the initiation of administrative penalty proceedings to the Committee by referral to the secretary of the Committee ("Secretary"). At the time of referral for a multifamily rental Development, the referral letter from the referring Division will require the Responsible Party who Controls the Development to provide a listing of the Actively Monitored Developments in their portfolio. The Secretary will use this information to help determine whether mandatory Debarment should be simultaneously considered by the Enforcement Committee in accordance with §2.401(e)(2) of this section, related to repeated violations.

(c) The Secretary shall promptly contact the Responsible Party. If fully acceptable corrective action documentation is submitted to the referring division before the ("Secretary") sends an informal

conference notice, the referral shall be closed with no further action provided that the Responsible Party is not subject to consideration for Debarment. If the Secretary is not able to facilitate resolution, but receives a reasonable plan for correction, such plan shall be reported to the Committee to determine whether to schedule an informal conference, modify the plan, or accept the plan. If accepted, plan progress shall be regularly reported to the Committee, but an informal conference will not be held unless the approved plan is substantively violated, or an informal conference is later requested by the Committee or the Responsible Party. Plan examples include but are not limited to: a rehabilitation plan with a scope of work or contracts already in place, plans approved by EARAC as part of an ownership transfer or funding application, plans approved by the Executive Director, plans approved by the Asset Management Division, and/or plans relating to newly transferred Developments with unresolved Events of Non-compliance originating under prior ownership. Should the Secretary and Responsible Party fail to come to, an agreement or closer of the referral, or if the Responsible Party or ownership group's prior history of administrative penalty referrals does not support closure, or if consideration of Debarment is appropriate, the Secretary will schedule an informal conference with the Responsible Party to attempt to reach an agreed resolution.

(d) When an informal conference is scheduled, a deadline for submitting Corrective Action documentation will be included, providing a final opportunity for resolution. If compliance is achieved at this stage, the referral will be closed with a warning letter provided that factors, as discussed below, do not preclude such closure. Closure with a warning letter shall be reported to the Committee. Factors that will determine whether it is appropriate to close with a warning letter include, but are not limited to:

(1) Prior Enforcement Committee history relating to the Development or other properties in the ownership group;

(2) Prior Enforcement Committee history regarding similar federal or state Programs;

(3) Whether the deadline set by the Secretary in the informal conference notice has been met;

(4) Whether the Committee has set any exceptions for certain finding types; and

(5) Any other factor that may be relevant to the situation.

(e) If an informal conference is held:

(1) Notwithstanding the Responsible Party's attendance or presence of an authorized representative, the Enforcement Committee may proceed with the informal conference;

(2) The Responsible Party may, but is not required to be, represented by legal counsel of their choosing at their own cost and expense;

(3) The Responsible Party may bring to the meeting third parties, employees, and agents with knowledge of the issues;

(4) Assessment of an administrative penalty and Debarment may be considered at the same informal conference; and

(5) In order to facilitate candid dialogue, informal conference will not be open to the public; however, the Committee may include such other persons or witnesses as the Committee deems necessary for a complete and full development of relevant information and evidence.

(f) An informal conference may result in the following, which shall be reported to the Executive Director:

(1) An agreement to dismiss the matter with no further action;

(2) A compliance assistance notice issued by the Committee, available for Responsible Parties appearing for the first time before the Committee for matters which the Committee determines do not necessitate the assessment of an administrative penalty, but for which the Committee wishes to place the Responsible Party on notice with regard to possible future penalty assessment;

(3) An agreement to resolve the matter through corrective action without penalty. If the agreement is to be included in an order, a proposed agreed order will be prepared and presented to the Board for approval;

(4) An agreement to resolve the matter through corrective action with the assessment of an administrative penalty which may be probated in whole or in part, and may, where appropriate, include additional action to promote compliance such as requirements to obtain training. In this circumstance, a proposed agreed order will be prepared and presented to Department's Governing Board for approval;

(5) A recommendation by the Committee to the Executive Director to determine that a violation occurred, and to issue a report to the Board and a Notice of Violation to the Responsible Party, seeking the assessment of administrative penalties through a contested case hearing with the State Office of Administrative Hearings ("SOAH"); or

(6) Other action as the Committee deems appropriate.

(g) Upon receipt of a recommendation from the Committee regarding the issuance of a report and assessment of an administrative penalty under subsection (f)(5), the Executive Director shall determine whether a violation has occurred. If needed, the Executive Director may request additional information and/or return the recommendation to the Committee for further development. If the Executive Director determines that a violation has occurred, the Executive Director will issue a report to the Board in accordance with §2306.043 of the Texas Government Code.

(h) Not later than fourteen (14) days after issuance of the report to the Board, the Executive Director will issue a Notice of Violation to the Responsible Party. The Notice of Violation issued by the Executive Director will include:

(1) A summary of the alleged violation(s) together with reference to the particular sections of the statutes and rules alleged to have been violated;

(2) A statement informing the Responsible Party of the right to a hearing before the SOAH, if applicable, on the occurrence of the violation(s), the amount of penalty, or both;

(3) Any other matters deemed relevant; and

(4) The amount of the recommended penalty. In determining the amount of a recommended administrative penalty, the Executive Director shall take into consideration the statutory factors at Tex. Gov't Code §2306.042 the penalty schedule shown in the tables in subsection (k) of this section and in the instance of a proceeding to assess administrative penalties against a Responsible Party administering CDBG, CSBG, or LIHEAP, whether the assessment of such penalty will interfere with the uninterrupted delivery of services under such program(s). The Executive Director shall further take into account whether the Department's purposes may be achieved or enhanced by the use of full or partial probation of penalties subject to adherence to specific requirements and whether the violation(s) in question involve disallowed costs.

(i) Not later than 20 days after the Responsible Party receives the Notice of Violation, the Responsible Party may accept the requirements of the Notice of Violation or request a SOAH hearing.

(j) If the Responsible Party requests a hearing or does not respond to the Notice of Violation, the Executive Director, with the approval of the Board, shall cause the hearing to be docketed before a SOAH administrative law judge in accordance with §1.13 of this title (relating to Contested Case Hearing Procedures), which outlines the remainder of the process.

(k) Penalty schedules.

Figure 1: 10 TAC §2.401(k)

Figure 2: 10 TAC §2.401(k)

Figure 3: 10 TAC §2.401(k)

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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Bobby Wilkinson

Executive Director

Texas Department of Housing and Community Affairs

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For further information, please call: (512) 475-1762



SUBCHAPTER D. DEBARMENT FROM PARTICIPATION IN PROGRAMS ADMINISTERED BY THE DEPARTMENT

10 TAC §2.401

STATUTORY AUTHORITY. The new sections are proposed pursuant to Tex. Gov't Code §2306.053, which authorizes the Department to adopt rules. Except as described herein the proposed new sections affect no other code, article, or statute.

§2.401. General.

(a) The Department may debar a Responsible Party, a Consultant and/or a Vendor who has exhibited past failure to comply with any condition imposed by the Department in the administration of its programs. A Responsible Party, Consultant or Vendor may be referred to the Committee for Debarment for any of the following:

(1) Refusing to provide an acceptable plan to implement and adhere to procedures to ensure compliant operation of the program after being placed on Modified Cost Reimbursement;

(2) Refusing to repay disallowed costs;

(3) Refusing to enter into a plan to repay disallowed costs or egregious violations of an agreed repayment plan;

(4) Meeting any of the ineligibility criteria referenced in §11.202 of this title (relating to Ineligible Applicants and Applications) or other ineligibility criteria outlined in a Program Rule, with the exception of: ineligibility related to conflicts of interest disclosed to the Department for review, and ineligibility identified in a previous participation review in conjunction with an application for funds or resources (unless otherwise eligible for Debarment under this Subchapter D);

(5) Providing fraudulent information, knowingly falsified documentation, or other intentional or negligent material misrepresent-

tation or omission with regard to any documentation, certification or other representation made to the Department;

(6) Failing to correct Events of Noncompliance as required by an order that became effective after the effective date of this rule, and/or failing to pay an administrative penalty as required by such order, within six months of a demand being issued by the Department. In this circumstance, if the Debarment process is initiated but the Responsible Party fully corrects the findings of noncompliance to the satisfaction of the referring division and pays the administrative penalty as required by the order before the Debarment is finalized by the Board, the Debarment recommendation may be cancelled or withdrawn by Committee recommendation and Executive Director concurrence. This type of referral would be initiated by the Secretary;

(7) Controlling a multifamily Development that was foreclosed after the effective date of this rule, where the foreclosure or deed in lieu of foreclosure terminates a subordinate TDHCA LURA;

(8) Controlling a multifamily Development and allowing a change in ownership after the effective date of this rule, without Department approval;

(9) Transferring a Development, after the effective date of this rule, without regard for a Right of First Refusal requirement;

(10) Being involuntary removed, or replaced due to a default by the General Partner under the Limited Partnership Agreement, after the effective date of this rule;

(11) Refusing to comply with conditions approved by the Board that were recommended by the Executive Award Review Advisory Committee after the effective date of this rule;

(12) Having any Event of Noncompliance that occur after the effective date of this rule that causes the Department to be required to repay federal funds to any federal agency including, but not limited to the U.S. Department of Housing and Urban Development; and/or

(13) Submitting a written certification that non-compliance has been corrected when it is determined that the Event of Noncompliance was not corrected. For certain Events of Noncompliance, in lieu of documentation, the Compliance Division accepts a written certification that noncompliance has been corrected. If it is determined that the Event of Noncompliance was not corrected, a Person who signed the certification may be recommended for debarment;

(14) Refusing to provide an amenity required by the LURA after the effective date of this rule;

(15) Failing to reserve units for Section 811 PRA participants after the effective date of this rule;

(16) Failing to notify the Department of the availability of 811 PRA units after the effective date of this rule;

(17) Taking "choice limiting" actions prior to receiving HUD environmental clearance (24 CFR §58.22);

(18) Substandard construction, as defined by the Program, and repeated failure to conduct required inspections;

(19) Repeated failure to provide eligible match. 24 CFR §92.220, 24 CFR §576.201, and as required by NOFA;

(20) Repeated failure to report program income. 24 CFR §570.500, 24 CFR §576.407(c), 2 CFR Part 215 (if applicable), and 10 TAC §20.9, or as defined by Program Rule;

(21) Participating in activities leading to or giving the appearance of "Conflict of Interest". 2 CFR Part 215 (if applicable), 24

CFR §84.42, §92.356 (if applicable), §570.489, §576.404, 10 TAC §20.9, or as defined by Program Rule;

(22) Repeated material financial system deficiencies. 24 CFR §§84.21, 84.43, 85.20, 85.22, 85.36, 92.205, 92.206, 92.350, 92.505, and 92.508 (if applicable), OMB A-110 Relocated to 2 CFR Part 215 (if applicable), OMB A-87 Relocated to 2 CFR Part 225 (if applicable), OMB A-122 Relocated to 2 CFR Part 230 (if applicable), 10 TAC §20.9 and Uniform Grant Management Standards (if applicable) and as defined by Program Rule.

(23) Repeated violations of Single Audit or other programmatic audit requirements;

(24) Failure to remain a CHDO for Department committed HOME funds;

(25) Commingling of funds, Misapplication of funds;

(26) Refusing to submit a required Audit Certification Form, Single Audit, or other programmatic audit;

(27) Refusing to timely respond to reports/provide required correspondence;

(28) Failure to timely expend funds; and

(29) A Monitoring Event determines that 50% or more of the client or household files reviewed do not contain required documentation to support income eligibility or indicate that the client or household is not income eligible.

(b) The Department shall debar any Responsible Party, Consultant, or Vendor who is debarred from participation in any program administered by the United States Government.

(c) Debarment for violations of the Department's Multifamily Programs. The Department shall debar any Responsible Party who has materially or repeatedly violated any condition imposed by the Department in connection with the administration of a Department program, including but not limited to a material or repeated violation of a land use restriction agreement (LURA). Subsection (d) of this section provides the criteria the Department will use to determine if there has been a material violation of a LURA. Subsections (e)(1) and (e)(2) of this section provide the criteria the Department shall use to determine if there have been repeated violations of a LURA.

(d) Material violations of a LURA. A Responsible Party will be considered to have materially violated a LURA, Program Agreement, or condition imposed by the Department and shall be referred to the committee for mandatory Debarment if they;

(1) Control a Development that has, on more than one occasion scored 50 or less on a UPCS inspection;

(2) Refuse to allow a monitoring visit when proper notice was provided or failed to notify residents resulting in inspection cancellation, or otherwise fails to make units and records available;

(3) Refuse to reduce rents to less than the highest allowed under the LURA;

(4) Fail to meet minimum set aside by the end of the first year of the credit period (HTC Developments only) after the effective date of this rule; or

(5) Excluding an individual or family from admission to the Development solely because the household participates in the HOME Tenant Based Rental Assistance Program, the housing choice voucher program under Section 8, United States Housing Act of 1937 (42 U.S.C. §1-437), or other federal, state, or local government rental assistance program after the effective date of this rule.

(e) Repeated Violations of a LURA that shall be considered grounds for Debarment.

(1) A Responsible Party shall be referred to the Committee for mandatory Debarment if they Control a Development that during two consecutive Monitoring Events is found to be out of compliance with the following Events of Noncompliance:

(A) No evidence of, or failure to certify to, material participation of a non-profit or HUB, if required by the Land Use Restriction Agreement;

(B) Uniform Physical Condition Standards Violations that result in a score of 70 or below in sequential UPCS inspections after the effective date of this rule;

(C) Refuse to submit all or parts of the Annual Owner's Compliance Report for two consecutive years after the effective date of this rule; or

(D) Gross rents exceed the highest rent allowed under the LURA or other deed restriction.

(2) Repeated violations in a portfolio. Persons who control five or more Actively Monitored Developments will be considered for Debarment based on repeated violations in a portfolio. A Person shall be referred to be committee for mandatory will be referred for Debarment if an inspection or referral, after the effective date of this rule, indicates the following:

(A) 50% or more of the Actively Monitored Developments in the portfolio have been referred to the Enforcement Committee; or,

(B) 50% or more of the Actively Monitored Developments in the portfolio score a 70 or less during a Uniform Physical Conditions Standards inspection.

(f) Debarment for violations of all other Department Programs, with the exception of the Non-Discretionary funds in the Community Services Block Grant program. Material or repeated violations of conditions imposed in connection with the administration of Programs administered by the Department. Administrators, Subrecipients, Responsible Parties, contractors, multifamily owners, and related parties shall be referred to the Committee for consideration for Debarment for violations including but not limited to:

(1) 50% or more loan defaults in the first 12 months of the loan agreement after the effective date of this rule;

(4) The following Davis Bacon Act Violations:

(A) Refusing to pay restitution (underpayment of wages). 29 CFR §5.31.

(B) Refusing to pay liquidated damages (overtime violations). 29 CFR §5.8.

(C) Repeated failure to pay full prevailing wage, including fringe benefits, for all hours worked. 29 CFR §5.31.

(2) The following violations of the Uniform Relocation Act and requirements of §104(d):

(A) Repeated failure to provide the General Information Notice to tenants prior to application. 49 CFR §24.203, 24 CFR §92.353, 24 CFR §93.352 and HUD Handbook 1378.

(B) Repeated failure to provide all required information in the General Information Notice. 49 CFR §24.203, 24 CFR §92.353, 24 CFR §93.352 and HUD Handbook 1378.

(C) Repeated failure to provide the Notice of Eligibility and/or Notice of Non-displacement on or before the Initiation of Negotiations date. 49 CFR §24.203, 24 CFR §92.353, 24 CFR §93.352, and 24 CFR §570.606.

(D) Repeated failure to provide all required information in the Notice of Eligibility and/or Notice of Non-displacement. 49 CFR §24.203, 24 CFR §92.353, 24 CFR §93.352, and 24 CFR §570.606.

(E) Repeated failure to provide 90 Day Notices to all "displaced" tenants and/or repeated failure to provide 30 Day Notices to all "non-displaced" tenants. 49 CFR §24.203, 24 CFR §92.353, 24 CFR §93.352, and 24 CFR §570.606.

(F) Repeated failure to perform and document "decent, safe and sanitary" inspections of replacement housing. 49 CFR §24.203, 24 CFR §92.353, 24 CFR §93.352, and 24 CFR §570.606.

(G) Refusing to properly provide Uniform Relocation Act or §104(d) assistance. 49 CFR §24.203, 24 CFR §92.353, 24 CFR §570.606 and §104(d) of the Housing & Community Development Act of 1974 - 24 CFR Part 42.

(3) Refusing to reimburse excess cash on hand;

(4) Using Department funds to demolish a homeowner's dwelling and then refusing to rebuild;

(5) Drawing down Department funds for an eligible use and then refusing to pay a properly submitted request for payment to a subgrantee or vendor with the drawn down funds.

(g) The referring division shall provide the Responsible Party with written notice of the referral to the Committee, setting forth the facts and circumstances that justify the referral for Debarment consideration.

(h) The Secretary shall then offer the Responsible Party the opportunity to attend an Informal Conference with the Committee to discuss resolution of the. In the event that the Debarment referral was the result of a violated agreed order or a determination that 50% or more of the Actively Monitored Developments in their portfolio have been referred to the Enforcement Committee, the above written notice of the referral to the Committee and the informal conference notice shall be combined into a single notice issued by the Secretary.

(i) A Debarment Informal Conference may result in the following, which shall be reported to the Executive Director:

(1) A determination that the Department did not have sufficient information and/or that the Responsible Party does not meet any of the criteria for Debarment;

(2) An agreed Debarment, with a proposed agreed order to be prepared and presented to the Board for approval;

(3) A recommendation by the Committee to the Executive Director for Debarment;

(4) A request for further information, to be considered during a future meeting; or,

(5) If Debarment is not mandatory, an agreement to dismiss the matter with no further action, an agreement to dismiss the matter with corrective action being taken, or any other action as the Committee deems appropriate, which will then be reported to the Executive Director.

(j) The Committee's recommendation to the Executive Director regarding Debarment shall include a recommended period of Debarment. Recommended periods of Debarment will be based on material factors such as repeated occurrences, seriousness of underlying issues,

presence or absence of corrective action taken or planned, including corrective action to install new responsible persons and ensure they are qualified and properly trained. Recommended periods of Debarment if based upon HUD Debarment, shall be for the period of the remaining HUD Debarment; or, if based upon criminal conviction, shall be up to ten (10) years or until fulfillment of all conditions of incarceration and/or probation, whichever is greater.

(k) The Executive Director shall accept, reject, or modify the Debarment recommendation by the Committee and shall provide written notice to the Responsible Party of the determination, and an explanation of the determination if different than the Committee's recommendation, including the period of Debarment, if any. The Responsible Party may appeal the Debarment determination in writing to the Board as described in §1.7 of this title (relating to Appeals Process).

(l) The Debarment recommendation will be brought to the next Board meeting for which the matter can be properly posted. The Board reserves discretion to impose longer or shorter Debarment periods than those recommended by staff based on its finding that such longer or shorter periods are appropriate when considering all factors and/or for the purposes of equity or other good cause. An action on a proposed Debarment of an Eligible Entity under the CSBG Act will not become final until and unless proceedings to terminate Eligible Entity status have occurred, resulting in such termination and all rights of appeal or review have run or Eligible Entity status has been voluntarily relinquished.

(m) Until the Responsible Party's Debarment referral is fully resolved, the Responsible Party may not participate in new Department financing and assistance opportunities.

(n) Any person who has been debarred is prohibited from participation as set forth in the final order of Debarment for the term of their Debarment. Unless specifically stated in the order of Debarment, Debarment does not relieve a Responsible Party from its current obligations, or prohibit it from continuing its participation in any existing engagements funded through the Department, nor limit its responsibilities and duties thereunder. The Board will not consider modifying the terms of the Debarment after the issuance of a final order of Debarment.

(o) If an Eligible Entity under the CSBG Act meets any of the criteria for Debarment in this rule, the Department may recommend the Eligible Entity for Debarment. However, that referral or recommendation shall not proceed until the termination of the Eligible Entity's status under the CSBG Act has concluded, and no right of appeal or review remains.

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

Filed with the Office of the Secretary of State on November 6, 2020.

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Bobby Wilkinson
Executive Director

Texas Department of Housing and Community Affairs
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For further information, please call: (512) 475-1762



TITLE 16. ECONOMIC REGULATION

PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

CHAPTER 117. MASSAGE THERAPY

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 117, Subchapter C, §117.20 and §117.24, Subchapter D, §117.30 and §117.31, Subchapter F, §117.64, Subchapter G, §117.82, Subchapter H, §117.90 - §117.92; and new rule at Subchapter D, §117.35 regarding the Massage Therapy Program. These proposed changes are referred to as "proposed rules."

EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 117 implement Texas Occupations Code, Chapter 455.

The proposed rules are necessary to implement House Bill (HB) 2059, 86th Legislature, Regular Session (2019). HB 2059 requires massage therapists and other health care practitioners to complete a human trafficking prevention training course in order to renew their license. The Executive Commissioner of the Health and Human Services Commission (HHSC) approves human trafficking prevention courses, including at least one course that is available without charge, and posts a list of approved courses on the HHSC website. The statutory provisions created by HB 2059 are located in Texas Occupations Code, Chapter 116. The proposed rules implement this training requirement and allow the training to count for up to three hours of continuing education during each license term. The proposed rules also clearly require that a new written consent be obtained before each session involving breast massage of a female client. Additionally, the proposed rules make clean-up and clarification changes designed to update the rules and make them easier to understand.

The proposed rules were presented and discussed at the Massage Therapy Advisory Board at its meeting on October 29, 2020. The Advisory Board did not make any changes to the proposed rules. The Advisory Board voted and recommended that the proposed rules be published in the *Texas Register* for public comment.

SECTION-BY-SECTION SUMMARY

The proposed rules amend §117.20 by requiring massage therapist applicants to ensure that a certified transcript or other record of all relevant coursework is submitted to the Department. This change allows for massage schools in Texas to send a record of coursework electronically to the Department, through the new PALMS system for reporting hours and enrolled students. The proposed change also allows applicants from out-of-state schools to send the Department a certified transcript.

The proposed rules amend §117.24 by requiring massage therapists to complete an HHSC-approved human trafficking prevention training and provide proof of completion to renew their massage therapist license. This training must be completed before each license renewal.

The proposed rules amend §117.30 by correcting a typographical error.

The proposed rules amend §117.31 by re-wording subsection (a) for clarity.

The proposed rules add new §117.35, which would allow an HHSC-approved human trafficking prevention training course to count for up to three hours of continuing education credit each license term. Providers of an HHSC-approved human trafficking prevention training course would not be required to obtain department approval as a continuing education provider and would not be required to comply with the requirements of §117.34.

The proposed rules amend §117.64 to require massage schools to provide certified, rather than certified or original, copies of student transcripts on request, for a reasonable charge, if the student has fulfilled the financial obligation to the school.

The proposed rules amend §§117.82, 117.90, and 117.92 to refer to the new written consent that must be obtained before each massage therapy session involving breast massage of a female client.

The proposed rules amend §117.91 to clearly require a new written consent be obtained before each session involving breast massage of a female client. The proposed rules also re-title §117.91 to refer to written consent.

FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to state or local government as a result of enforcing or administering the proposed rules. The proposed rules will not affect the amount of resources or personnel needed by the Department, and local governments do not enforce or administer the proposed rules.

Mr. Couvillon has determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to the state or local government as a result of enforcing or administering the proposed rules. The proposed rules will not increase or decrease the amount of fees paid to the Department, and local governments do not enforce or administer the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect the local economy, so the agency is not required to prepare a local employment impact statement under Texas Government Code §2001.022. The human trafficking prevention training course required by HB 2059 and the proposed rules is applicable to all geographical areas of Texas and may be completed without cost to the licensee. Additionally, the proposed rules will not change the process of becoming a massage therapist or obtaining a massage therapist license and will not change the number of individuals who are seeking to become licensed massage therapists. Therefore, the proposed rules will not have an impact on local employment.

PUBLIC BENEFITS

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be training licensees to identify the signs of human trafficking and assist in the prevention of human trafficking. Additionally, several rule language corrections and improvements will make the rules clearer and easier to understand. The proposed changes also take into account that Texas massage schools will submit electronic records of coursework to the Department, and the proposed rules clarify that massage schools must make available certified transcripts rather than the original transcript itself. Fi-

nally, the proposed rules add language to clearly require a new written consent before each session involving breast massage of a female client. This sets clear expectations regarding each session for both the client and the licensee.

PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules. HB 2059 requires HHSC to approve at least one human trafficking prevention course that is available free of charge. Other changes in the proposed rules are designed to correct errors and clarify and update the rule language. They will not impose costs on any person or entity. Additionally, the Department does not anticipate any economic costs as a result of the requirement for a new written consent before each session involving breast massage of a female client. The Department does not prescribe a particular format for the written consent, and not all massage therapists offer this service. Any costs associated with updating forms or documents would be discretionary in nature, and costs would be minimal if the form is needed.

FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There will be no adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. The Department regulates massage therapists, massage establishments, schools, and continuing education course providers, some of which may operate a micro or small business.

The proposed rules do not impose additional fees on these businesses, nor do they create requirements that would cause small or micro-businesses to expend funds for equipment, staff, supplies, or infrastructure, other than printing a form if a breast massage will be performed on a female client. It is not anticipated that this will have any adverse economic effect. Moreover, although massage therapists will be required to expend time completing a human trafficking training, this requirement is imposed by HB 2059, and any cost of attending the required course once every two years will not have an adverse impact on a small or micro-business or rural community. Finally, the proposed rules will not decrease the availability of licensed massage therapists in rural communities or increase the cost of their services in these communities. Since the agency has determined that the proposed rules will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do not require an increase or decrease in fees paid to the agency.
5. The proposed rules do create a new regulation. The proposed rules add new §117.35, which would allow an HHSC-approved human trafficking prevention training course to count for up to three hours of continuing education credit each license term. Providers of an HHSC-approved human trafficking prevention training would not be required to obtain department approval as a continuing education provider and would not be required to comply with §117.34.
6. The proposed rules do expand, limit, or repeal an existing regulation. The proposed rules implement HB 2059 by expanding the renewal requirements for massage therapists. Licensed massage therapists must complete human trafficking prevention training for each license renewal. Additionally, the proposed rules expand the written consent requirements relating to breast massage. Under the proposed rules, a new written consent must be obtained before each session involving breast massage of a female client.
7. The proposed rules do not increase or decrease the number of individuals subject to the rules' applicability.
8. The proposed rules do not positively or adversely affect this state's economy.

TAKINGS IMPACT ASSESSMENT

The Department has determined that no private real property interests are affected by the proposed rules and the proposed rules do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rules do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

PUBLIC COMMENTS

Comments on the proposed rules may be submitted electronically on the Department's website at <https://ga.tdlr.texas.gov:1443/form/gcerules>; by facsimile to (512) 475-3032; or by mail to Vanessa Vasquez, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711. The deadline for comments is 30 days after publication in the *Texas Register*.

SUBCHAPTER C. LICENSED MASSAGE THERAPIST AND STUDENT PERMIT

16 TAC §117.20, §117.24

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 455, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters

and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 455. No other statutes, articles, or codes are affected by the proposed rules.

§117.20. *Massage Therapist License--General Requirements and Application.*

(a) To be eligible for a Massage Therapist license an applicant must:

- (1) submit a completed application on a department-approved form;
- (2) pay the fee required under §117.100;
- (3) be at least 18 years of age;
- (4) ensure that a certified transcript or other record of all relevant course work is submitted to the department [~~submit a transcript(s) of all relevant course work; acceptable to the department~~];
- (5) provide proof of successfully passing the required exam;
- (6) provide proof of successfully passing the jurisprudence exam;
- (7) successfully pass a criminal history background check performed by the department in accordance with the Act, the department's criminal conviction guidelines, and pursuant to Texas Occupations Code, Chapters 51 and 53; and
- (8) satisfactorily complete massage therapy studies in a minimum 500-hour department approved course at a licensed massage school in which includes at least:

- (A) 200 hours of massage therapy techniques and theory and the practice of manipulation of soft tissue, with at least 125 hours of Swedish massage therapy techniques;
- (B) 50 hours of anatomy;
- (C) 25 hours of physiology;
- (D) 50 hours of kinesiology;
- (E) 40 hours of pathology;
- (F) 20 hours of hydrotherapy;
- (G) 45 hours of massage therapy laws and rules, business practices and professional ethics;
- (H) 20 hours of health, hygiene, first aid, universal precautions, and cardiopulmonary resuscitation (CPR); and
- (I) 50-hour internship program.

(b) - (g) (No change.)

§117.24. *Massage Therapist License Term; Renewals.*

(a) (No change.)

(b) To renew a massage therapist license, a licensee must:

- (1) submit a completed renewal application on a department-approved form;
- (2) complete all applicable continuing education requirements; [~~and~~]
- (3) submit all applicable fees as prescribed under §117.100; and [-]

(4) complete the human trafficking prevention training required under Occupations Code, Chapter 116, and provide proof of completion as prescribed by the department. This training must be completed before each renewal.

(c) - (e) (No change.)

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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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-3671



SUBCHAPTER D. CONTINUING EDUCATION

16 TAC §§117.30, 117.31, 117.35

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 455, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 455. No other statutes, articles, or codes are affected by the proposed rules.

§117.30. Massage Therapist Continuing Education--Hours.

(a) Massage therapists [therapist] must successfully complete at least twelve hours of approved continuing education per license term.

(b) - (c) (No change.)

§117.31. Massage Therapist--Approved Continuing Education Courses and Providers.

(a) Acceptable continuing education includes attendance at and completion of department-approved [department approved] or -recognized[;] institutes, seminars, workshops, state or national conferences, associations, courses provided by an approved massage therapy school, or college and university academic courses. These programs must be designed to increase and enhance professional knowledge, skills, or competence in the practice of massage therapy. The subject matter must be [that are]:

(1) directly related to the theory or clinical application of theory pertaining to the practice of massage therapy and the manipulation of soft tissue, massage therapy laws and rules, business practices, professional ethics, anatomy, physiology, hydrotherapy, kinesiology, pathology, or health and hygiene; [or]

(2) first aid and/or CPR, not to exceed six hours total each renewal period; or

(3) advanced massage therapy or bodywork techniques acceptable to the department. [; and]

~~{(4) designed to increase and enhance professional knowledge, skills, or competence in the practice of massage therapy.}~~

(b) - (e) (No change.)

§117.35. Continuing Education Credit for Human Trafficking Prevention Training.

(a) Notwithstanding any other provision in this chapter, a human trafficking prevention training course approved by the Health and Human Services Commission (HHSC) in accordance with Occupations Code, Chapter 116, will count as acceptable continuing education.

(b) No more than three hours of credit per license term may be awarded for completing human trafficking prevention training. The number of hours credited will be determined by the number of hours indicated on the certificate of completion, or, if the number of hours is not indicated, by the amount of time the course takes to complete, as determined by the department.

(c) A provider of an HHSC-approved human trafficking prevention training course is not required to obtain department approval as a continuing education provider or comply with the requirements of §117.34.

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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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

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SUBCHAPTER F. LICENSED MESSAGE SCHOOLS

16 TAC §117.64

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 455, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 455. No other statutes, articles, or codes are affected by the proposed rules.

§117.64. Massage School Transcripts and Records.

(a) - (c) (No change.)

(d) Each massage school shall maintain student transcripts of academic records permanently. Certified [Original or eertified] copies of transcripts (official transcripts) shall be available to students and any person authorized by the student at a reasonable charge if the student has fulfilled the financial obligation to the school. Transcripts must be

made available to students who have satisfied the terms of the enrollment agreement within ten (10) calendar days of the date the terms are satisfied. The transcript of a student shall include the following:

- (1) name and license number of massage therapy educational program;
 - (2) the name of the student;
 - (3) student's social security number;
 - (4) student's date of birth;
 - (5) inclusive dates of attendance;
 - (6) list of subjects and number of course hours taken by the student at the massage school;
 - (7) dates of courses;
 - (8) address of student;
 - (9) signature of the school owner or designated contact person; and
 - (10) pass/fail score.
- (c) (No change.)

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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Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
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SUBCHAPTER G. LICENSED MASSAGE ESTABLISHMENTS

16 TAC §117.82

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 455, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 455. No other statutes, articles, or codes are affected by the proposed rules.

§117.82. *Massage Establishments--General Requirements.*

- (a) - (g) (No change.)
- (h) A massage establishment shall:

- (1) properly maintain and secure for each client the initial consultation documents, all session notes, written consent documents, and related billing records; and

- (2) maintain a current list of all establishment employees and/or contractors at all times which includes:

- (A) full name; and
- (B) license number and expiration date (if licensed as a massage therapist).

- (i) For purposes of this section:

- (1) "Nude" means a person who is:
 - (A) entirely unclothed; or
 - (B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts or any portion of the genitals or buttocks.

- (2) "Sexual contact" includes:

- (A) any touching of any part of the genitalia or anus;
- (B) any touching of the breasts of a female client, unless the touching is breast massage that is specifically authorized by the client as required [~~through the signed consultation document referenced~~] in §117.91;

- (C) any offer or agreement to engage in any activity described in subparagraph (A) or (B);

- (D) kissing;

- (E) deviate sexual intercourse, sexual contact, sexual intercourse, indecent exposure, sexual assault, prostitution, and promotion of prostitution as described in Texas Penal Code, Chapters 21, 22, and 43, or any offer or agreement to engage in such activities;

- (F) any behavior, gesture, or expression that may reasonably be interpreted as inappropriately seductive or sexual; or

- (G) inappropriate sexual comments about or to a client, including sexual comments about a person's body.

- (j) - (k) (No change.)

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

Filed with the Office of the Secretary of State on November 9, 2020.

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Brad Bowman
General Counsel
Texas Department of Licensing and Regulation
Earliest possible date of adoption: December 20, 2020
For further information, please call: (512) 463-3671



SUBCHAPTER H. RESPONSIBILITIES OF THE LICENSEE AND CODE OF ETHICS

16 TAC §§117.90 - 117.92

STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code, Chapters 51 and 455, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters

and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code, Chapters 51 and 455. No other statutes, articles, or codes are affected by the proposed rules.

§117.90. *General Ethical Requirements.*

(a) - (t) (No change.)

(u) A licensee shall provide draping and treatment services sufficient to protect a client's safety, comfort, and privacy, and must drape:

(1) the genital area and gluteal cleavage of all clients at all times [time]; and

(2) the breasts of female clients at all times, unless performing breast massage that is [as] specifically authorized by the client as required [through the signed consultation document referenced] in §117.91.

§117.91. *Consultation Document and Written Consent.*

(a) A licensee shall provide an initial consultation to each client before the first massage therapy session and obtain the signature of the client on the consultation document. The consultation document shall include:

(1) the type of massage therapy services or techniques the licensee anticipates using during the massage therapy session;

(2) the parts of the client's body that will be massaged or the areas of the client's body that will be avoided during the session, including indications and contraindications;

(3) a statement that the licensee shall drape the breasts of all female clients and not engage in breast massage of female clients unless the client gives [without the] written consent before each session involving breast massage [of the client];

(4) a statement that draping of the genital area and gluteal cleavage will be used at all times during the session for all clients;

(5) a statement that if uncomfortable for any reason, the client may ask the licensee to cease the massage and the licensee will end the massage session; and

(6) the signature of both the client and the licensee.

(b) (No change.)

(c) A licensee shall obtain a new written consent, signed and dated by the client, before each session in which breast massage of a female client will be performed. This written consent may be documented on a new consultation document or in a separate document.

§117.92. *Sexual Misconduct.*

(a) A licensee shall not engage in sexual contact during a session with a client. For the purposes of this section, sexual contact includes:

(1) any touching of any part of the genitalia or anus;

(2) any touching of the breasts of a female client, unless the touching is breast massage that is specifically authorized by the client as required [through the signed consultation document referenced] in §117.91;

(3) any offer or agreement to engage in any activity described in paragraph (1) or (2);

(4) kissing;

(5) deviate sexual intercourse, sexual contact, sexual intercourse, indecent exposure, sexual assault, prostitution, and promotion of prostitution as described in the Texas Penal Code, Chapters 21, 22, and 43, or any offer or agreement to engage in any such activities;

(6) any behavior, gestures, or expressions which may reasonably be interpreted as inappropriately seductive or sexual; or

(7) inappropriate sexual comments about or to a client, including making sexual comments about a person's body.

(b) - (e) (No change.)

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

Filed with the Office of the Secretary of State on November 9, 2020.

TRD-202004777

Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 463-3671



TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 17. RESOURCE PLANNING SUBCHAPTER L. FACILITIES AUDIT

19 TAC §17.113

The Texas Higher Education Coordinating Board (Coordinating Board) proposes amendments to Texas Administrative Code, Title 19, Part 1, Chapter 17, Subchapter L, §17.113, concerning the Institutional Audit Cycle. Specifically, this amendment will provide the Coordinating Board and institutions of higher education with greater flexibility regarding the required frequency of facility audits.

Texas Education Code §61.0583 requires the Texas Higher Education Coordinating Board (THECB) to conduct a comprehensive audit of educational and general facilities on the campuses of public senior colleges and universities and the Texas State Technical College System to verify the accuracy of the facilities inventory for each of those institutions. 19 TAC Rule §17.113(b) requires that each institution be audited a minimum of once each five years.

Since the timeline requirement was adopted by rule and not specified in the Education Code, by changing Rule 17.113, the THECB will gain flexibility in the audit timeline for cases of natural disaster or other circumstances resulting in a need for prioritizing audits at an institution during a certain fiscal year. This change would not amend the rule text limiting these audits to not more than once every five years except upon specific request as required under Rule 17.113.

Section 17.113(b) is amended to remove the requirement that institutions must be audited a minimum of once each five years to allow flexibility in the scheduling of the audits.

Section 17.113(c) is amended due to division name changes and provides that staff of the Coordinating Board will publish the schedule rather than specifying a division.

Emily Cormier, Assistant Commissioner for Funding, has determined that for each of the first five years the sections are in effect, there would be no fiscal implications for state or local governments as a result of enforcing or administering the rules. There are no estimated reductions in costs to the state and to local governments as a result of enforcing or administering the rule. There is no estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the rule.

There is no impact on small businesses, micro businesses, and rural communities. There is no anticipated impact on local employment.

Emily Cormier has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be greater flexibility regarding the required frequency of facility audits for the Coordinating Board and public institutions of higher education. There are no anticipated economic costs to persons who are required to comply with the sections as proposed.

Government Growth Impact Statement

- (1) the rules will not create or eliminate a government program;
- (2) implementation of the rules will not require the creation or elimination of employee positions;
- (3) implementation of the rules will not require an increase or decrease in future legislative appropriations to the agency;
- (4) the rules will not require an increase or decrease in fees paid to the agency;
- (5) the rules will not create a new rule;
- (6) the rules will not limit an existing rule;
- (7) the rules will not change the number of individuals subject to the rule; and
- (8) the rules will not affect this state's economy.

Comments on the proposal may be submitted to Emily Cormier, Assistant Commissioner for Funding, P.O. Box 12788, Austin, Texas 78711, Emily.Cormier@highered.texas.gov. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendment is proposed under the Texas Education Code, Section 61.0583, which provides the Coordinating Board with the authority to periodically conduct a comprehensive audit of all educational and general facilities on the campuses of public senior colleges and universities and the Texas State Technical College System and Texas Education Code, Section 61.027 which authorizes the Coordinating Board to adopt rules to effectuate the provisions of the Chapter.

The proposed amendment affects Texas Education Code §61.0583.

§17.113. Institutional Audit Cycle.

- (a) (No change.)
- (b) [~~Each institution of higher education shall be audited a minimum of once each five years.~~] The Board may conduct an audit [Audits] of an institution [institutions may be conducted] more often

than every five years upon the request of the institution, the Board, the Legislature, or another agency within revenue appropriated for this purpose.

(c) Staff of the Board [The Office of Resource Planning] shall publish a schedule of audits for the succeeding fiscal year.

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

Filed with the Office of the Secretary of State on November 3, 2020.

TRD-202004614

Nichole Bunker-Henderson

General Counsel

Texas Higher Education Coordinating Board

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 427-6548



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 133. HOSPITAL LICENSING SUBCHAPTER C. OPERATIONAL REQUIREMENTS

25 TAC §133.48

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes the repeal of §133.48, concerning Patient Safety Program.

BACKGROUND AND PURPOSE

The purpose of the proposal is to remove outdated references to the Patient Safety Program. House Bill (H.B.) 1614, 78th Legislature, Regular Session, 2003, amended Texas Health and Safety Code, Chapter 241, by adding Subchapter H, Patient Safety Program, requiring hospitals to report certain medical errors to HHSC. This subchapter expired under its own terms on September 1, 2007; therefore, the reporting requirements associated with H.B. 1614 are defunct. The proposed repeal is necessary to remain consistent with Texas Health and Safety Code, Chapter 241.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §133.48 deletes an unnecessary rule resulting from the expiration of the Patient Safety Program and medical error reporting requirements.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined for each year of the first five years the repeal will be in effect, enforcing or administering the rule will not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC determined during the first five years the repeal will be in effect:

- (1) the proposed repeal will not create or eliminate a government program;
- (2) implementation of the proposed repeal will not affect the number of HHSC employee positions;
- (3) implementation of the proposed repeal will result in no assumed change in future legislative appropriations;
- (4) the proposed repeal will not affect fees paid to HHSC;
- (5) the proposed repeal will not create a new rule;
- (6) the proposed repeal will limit existing rules;
- (7) the proposed repeal will not change the number of individuals subject to the rules; and
- (8) the proposed repeal will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules repeal does not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules.

LOCAL EMPLOYMENT IMPACT

The proposed repeal will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule is necessary to protect the health, safety, and welfare of the residents of Texas; does not impose a cost on regulated persons; and is repealed to reduce the burden or responsibilities imposed on regulated persons by the rules.

PUBLIC BENEFIT AND COSTS

David Kostroun, Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the rule repeal is in effect, the public will benefit from greater clarity of reporting requirements for hospitals and conformity with existing statutes.

Trey Wood has also determined that for each year of the first five years the repeal is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed repeal, because the repeal of outdated rules ensures HHSC rules are consistent with current existing statutes and removes references to outdated reporting requirements.

TAKINGS IMPACT ASSESSMENT

HHSC has determined the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or by email to HCQ_PRT@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day

of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R010" in the subject line.

STATUTORY AUTHORITY

The proposed repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Health and Safety Code, §241.026, which requires HHSC to develop, establish, and enforce standards for the construction, maintenance, and operation of licensed hospitals.

The repeal implements Texas Government Code §531.0055 and Texas Health and Safety Code, §241.026.

§133.48. *Patient Safety Program.*

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

Filed with the Office of the Secretary of State on November 6, 2020.

TRD-202004717

Karen Ray

Chief Counsel

Department of State Health Services

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 834-4591



CHAPTER 135. AMBULATORY SURGICAL CENTERS

SUBCHAPTER A. OPERATING REQUIREMENTS FOR AMBULATORY SURGICAL CENTERS

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §135.26, concerning Reporting Requirements, and the repeal of §135.27, concerning Patient Safety Program.

BACKGROUND AND PURPOSE

The purpose of the proposal is to remove outdated references to the Patient Safety Program and update reporting requirements for Ambulatory Surgical Centers (ASCs). House Bill (H.B.) 1614, 78th Legislature, Regular Session, 2003, amended Texas Health and Safety Code, Chapter 243, by adding Subchapter B, Patient Safety Program requiring ASCs to report certain medical errors to HHSC. This subchapter expired under its own terms on September 1, 2007; therefore, the reporting requirements associated with H.B. 1614 are no longer current. The proposed amendment and repeal is necessary to remain consistent with Texas Health and Safety Code, Chapter 243.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §135.26 removes outdated references to the Department of State Health Services and add HHSC Complaint and Incident Intake as the appropriate place to send incident reports.

The proposed repeal of §135.27 deletes an unnecessary rule, resulting from the expiration of the Patient Safety Program and related medical error reporting requirements.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined for each year of the first five years the repeal will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC determined during the first five years the repeal will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to HHSC;
- (5) the proposed rules will not create a new rule;
- (6) the proposed rules will limit existing rules;
- (7) the proposed rules will not change the number of individuals subject to the rules; and
- (8) the proposed rules will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. These Rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules.

LOCAL EMPLOYMENT IMPACT

The proposed repeal will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules: are necessary to protect the health, safety, and welfare of the residents of Texas; do not impose a cost on regulated persons; and are repealed or amended to reduce the burden or responsibilities imposed on regulated persons by the rules.

PUBLIC BENEFIT AND COSTS

David Kostroun, Deputy Executive Commissioner of Regulatory Services, determined that for each year of the first five years the rules are in effect, the public will benefit from greater clarity regarding reporting requirements for ASCs and conformity with existing statutes.

Trey Wood has also determined that for each year of the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules, because these amendments ensure that HHSC rules are

consistent with current existing statutes and remove references to outdated reporting requirements.

TAKINGS IMPACT ASSESSMENT

HHSC has determined the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or by email to HCQ_PRT@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R010" in the subject line.

25 TAC §135.26

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Health and Safety Code, §243.010, which requires HHSC to adopt rules for the minimum standards applicable to an ASC.

The amendment implements Texas Government Code §531.0055 and Texas Health and Human Safety Code, §243.010.

§135.26. Reporting Requirements.

(a) The ambulatory surgical center (ASC) shall make a report of the following incidents to the Texas Health and Human Services Commission (HHSC) [department]. An incident report form shall be submitted to HHSC Complaint and Incident Intake [A written letter of explanation with supporting documents shall be mailed to the department] within 10 business days of the incident. [The mailing address is Department of State Health Services, Facility Licensing Group, Post Office Box 149347, Austin, Texas 78714-9347.]

- (1) The death of a patient while under the care of the ASC;
- (2) The transfer of a patient to a hospital;
- (3) Patient development of complications within 24 hours of discharge from the ASC resulting in admission to a hospital; and
- (4) A patient stay exceeding 23 hours.

(b) On an annual basis, the ASC shall report the types and numbers of procedures performed and the average length of stay during the previous 12-month period. The report shall be made using a form to be prescribed by the department.

(c) Any theft of drugs and/or diversion of controlled drugs shall be reported to the local police agency, the Texas State Board of Pharmacy, the Texas Department of Public Safety, and/or the Drug En-

forcement Administration, and HHSC [the Department of State Health Services].

(d) An ASC that performs abortions shall comply with the reporting requirements specified in the Texas Health and Safety Code, Chapters 171 and 245, and Chapter 139 of this title.

(e) The ASC shall submit reports to the Department of State Health Services [department] in accordance with the reporting requirements in Texas Health and Safety Code, §98.103 and §98.1045 (relating to Reportable Infections and Reporting of Preventable Adverse Events), and associated rules.

(f) Occurrences of fire in the ASC shall be reported as specified under §135.41(a)(2) of this title (relating to Fire Prevention and Protection) and §135.43(b)(6) of this title (relating to Handling and Storage of Gases, Anesthetics, and Flammable Liquids).

(g) An ASC that donates human fetal tissue under Texas Health and Safety Code, Chapter 173, shall submit an annual report to the Health and Human Services Commission that includes, for each donation, the specific type of fetal tissue donated and the accredited public or private institution of higher learning that received the donation. The ASC shall submit the annual report no later than January 31st of the subsequent year.

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

Filed with the Office of the Secretary of State on November 6, 2020.

TRD-202004718

Karen Ray

Chief Counsel

Department of State Health Services

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 834-4591



25 TAC §135.27

STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Health and Safety Code, §243.010, which requires HHSC to adopt rules for the minimum standards applicable to an ASC.

The repeal implements Texas Government Code §531.0055 and Texas Health and Human Safety Code, §243.010.

§135.27. *Patient Safety Program.*

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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TRD-202004719

Karen Ray

Chief Counsel

Department of State Health Services

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For further information, please call: (512) 834-4591



TITLE 26. HEALTH AND HUMAN SERVICES

PART 1. HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 510. PRIVATE PSYCHIATRIC HOSPITALS AND CRISIS STABILIZATION UNITS

SUBCHAPTER C. OPERATIONAL REQUIREMENTS

26 TAC §510.47

PROPOSED PREAMBLE

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes to the repeal of §510.47, concerning Patient Safety Program.

BACKGROUND AND PURPOSE

The purpose of the proposal is to remove outdated references to the Patient Safety Program. House Bill (H.B.) 1614, 78th Legislature, Regular Session, 2003, amended Texas Health and Safety Code, Chapter 577, by adding Subchapter B, Patient Safety Program requiring private psychiatric hospitals and crisis stabilization units (PPHCSUs) to report certain medical errors to HHSC. This subchapter expired under its own terms on September 1, 2007; therefore, the reporting requirements associated with H.B. 1614 are defunct. The proposed repeal is necessary to remain consistent with Texas Health and Safety Code, Chapter 577.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §510.47 deletes an unnecessary rule, resulting from the expiration of the Patient Safety Program and related medical error reporting requirements.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined for each year of the first five years the repeal will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC determined during the first five years that the repeal will be in effect:

- (1) the proposed repeal will not create or eliminate a government program;
- (2) implementation of the proposed repeal will not affect the number of HHSC employee positions;
- (3) implementation of the proposed repeal will result in no assumed change in future legislative appropriations;
- (4) the proposed repeal will not affect fees paid to HHSC;

- (5) the proposed repeal will not create a new rule;
- (6) the proposed repeal will limit existing rules;
- (7) the proposed repeal will not change the number of individuals subject to the rules; and
- (8) the proposed repeal will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined there will be no adverse economic effect on small businesses, micro-businesses, or rural communities related to the proposed rule. The proposed rule repeal does not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rule.

LOCAL EMPLOYMENT IMPACT

The proposed repeal will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the repeal is necessary to protect the health, safety, and welfare of the residents of Texas; does not impose a cost on regulated persons; and is repealed to reduce the burden or responsibilities imposed on regulated persons by the rule.

PUBLIC BENEFIT AND COSTS

David Kostroun, Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the repeal is in effect, the public will benefit from greater clarity regarding reporting requirements for PPHCSUs and conformity with existing statutes.

Trey Wood has also determined that for each year of the first five years the repeal is in effect, there are no anticipated economic costs to persons who are required to comply with the proposed repeal, because the repeal of outdated rules ensures that HHSC rules are consistent with current existing statutes and removes references to outdated reporting requirements.

TAKINGS IMPACT ASSESSMENT

HHSC has determined the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or by email to HCQ_PRT@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be post-marked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R010" in the subject line.

STATUTORY AUTHORITY

The proposed repeal is authorized by Texas Government Code §531.0055, which provides the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Health and Safety Code, §577.010, which requires HHSC to adopt rules and standards necessary and appropriate to ensure the proper care and treatment of patients in a private mental hospital or mental health facility.

The repeal implements Texas Government Code §531.0055 and Texas Health and Safety Code, §577.010.

§510.47. *Patient Safety Program.*

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

Filed with the Office of the Secretary of State on November 6, 2020.

TRD-202004720

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 834-4591



CHAPTER 742. MINIMUM STANDARDS FOR LISTED FAMILY HOMES

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes new §§742.101, 742.103, 742.105, 742.107, 742.109, 742.111, 742.201, 742.203, 742.301, 742.303, 742.305, 742.307, 742.401, 742.403, 742.405, 742.407, 742.501, 742.503, 742.505, 742.507, 742.509, 742.511, 742.513, 742.601, 742.603, 742.701, 742.703, 742.801, 742.803, 742.805, 742.807, 742.809, 742.811, and 742.813 in Title 26, Texas Administrative Code, new Chapter 742, Minimum Standards for Listed Family Homes.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement the portions of Senate Bill (S.B.) 569, 86th Legislature, Regular Session, 2019, that add Human Resources Code (HRC) §42.042(d-1) and §42.0495, which respectively require HHSC to establish minimum standards and add liability insurance requirements for listed family homes.

S.B. 569 states that the minimum standards must: (1) promote the health, safety, and welfare of children; (2) promote safe, comfortable, and healthy homes for children; (3) ensure adequate supervision of children by capable, qualified, and healthy personnel; and (4) ensure medication is administered in accordance with HRC §42.065. HHSC Child Care Regulation (CCR) will evaluate for compliance with these requirements by investigating complaints of minimum standard deficiencies, which will include an evaluation of the complaint and any obvious standard deficiencies seen during the investigation.

SECTION-BY-SECTION SUMMARY

Proposed new §742.101 states that the purpose of Chapter 742 is to establish the minimum standards for listed family homes.

Proposed new §742.103 defines a listed family home as a home that provides care and supervision to three or fewer children, not related to the primary caregiver, for compensation in the caregiver's own home for a certain amount of time. The home may also not provide care for more than 12 children, including children related to the primary caregiver.

Proposed new §742.105 clarifies that the permit holder of a listed family home, or any home that operates without a permit as described in proposed new §742.103, must ensure compliance with the minimum standards.

Proposed new §742.107 clarifies that a listed family home that receives federal subsidies from the Texas Workforce Commission and only cares for children related to the primary caregiver is not required to comply with these minimum standards.

Proposed new §742.109 defines (1) the pronouns used for the primary caregiver; and (2) the title "Licensing," which is the Child Care Regulation department of HHSC.

Proposed new §742.111 defines the words and terms used in this chapter, including "caregiver," "children related to the primary caregiver," "health-care professional," "infant," "pre-kindergarten age child," "restrictive device," "school-age child," and "toddler."

Proposed new §742.201 defines a "primary caregiver" as the person who (1) ensures compliance with the minimum standards and licensing laws; (2) lives in the home where care is provided; and (3) is the permit holder, unless a business entity is formed to serve as the permit holder for the home.

Proposed new §742.203 (1) requires the primary caregiver to be routinely present in the home during hours of operation; and (2) allows the primary caregiver to be temporarily absent for limited periods of time with the designation of a substitute caregiver who meets the requirements identified in this rule.

Proposed new §742.301 requires a primary caregiver and a substitute caregiver to be at least 18 years old and to meet the background check requirements.

Proposed new §742.303 lists the general responsibilities of caregivers: (1) treating children with courtesy, respect, acceptance, and patience; (2) ensuring children are not abused, neglected, or exploited; (3) releasing children only to a parent or person designated by a parent; (4) demonstrating competency, good judgment, and self-control; (5) knowing and complying with the minimum standards; (6) knowing each child's name and age; (7) supervising children at all times; and (8) interacting with children in a positive manner.

Proposed new §742.305 clarifies that to "supervise children at all times," as it is referenced in proposed new §742.303, requires caregivers to (1) be responsible for the ongoing activity of each child, including appropriate visual and auditory awareness, physical proximity, and knowledge of each child's needs; and (2) intervene when necessary to ensure each child's safety. The proposed rule also specifies factors for the caregiver to take into consideration when deciding how closely to supervise children.

Proposed new §742.307 lists the additional responsibilities of a primary caregiver: (1) requesting background checks on caregivers, household members, and anyone else who requires a background check; (2) obtaining from the parent specific information before admission, including name and age of the child, parent contact information, who the child may be released to,

and any food allergy information; (3) ensuring the capacity of children in care is never exceeded; and (4) ensuring parents are able to visit the home during the hours of operation to observe their child without having to secure prior approval.

Proposed new §742.401 states that a home must notify (1) the Texas Department of Family and Protective Services immediately if: (A) there is suspected abuse, neglect, or exploitation; (B) a child dies while in care; or (C) a child was forgotten in a vehicle or wandered away from the home unsupervised; (2) Licensing immediately if a household member, caregiver, or child in care contracts an illness deemed notifiable by the Texas Department of State Health Services; (3) a child's parent immediately after ensuring the safety of the child, if (A) a child is injured and requires medical treatment or hospitalization; (B) shows signs or symptoms of an illness and requires hospitalization; or (C) the child was forgotten in a vehicle or wandered away from the home unsupervised; (4) the parent of a child of less serious injuries when the parent picks the child up from the home; (5) the parent of each child attending the home in writing within 48 hours after you become aware that a household member, caregiver, or child in care contracts an illness deemed notifiable by the Texas Department of State Health Services; and (6) Licensing within 15 days of relocating or closing the home.

Proposed new §742.403 includes the statutory requirement that a listed family home have liability insurance of at least \$300,000 for each occurrence of negligence that covers injury to a child, unless there is an acceptable reason not to have the insurance. The home must also submit proof of coverage to Licensing each year.

Proposed new §742.405 lists the statutory exceptions for the liability insurance described in proposed new §742.403. The rule also requires a listed family home to provide written notification to Licensing if the home is unable to carry or stops carrying the insurance because of one of the exceptions.

Proposed new §742.407 requires written parental notification if a listed family home cannot carry the required liability insurance. The notification must be (1) before admitting a child; (2) for current children in care, by May 25, 2021, if the listed family home received its permit before April 25, 2021, and cannot obtain the liability insurance by that date; and (3) within 30 days of the liability insurance coverage ending, if the listed family home previously carried the liability insurance and subsequently stopped carrying it. The proposed rule also indicates the listed family home may use the form on the Licensing provider website to notify parents.

Proposed new §742.501 creates the basic care requirements for infants: (1) giving individual attention; (2) holding and comforting; (3) giving prompt attention to physical needs; (4) talking to the infant while interacting; (5) storing objects that could cause choking out of the infant's reach; (6) providing, or having the parent provide, an individual crib or play yard for each non-walking infant younger than 12 months of age; and (7) providing, or having the parent provide, an individual cot, bed, or mat that is waterproof or washable for each walking infant.

Proposed new §742.503 creates the safety requirements for cribs, whether provided by the home or the parent: (1) having a firm, flat mattress designed specifically for the crib without any supplemental pads; and (2) being bare for an infant younger than 12 months of age except for a tight-fitting sheet and mattress cover to protect against wetness. The mattress cover must also be: (1) designed specifically for the mattress; (2) tight-fitting and thin; and (3) not designed to make the sleep surface softer.

Proposed new §742.505 identifies sleeping equipment that is prohibited from being used with infants: (1) a bean bag, waterbed, or foam pad; and (2) a restrictive device used for sleeping.

Proposed new §742.507 creates additional requirements that apply when an infant is sleeping or resting: (1) placing an infant who is not yet able to turn over without assistance in a face-up sleeping position, unless there is a signed medical statement; (2) not laying a swaddled infant down to sleep or rest on any surface at any time, unless there is a signed medical statement; and (3) not covering an infant's head, face, or crib with items such as blankets, linens, or clothing.

Proposed new §742.509 creates the basic care requirements for toddlers: (1) giving individual attention; (2) holding and comforting; (3) maintaining routines; (4) storing objects that could cause choking out of the toddler's reach; and (5) providing or having the parent provide an individual cot, bed, or mat that is waterproof or washable.

Proposed new §742.511 creates the basic care requirements for pre-kindergarten age children: (1) giving individual attention; (2) encouraging the child to communicate and express feelings in appropriate ways; and (3) providing, or having the parent provide, an individual cot, bed, or mat that is waterproof or washable.

Proposed new §742.513 creates the basic care requirements for school-age children: (1) giving individual attention; (2) encouraging the child to converse with adults; and (3) providing physical care routines.

Proposed new §742.601 requires any discipline and guidance to be (1) individualized and consistent; (2) appropriate to the child's level of understanding; (3) directed toward teaching acceptable behavior and self-control; and (4) a positive method that encourages self-esteem, self-control, and self-direction.

Proposed new §742.603 lists the types of punishment, discipline, or guidance that are prohibited: (1) corporal punishment; (2) any harsh, cruel, or unusual treatment; (3) pinching, shaking, or biting; (4) putting anything in or on a child's mouth; (5) humiliating, ridiculing, rejecting, or yelling; (6) harsh, abusive, or profane language; (7) placing a child in a locked or dark room; and (8) requiring a child to remain silent or inactive for inappropriately long periods of time.

Proposed new §742.701 creates the basic food requirements for children: (1) offering a meal or snack every three hours, unless the child is sleeping; (2) allowing parents to provide meals and snacks for their children instead of the listed family home; (3) ensuring drinking water is always available and served at every snack, mealtime, and after active play; (4) ensuring all food and drink is of safe quality and is stored, prepared, distributed, and served under sanitary and safe conditions; and (5) ensuring food is not used as a reward.

Proposed new §742.703 (1) ensures that a child does not have access to foods that will cause the child to have an allergic reaction; and (2) if there is an allergic reaction, requires the home to follow the steps to be taken for an allergic reaction that the parent provided at admission.

Proposed new §742.801 creates requirements to ensure a healthy environment for children: (1) cleaning, repairing, and maintaining the home, grounds, pool, hot tub, and equipment; (2) marking cleaning supplies and hazardous materials and ensuring they are inaccessible to children; (3) washing hands

often; and (4) keeping accessible areas free from hazards. The proposed rule also states that during operating hours people must not consume or be under the influence of alcohol or controlled substances and must not use any e-cigarette, vaporizer, or tobacco product.

Proposed new §742.803 defines "medication" to include prescription and non-prescription medication and creates requirements for administering medication to children: (1) obtaining parental authorization; (2) following the medication's label instructions; (3) obtaining parental reauthorization annually; and (4) only administering medication to a child without parental authorization in a medical emergency to prevent death or serious bodily injury.

Proposed new §742.805 states that if a child has an illness or injury that requires the immediate medical attention of a health-care professional, emergency medical services must be contacted or the child must be taken to the nearest emergency room after ensuring the other children in the home are being supervised.

Proposed new §742.807 creates water activity and swimming requirements: (1) maintaining constant and active supervision when a child is in or around water; (2) ensuring there is one caregiver for each infant or toddler who is wading, bathing, or swimming; (3) taking precautionary measures to protect the safety of a non-swimmer of any age; (4) not allowing children to swim in a lake, pond, river, or similar body of water; (5) allowing children to wade in a wading pool of less than two feet of water if the caregiver is present and has completed a water safety course; and (6) allowing children to swim or wade in a swimming pool or wading pool if there is a lifeguard on duty.

Proposed new §742.809 creates transportation requirements: (1) accounting for all children exiting a vehicle; (2) never leaving a child unattended in a vehicle; (3) using car seats; (4) wearing safety belts; (5) having proof of automobile liability insurance; and (6) carrying a current driver's license.

Proposed new §742.811 requires an emergency preparedness plan that addresses the types of emergencies most likely to occur in the home's area: (1) an evacuation of the home to a designated safe area if there is a fire or gas leak; (2) a relocation of the children and caregivers to a designated, alternate shelter in the case of a flood, hurricane, medical emergency, or communicable disease outbreak; and (3) the sheltering and lock-down of children and caregivers within the home to temporarily protect them from a tornado, a volatile person on the premises, or an endangering person in the area. In addition, the proposed rule requires the practice of the emergency preparedness plan on a routine basis.

Proposed new §742.813 creates fire safety requirements. These safety requirements include having a (1) fire extinguisher; (2) smoke detector; and (3) carbon monoxide detector for most homes.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, enforcing or administering the rule will not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not create new HHSC employee positions;
- (3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to HHSC;
- (5) the proposed rules will create new rules;
- (6) the proposed rules will expand existing rules;
- (7) the proposed rules will not change the number of individuals subject to the rules; and
- (8) the proposed rules will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there will be an adverse economic effect on small businesses and micro-businesses, but not on rural communities.

Chapter 2006 of the Texas Government Code defines a small business as one that is for-profit with fewer than 100 employees. A micro-business is one that is for-profit with no more than 20 employees. Listed family homes are limited to providing care and supervision to three unrelated children. As of February 28, 2020, there were approximately 2,342 listed family homes. Of those listed family homes, approximately 591 were receiving subsidies from the Texas Workforce Commission and only providing care and supervision to children related to the primary caregiver. The new minimum standards would not apply to those 591 homes. CCR estimates that the 1,751 remaining listed family homes are both small businesses and micro-businesses subject to the proposed rules.

The projected economic impact on small businesses and micro-businesses is limited to proposed new §§742.403, 742.501, 742.509, 742.511, 742.701, 742.807, 742.809, and 742.813.

CCR staff developed the methodologies used to calculate the fiscal impact of these rules. The impact was calculated using cost research conducted by staff and assumptions regarding child-care practices. The key assumptions and methodologies are described in detail below, as these underlie the individual impact calculations that are projected to have a fiscal impact on at least some listed family homes.

Fiscal Impact for Proposed §742.403: This section requires liability insurance coverage in the amount of at least \$300,000 for each occurrence of negligence, unless there is an acceptable reason not to have the insurance under §742.405. The section also requires that the insurance cover injury to a child that occurs either at the listed family home or off the premises while the child is in care. Two insurance companies that were contacted indicated an approximate insurance cost would be between \$400 and \$900 per year. S.B. 569 also requires CCR to begin posting to the HHSC provider website any deficient minimum standards. It is unclear whether this will have a subsequent impact on the cost of the liability insurance. Since listed family homes are limited to providing care and supervision to at most three unrelated children, CCR's assessment is that many listed family homes may determine the insurance to be cost prohibitive. For listed family homes that determine liability insurance to be cost prohibitive, §742.405 lists out acceptable reasons for a listed family home not to have liability insurance. For the homes that do ob-

tain the required insurance, CCR estimates that the insurance costs will be between \$400 and \$900 annually.

Fiscal Impact for Proposed §742.501: This section requires a crib or play yard for each non-walking infant younger than 12 months of age and a waterproof or washable cot, bed, or mat for each walking infant. These items may be provided by the listed family home or the parent. According to online pricing research of major retailers, the general cost for (1) a crib ranges from \$120 to \$300; (2) a play yard ranges from \$42 to \$80; and (3) a cot, bed, or mat ranges from \$10 to \$90. CCR's assessment is that this rule will not be a cost for most listed family homes because (1) some homes do not care for infants; (2) many homes already have the appropriate equipment; or (3) the home will require the parent to provide the appropriate equipment. For the homes that will purchase a crib or play yard, CCR estimates these homes will spend \$55 to \$130 per crib or play yard. For homes that will purchase a cot, bed, or mat, CCR estimates these homes will spend \$25 to \$75 per cot, bed, or mat.

Fiscal Impact for Proposed §742.509: This section requires a waterproof or washable cot, bed, or mat for each toddler. This item may be provided by the listed family home or the parent. According to online pricing research of major retailers, the general cost for a cot, bed, or mat ranges from \$10 to \$90. CCR's assessment is that this rule will not be a cost for most listed family homes because (1) many homes already have the appropriate equipment; or (2) the home will require the parent to provide the appropriate equipment. For homes that will purchase a cot, bed, or mat, CCR estimates these homes will spend \$25 to \$75 per cot, bed, or mat.

Fiscal Impact for Proposed §742.511: This section requires a waterproof or washable cot, bed, or mat for each pre-kindergarten age child. This item may be provided by the listed family home or the parent. According to online pricing research of major retailers, the general cost for a cot, bed, or mat ranges from \$10 to \$90. CCR's assessment is that this rule will not be a cost for most listed family homes because (1) many homes already have the appropriate equipment; or (2) the home will require the parent to provide the appropriate equipment. For homes that will purchase a cot, bed, or mat, CCR estimates these homes will spend \$25 to \$75 per cot, bed, or mat.

Fiscal Impact for Proposed §742.701: This section requires a meal or snack every three hours for the child, unless the child is sleeping. The meals and snacks for a child may be provided by the child's parent. The Child and Adult Care Food Program (CACFP) reimbursement rates for 2019 - 2020 are \$1.33 for breakfast, \$2.49 for lunch or supper, and \$0.74 for snacks. CCR's assessment is that this rule will not be a cost for most listed family homes because (1) many homes already comply with this requirement; or (2) the home will require the parent to provide the meals and snacks. In addition, if a home is eligible, the home may apply to get reimbursed for these costs by CACFP. For those homes that are not eligible for reimbursement or choose not to participate in the program and choose to provide the meals and snacks, the cost will depend upon the time the child is in care. Based on the CACFP reimbursement rates, CCR estimates that the food costs for children in care 3 - 4 hours is \$1.33 per day per child, 5 - 6 hours is \$2.07 per day per child, and 7 - 8 hours is \$4.56 per day per child.

Fiscal Impact for Proposed §742.807: This section allows a child to wade in a wading pool of less than two feet of water if the caregiver is present and has completed an online water safety course. There are several online water safety courses that are

available at no cost. The courses take on the average 30 minutes to complete. The home may also choose not to allow children to wade in wading pools. CCR's assessment is that this rule will be a cost for listed family homes, for the 30 minutes it would take a primary caregiver to take this training online.

Fiscal Impact for Proposed §742.809: This section requires a child safety seat system if the listed family home transports children in care. An appropriate child safety seat will depend upon the age, height, and weight of a child. According to online pricing research of major retailers, the general cost for an infant seat or booster seat ranges from \$50 to \$200, though there are infant seats that cost more. CCR's assessment is that this rule will not be a cost for most listed family homes because (1) many homes already have the appropriate equipment; (2) the home will require the parent to provide the appropriate equipment; or (3) the home will choose not to transport children. For homes that will purchase a safety seat system, CCR estimates these homes will spend \$100 to \$150 per child safety seat.

Fiscal Impact for Proposed §742.813: This section requires a listed family home to have a fire extinguisher, smoke detector, and carbon monoxide detector in most homes. According to online pricing research of major retailers, the general cost for a (1) fire extinguisher ranges from \$13 to \$55; (2) smoke detector ranges from \$10 to \$37; and (3) carbon monoxide detector ranges from \$15 to \$50. CCR's assessment is that many homes will already meet all of these requirements, or at least some of the requirements. Many municipalities already mandate smoke detectors and carbon monoxide detectors in homes. For homes that need to purchase one or more items, CCR estimates these homes will spend \$33 for a fire extinguisher, \$23 for a smoke detector, and \$30 for a carbon monoxide detector.

Regulatory Flexibility Analysis: The requirement for new minimum standards for listed family homes was added to Texas Human Resources Code §42.042 to ensure the health and safety of children in these homes. Considering alternative methods to achieve this purpose for small businesses and micro-businesses would not be consistent with ensuring the health and safety of children. Therefore, a regulatory flexibility analysis is not required.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not will not affect a local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary (1) to protect the health, safety, and welfare of the residents of Texas; and (2) to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT AND COSTS

Jean Shaw, Associate Commissioner for Child Care Regulation, has determined that for each year of the first five years that the new rules are in effect, the public benefit will be the safety of children in care, improvements in the quality of their care, compliance with statutory requirements, and more consistency in the regulation of listed family homes.

Trey Wood has also determined that for the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules other than the costs noted under the small businesses and micro-businesses analysis.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Gerry Williams by email at Gerry.Williams@hhsc.state.tx.us.

Written comments on the proposal may be submitted to Gerry Williams, Rules Writer, Child Care Regulation, Texas Health and Human Services Commission, E-550, P.O. Box 149030, Austin, Texas 78714-9030; or by email to CCLrules@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R021" in the subject line.

SUBCHAPTER A. PURPOSE, SCOPE, AND DEFINITIONS

26 TAC §§742.101, 742.103, 742.105, 742.107, 742.109, 742.111

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC.

The new sections implement Texas Human Resources Code §42.042 and §42.0495.

§742.101. What is the purpose of this chapter?

The purpose of this chapter is to establish minimum standards that apply to listed family homes.

§742.103. What is a listed family home?

For purposes of this chapter, a listed family home:

(1) Provides care and supervision in the primary caregiver's own home:

(A) For compensation;

(B) For three or fewer children who are 13 years of age or younger and not related to the primary caregiver; and

(C) For at least four hours a day:

(i) Three or more days a week, for three or more consecutive weeks; or

(ii) For 40 or more days in a 12-month period; and

(2) May not provide care for more than 12 children, including children related to the primary caregiver.

§742.105. Who is responsible for complying with these minimum standards?

(a) For a listed family home, as described in §742.103 of this subchapter (relating to What is a listed family home?), the permit holder must ensure compliance with all minimum standards in this chapter at all times.

(b) Any home that provides care and supervision, as described in §742.103 of this subchapter, is responsible for meeting the requirements in this chapter. If a home operates a listed family home without a permit, the home is still accountable for failing to meet any requirement in this chapter in addition to the legal consequences for operating without a permit.

§742.107. Is a listed family home that only provides care and supervision for children related to the primary caregiver required to comply with the minimum standards in this chapter?

A listed family home is not required to comply with the minimum standards in this chapter if:

(1) The permit holder is receiving federal subsidies from the Texas Workforce Commission; and

(2) The home only provides care and supervision to children related to the primary caregiver.

§742.109. What do certain pronouns or titles mean when used in this chapter?

The following pronouns and title have the following meanings when used in this chapter:

(1) I, my, you, and your--The primary caregiver in a listed family home, unless otherwise stated.

(2) Licensing--The Child Care Regulation department of the Texas Health and Human Services Commission.

§742.111. What do certain words and terms mean when used in this chapter?

The following words and terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

(1) Caregiver--A person whose duties include the care, supervision, guidance, and protection of a child or children in care.

(2) Children related to the primary caregiver--Children who are children, grandchildren, siblings, great-grandchildren, first cousins, nieces, or nephews of the primary caregiver. This includes any of those relationships that exist due to common ancestry, adoption, or marriage.

(3) Health-care professional--A licensed physician, a licensed advanced practice registered nurse (APRN), a licensed vocational nurse (LVN), a licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of the license. This does not include physicians, nurses, or other medical personnel who are not licensed in the United States or in the country in which the person practices.

(4) Infant--A child from birth through 17 months.

(5) Pre-kindergarten age child--A child who is three or four years of age before the beginning of the current school year.

(6) Restrictive device--Equipment that places the body of a child in a position that may restrict airflow or cause strangulation; usually, the child is placed in a semi-seated position. Examples of restrictive devices are car seats, swings, bouncy seats, and high chairs.

(7) School-age child--A child who is five years of age or older and is enrolled in or has completed kindergarten.

(8) Toddler-A child from 18 months through 35 months.

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

Filed with the Office of the Secretary of State on November 6, 2020.

TRD-202004706

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 438-3269



SUBCHAPTER B. CAREGIVERS

26 TAC §742.201, §742.203

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC.

The new sections implement Texas Human Resources Code §42.042 and §42.0495.

§742.201. Who is a primary caregiver?

The primary caregiver is the person responsible for ensuring that the listed family home operates in compliance with these minimum standards and the licensing laws. The primary caregiver must:

(1) Live in the home where care is provided; and

(2) Be the permit holder, unless the primary caregiver forms a business entity that is the permit holder for the home.

§742.203. Must I be present at my home during all hours of operation?

(a) As the primary caregiver, you must routinely be present in your listed family home during the hours of operation.

(b) You may be temporarily absent for limited periods of time only if you designate a substitute caregiver to be in charge of the home during your absence. Substitutes must:

(1) Know they are in charge of the home and for how long;

(2) Know their responsibilities while in charge;

(3) Have access to all information that would be necessary to communicate with parents and state and local authorities; and

(4) Have the responsibility from you to run the home in compliance with the minimum standards.

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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Karen Ray
Chief Counsel
Health and Human Services Commission
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For further information, please call: (512) 438-3269



SUBCHAPTER C. CAREGIVER QUALIFICATIONS AND RESPONSIBILITIES

26 TAC §§742.301, 742.303, 742.305, 742.307

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC.

The new sections implement Texas Human Resources Code §42.042 and §42.0495.

§742.301. What types of minimum qualifications must caregivers have?

Primary caregivers and substitute caregivers must:

- (1) Be at least 18 years of age;
- (2) Meet the requirements in Chapter 745, Subchapter F of this title (relating to Background Checks).

§742.303. What general responsibilities do caregivers have?

Primary and substitute caregivers:

- (1) Are responsible for seeing that children are:
 - (A) Treated with courtesy, respect, acceptance, and patience;
 - (B) Not abused, neglected, or exploited; and
 - (C) Released only to a parent or a person designated by a parent;
- (2) Must demonstrate competency, good judgment, and self-control in the presence of children;
- (3) Must know and comply with the minimum standards specified in this chapter;
- (4) Must know each child's name and age;
- (5) Must supervise children at all times, as specified in §742.305 of this subchapter (relating to What does "supervise children at all times" mean?); and
- (6) Must interact with children in a positive manner.

§742.305. What does "supervise children at all times" mean?

Supervising children at all times means the primary caregiver and substitute caregiver are accountable for each child's care. This includes responsibility for the ongoing activity of each child, appropriate visual and auditory awareness, physical proximity, and knowledge of each child's needs. The caregiver must intervene when necessary to ensure each child's safety. In deciding how closely to supervise children, the caregiver must take into account the:

- (1) Ages of the children;

- (2) Individual differences and abilities;
- (3) Layout of the home and play area; and
- (4) Neighborhood circumstances, hazards, and risks.

§742.307. What additional responsibilities do primary caregivers have?

Primary caregivers are also responsible for:

(1) Initiating background checks on caregivers, household members, and anyone else who requires a background check, as specified in Chapter 745, Subchapter F of this title (relating to Background Checks);

(2) Obtaining from parents, when admitting a child into care:

- (A) The child's name and date of birth;
- (B) The parent's home address and telephone number;
- (C) The names of other persons the child may be released to; and

(D) A list of each food a child is allergic too, possible symptoms if the child is exposed to the food, and the steps to take if the child has an allergic reaction;

(E) Authorization to give the child medication, if applicable;

(3) Ensuring the following regarding the number of children in care at the home or away from the home:

(A) The number of children not related to the primary caregiver never exceeds three; and

(B) The total number of children, both related and not related to the primary caregiver, never exceeds 12; and

(4) Ensuring parents can visit your home any time during the hours of operation to observe their child, without having to secure prior approval.

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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Karen Ray
Chief Counsel

Health and Human Services Commission
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SUBCHAPTER D. NOTIFICATION OF LIABILITY INSURANCE REQUIREMENTS

26 TAC §§742.401, 742.403, 742.405, 742.407

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and

§531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC.

The new sections implement Texas Human Resources Code §42.042 and §42.0495.

§742.401. What are the notification requirements?

(a) A caregiver must notify the Department of Family and Protective Services immediately at 1-800-252-5400 if:

(1) There is any suspected abuse, neglect, or exploitation;

(2) A child dies while in your care; or

(3) A child was forgotten in a vehicle or wandered away from your home or care unsupervised;

(b) You must notify Licensing immediately if you become aware that a household member, caregiver, or child in care contracts an illness deemed notifiable by the Texas Department of State Health Services.

(c) After you ensure the safety of the child, you must notify the parent immediately if the child:

(1) Is injured and the injury requires medical treatment by a health-care professional or hospitalization;

(2) Shows signs or symptoms of an illness that requires hospitalization; or

(3) Was forgotten in a vehicle or wandered away from your home or care unsupervised.

(d) You must notify the parent of a child of less serious injuries when the parent picks the child up from the home. Less serious injuries include, minor cuts, scratches, and bites from other children requiring first aid treatment by caregivers.

(e) You must notify the parent of each child attending the home in writing within 48 hours after you become aware that a household member, caregiver, or child in care contracts an illness deemed notifiable by the Texas Department of State Health Services; or

(f) You must notify Licensing in writing within 15 days of:

(1) Relocating your listed family home; or

(2) Closing the home.

§742.403. What are the liability insurance requirements?

Unless you have an acceptable reason not to have the insurance, you must:

(1) Have liability insurance coverage:

(A) Of at least \$300,000 for each occurrence of negligence; and

(B) That covers injury to a child that occurs while the child is in your care, regardless of whether the injury occurs on or off the premises of your home; and

(2) Provide proof of coverage to Licensing each year by the anniversary date of the issuance of your permit to operate a listed family home.

§742.405. What are acceptable reasons not to have liability insurance?

(a) You do not have to have liability insurance that meets the requirements of §742.403 of this subchapter (relating to What are the liability insurance requirements?) if you are unable to carry the insurance because:

(1) Of financial reasons;

(2) You are unable to locate an underwriter who is willing to issue a policy to the home; or

(3) You have already exhausted the limits of a policy that met the requirements.

(b) If you are unable to carry the liability insurance or stop carrying the insurance because of a reason listed in subsection (a) of this section, you must send written notification to Licensing by the anniversary date of the issuance of your permit to operate a listed family home. Your notification must include the reason that you are unable to carry the insurance.

§742.407. When must I notify parents that I do not carry liability insurance?

(a) If you do not carry liability insurance that meets the requirements of §742.403 of this subchapter (relating to What are the liability insurance requirements?), then you must notify a child's parent in writing that you do not carry liability insurance before you admit a child into your care.

(b) If you received your permit to operate a listed family home before April 25, 2021, and cannot obtain the liability insurance by that date, then you must notify the parents of children in your care that you do not carry the insurance by May 25, 2021.

(c) If you previously carried the liability insurance and you subsequently stop carrying the liability insurance, then you must notify the parent of each child in your care that you do not carry the insurance, in writing, within 30 days after you stop carrying it.

(d) You may use Form 2962, Attachment A, Parental Notification of Lack of Required Liability Insurance, located on Licensing's provider website to notify parents. Regardless of whether you use this form, you must be able to demonstrate that you provided written notice to the parent of each child in your care.

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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Karen Ray

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SUBCHAPTER E. BASIC CARE REQUIREMENTS

26 TAC §§742.501, 742.503, 742.505, 742.507, 742.509, 742.511, 742.513

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and

§531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC.

The new sections implement Texas Human Resources Code §42.042 and §42.0495.

§742.501. What are the basic care requirements for an infant?

Basic care for an infant must include:

- (1) Giving individual attention to the infant including, playing, talking, cuddling, and holding;
- (2) Holding and comforting the infant when the infant is upset;
- (3) Giving prompt attention to the physical needs of the infant, such as feeding and diapering;
- (4) Talking to the infant while you are feeding, changing, and holding the infant, such as naming objects, singing, or saying rhymes;
- (5) Storing objects that could cause choking (objects that are less than 1 and 1/4 inches in diameter) out of the infant's reach;
- (6) Providing or having the parent provide an individual crib or play yard (also known as a play pen) for each non-walking infant younger than 12 months of age to sleep in; and
- (7) Providing or having the parent provide an individual cot, bed, or mat that is waterproof or washable for each walking infant to sleep or rest on.

§742.503. What safety requirements must my cribs meet?

(a) Each crib or play yard (also known as a play pen), whether provided by the home or the child's parent, must have a firm, flat mattress that the manufacturer designed specifically for the crib or play yard model number that snugly fits the sides of the crib or play yard. You may not supplement the mattress with additional foam material or pads.

(b) Each crib or play yard must be bare for an infant younger than 12 months of age, except for a tight-fitting sheet and a mattress cover to protect against wetness. The mattress cover, whether provided by the home or the parent, must:

- (1) Be designed specifically for the size and type of crib and crib mattress that the cover is being used with;
- (2) Be tight fitting and thin; and
- (3) Not be designed to make the sleep surface softer.

§742.505. What types of sleeping equipment am I prohibited from using with infants?

(a) You may not use a bean bag, waterbed, or a foam pad as sleeping equipment for an infant.

(b) An infant may not sleep in a restrictive device, unless you have a signed statement from a health-care professional stating that it is medically necessary for the infant to sleep in a restrictive device. If an infant falls asleep in a restrictive device, you must remove the infant from the device and place the infant in a crib as soon as possible.

§742.507. What additional requirements apply when an infant is sleeping or resting?

(a) You must place an infant who is not yet able to turn over without assistance in a face-up sleeping position, unless you have a signed statement from a health-care professional stating that it is medically necessary for the infant to sleep in a different sleeping position.

(b) You may not lay a swaddled infant down to sleep or rest on any surface at any time, unless you have a signed statement from a

health-care professional stating it is medically necessary for the infant to be swaddled while the infant is sleeping.

(c) An infant's head, face, or crib must not be covered by items such as blankets, linens, or clothing at any time.

§742.509. What are the basic care requirements for a toddler?

Basic care for a toddler must include:

- (1) Giving individual attention to the toddler, including playing, talking, cuddling, and holding;
- (2) Holding and comforting a toddler when the toddler is upset;
- (3) Maintaining routines, such as feeding, diapering, sleeping, and indoor and outdoor play during the same time each day, as closely as possible;
- (4) Storing objects that could cause choking (objects that are less than 1 and 1/4 inches in diameter) out of the toddler's reach; and

(5) Providing, or having the parent provide, an individual cot, bed, or mat that is waterproof or washable for each toddler to sleep or rest on.

§742.511. What are the basic care requirements for a pre-kindergarten age child?

Basic care for a pre-kindergarten age child must include:

- (1) Giving individual attention to the child;
- (2) Encouraging the child to communicate and express feelings in appropriate ways; and
- (3) Providing, or having the parent provide, an individual cot, bed, or mat that is waterproof or washable for each toddler to sleep or rest on.

§742.513. What are the basic care requirements for a school-age child?

Basic care for a school-age child must include:

- (1) Giving individual attention to the child;
- (2) Encouraging the child to converse with adults; and
- (3) Providing physical care routines that are appropriate to the child's developmental needs.

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SUBCHAPTER F. DISCIPLINE AND GUIDANCE

26 TAC §742.601, §742.603

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC.

The new sections implement Texas Human Resources Code §42.042 and §42.0495.

§742.601. What methods of discipline and guidance may I use?

Discipline and guidance must be:

- (1) Individualized and consistent for each child;
- (2) Appropriate to the child's level of understanding;
- (3) Directed toward teaching the child acceptable behavior and self-control; and
- (4) A positive method of discipline and guidance that encourages self-esteem, self-control, and self-direction, including:
 - (A) Using praise and encouragement of good behavior instead of focusing only upon unacceptable behavior;
 - (B) Reminding a child of behavior expectations daily by using clear, positive statements;
 - (C) Redirecting behavior using positive statements; and
 - (D) Using brief supervised separation or time out from the group, when appropriate for the child's age and development, which is limited to no more than one minute per the year of the child's age.

§742.603. What types of punishment, discipline, or guidance are prohibited?

- (a) You may not use or threaten to use corporal punishment with any child in care. Corporal punishment is the infliction of physical pain on a child as a means of controlling or managing behavior, including hitting or spanking a child with a hand or an instrument or slapping or thumping a child.
- (b) In addition to corporal punishment, prohibited discipline or guidance techniques include:
 - (1) Any harsh, cruel, or unusual treatment of any child;
 - (2) Punishment associated with food, naps, or toilet training;
 - (3) Pinching, shaking, or biting a child;
 - (4) Putting anything in or on a child's mouth;
 - (5) Humiliating, ridiculing, rejecting, or yelling at a child;
 - (6) Subjecting a child to harsh, abusive, or profane language;
 - (7) Placing a child in a locked or dark room, bathroom, or closet; and
 - (8) Requiring a child to remain silent or inactive for inappropriately long periods of time for the child's age, including requiring a child to remain in a restrictive device.

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SUBCHAPTER G. NUTRITION AND FOOD

26 TAC §742.701, §742.703

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC.

The new sections implement Texas Human Resources Code §42.042 and §42.0495.

§742.701. What are the basic food requirements?

- (a) You must offer a child a meal or snack every three hours, unless the child is sleeping.
- (b) Parents may provide meals and snacks for their children instead of you providing them.
- (c) You must ensure a supply of drinking water is always available to each child. You must serve water at every snack, mealtime, and after active play.

(d) All food and drinks must be of safe quality. You must store, prepare, distribute, and serve food and drinks under sanitary and safe conditions.

(e) You must not use food as a reward.

§742.703. How should I care for a child with a food allergy?

- (a) If the child has a food allergy, you must ensure the child does not have access to foods that will cause an allergic reaction.
- (b) If a child shows symptoms of an allergic reaction, you must follow the steps to be taken for an allergic reaction that the parent provided at admission.

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SUBCHAPTER H. HEALTH AND SAFETY PRACTICES

26 TAC §§742.801, 742.803, 742.805, 742.807, 742.809, 742.811, 742.813

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC.

The new sections implement Texas Human Resources Code §42.042 and §42.0495.

§742.801. How do I ensure a healthy environment for children at my home?

(a) You must clean, repair, and maintain your listed family home, grounds, pool, hot tub, and equipment to protect the health safety of the children in your care, including:

(1) Keeping all parts of your listed family home used by children well heated, lighted, and ventilated;

(2) Having at least one working sink and flushing toilet in the home; and

(3) Sanitizing toys and equipment that are placed in a child's mouth or are otherwise contaminated by food, body secretions, or excrement.

(b) You must clearly mark cleaning supplies and hazardous materials and ensure that they are inaccessible to children.

(c) Caregivers should wash their hands and children's hands often.

(d) All areas accessible to a child must be free from hazards.

(e) During operating hours, people must not consume or be under the influence of alcohol or controlled substances in the home, during transportation, or on field trips.

(f) During operating hours, people must not smoke any e-cigarette, vaporizer, or tobacco product or otherwise use any tobacco product in your home, in the garage, on the playground, in transportation vehicles, or during field trips.

§742.803. What are the medication requirements?

(a) Medication in this chapter means:

(1) A prescription medication; or

(2) A non-prescription medication, excluding topical ointments such as diaper ointment, insect repellent, or sunscreen.

(b) Before you may give medication to a child in care, the child's parent must authorize you to give the medication to the child. The authorization must be:

(1) In writing, signed, and dated;

(2) In an electronic format that is capable of being viewed and saved; or

(3) By telephone to administer a single dose of a medication.

(c) You must administer medication as required on the medication's label instructions, unless amended in writing by the prescribing health-care professional.

(d) Parental authorization to give medication is only good for one year. The child's parent must give you a new authorization in order for you to continue giving the child medication after the year expires.

(e) You may administer medication to a child without parental authorization in a medical emergency to prevent the death or serious bodily injury of the child.

§742.805. How should I respond to an illness or injury that requires the immediate attention of a health-care professional?

If a child in your care requires the immediate medical attention of a health-care professional, you must contact emergency medical services or take the child to the nearest emergency room after you have ensured the supervision of the other children in the home.

§742.807. What are the water activity and swimming requirements?

(a) You must maintain constant and active supervision when a child is in or around water.

(b) When an infant or toddler is taking part in a water activity, there must always be one caregiver for each infant or toddler who is wading, bathing, or swimming.

(c) You must take precautionary measures to protect the safety of a non-swimmer of any age.

(d) You must not allow children to swim in a lake, pond, river, or similar body of water.

(e) You may allow children to wade in a wading pool of less than two feet of water if you are present and have completed an online water safety course. Otherwise, you may allow children to swim or wade in a swimming pool or wading pool only if a lifeguard is on duty.

§742.809. What are the transportation requirements?

(a) You must account for all children exiting a vehicle before leaving the vehicle unattended.

(b) You must abide by all state laws, including:

(1) Never leaving a child unattended in a vehicle;

(2) Always using a child safety seat system (an infant safety seat, rear-facing convertible safety seat, forward facing safety seat, booster seat), safety vest, harness, or safety belt, as appropriate to the child's age, height, and weight and according to the manufacturer's instructions, for children as required by law;

(3) Always using a safety belt for adults; and

(4) Requiring the driver while transporting children to:

(A) Have proof of automobile liability insurance; and

(B) Carry a current driver's license.

§742.811. What type of emergency preparedness plan must I have?

(a) You must have an emergency preparedness plan that addresses the types of emergencies most likely to occur in your area, including:

(1) An evacuation of your home to a designated safe area in an emergency such as a fire or gas leak;

(2) A relocation of the children and caregivers to a designated, alternate shelter in an emergency such as a flood, a hurricane, medical emergency, or communicable disease outbreak; and

(3) The sheltering and lock-down of children and caregivers within your home to temporarily protect them from situations such as a tornado, volatile person on the premises, or an endangering person in the area.

(b) You must practice the emergency preparedness plan on a routine basis.

§742.813. What are the Fire Safety Requirements?

(a) Your home must have a fire extinguisher that is serviced according to the manufacturer's instructions, or as required by the state or local fire marshal.

(b) Your home must have a smoke detector and you must replace the batteries annually.

(c) If your home uses gas or propane or your garage is directly connected to your home, then your home must have a carbon monoxide detector and you must replace the batteries annually.

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CHAPTER 744. MINIMUM STANDARDS FOR SCHOOL-AGE AND BEFORE OR AFTER-SCHOOL PROGRAMS

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §§744.123, 744.501, 744.2001, 744.2003, 744.2005, 744.2007, 744.2105, 744.2401, 744.2409, 744.2411, and 744.2421; new §744.2002; and the repeal of §§744.2403, 744.2405, 744.2407, 744.2415, and 744.2417 in Title 26, Texas Administrative Code, Chapter 744, Minimum Standards for School-Age and Before or After-School Programs.

BACKGROUND AND PURPOSE

Senate Bill (S.B.) 952, 86th Legislature, Regular Session, 2019, added Subsections 42.042(e-3), (e-4), and (e-5) to the Texas Human Resources Code (HRC). The new Subsections require HHSC Child Care Regulation (CCR) to align the minimum standards for child-care centers and registered child-care homes with standards for physical activity and screen time in Caring for Our Children (CFOC), 4th edition, and with the nutrition standards of the federal Child and Adult Care Food Program (CACFP).

CCR is extending these requirements to School-Age and Before and After-School Programs in Chapter 744 and Licensed Homes in Chapter 747, so that the minimum standards for physical activity, nutrition, and screen time are congruent throughout Chapters 744, 746, and 747.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §744.123 (1) updates language and punctuation for better readability and understanding in the definitions for "before or after-school," "caregiver," "certified life-guard," "CEUs," "clock hour," "high school equivalent," and "special care needs"; (2) updates citations in the definitions for "caregiver," "clock hour," "permit is no longer valid," and "regular"; (3) relocates "director" from after to before "employee" to be consistent with formatting throughout the rule; (4) replaces and up-

dates the definition for "frequently" with "frequent" for consistency with other Licensing chapters; (5) updates the definition for "health-care professional" to clarify the definition excludes only persons not licensed in the U.S. or in the country in which the person practices; (6) updates the definition for "natural environment" to be consistent with the current definition in the Individuals with Disabilities Education Act, and provides an example to aid in clarity; (7) adds definitions for "physical activity (moderate)," "physical activity (vigorous)," and "screen time activity"; (7) adds a definition for "pre-kindergarten age child" to be consistent with other Licensing chapters; (8) deletes "regularly or frequently present at an operation" for consistency with other Licensing chapters; (9) updates the definition for "school-age child" for better understanding and consistency with other Licensing chapters; and (10) updates the numbering of the definitions accordingly.

The proposed amendment to §744.501 (1) updates citations; (2) updates language for better readability and increased consistency throughout the chapter; and (3) corrects the title of the agency.

The proposed amendment to §744.2001 (1) updates the rule title for better readability and understanding; (2) deletes activity requirements for children in care for five or more consecutive hours in a day, as those requirements are now included in proposed §744.2002; and (3) updates the numbering of rules accordingly.

Proposed new §744.2002 outlines the activities a child-care operation must include when a child is in care for five or more consecutive hours in a day. The proposed rule incorporates all the activities that will no longer be in proposed §744.2001.

The proposed amendment to §744.2003: (1) updates the rule title and language throughout the rule for better readability and understanding; (2) adds requirements for child-care operations caring for children under age five, including (A) the addition of procedures addressing outdoor and active play when children are in care more than five consecutive hours in a day, and (B) the inclusion of written operational policies for physical activity that are shared with parents at enrollment and as needed thereafter; and (3) updates the numbering of rules accordingly.

The proposed amendment to §744.2005 (1) updates the rule title for better readability and understanding; (2) updates the rule to require compliance with proposed §§744.2002 and 744.2003(1)(C) when a child is in care for more than five consecutive hours in a day; (3) adds a requirement that a written activity plan include the specific daily activities and approximate times of the activities; (4) requires the child-care operation to follow the plan; (5) adds language regarding screen time activities to specify an activity plan may include one or more screen time activities; and (6) reorganizes language in the rule for better readability and understanding.

The proposed amendment to §744.2007 (1) replaces the phrase "TV/video, computer, or video games" with "screen time activity"; (2) reorganizes and clarifies language in the rule for better readability and understanding; (3) updates citations; (4) adds restrictions to screen time activities offered at the child-care operation, including (A) reducing the amount of allotted screen time from two hours to one hour per day, and (B) requiring that screen time activities relate to educational goals, are not used during meal-times, snack times, naptimes, or rest times, do not include advertising or violence, and are turned off when not in use; and (5) adds flexibility for school-age children to use screen time without restriction for homework.

The proposed amendment to §744.2105 (1) expands the list of prohibited discipline and guidance measures to include withholding active play or keeping a child inside as a consequence for behavior and (2) updates the numbering of rules accordingly.

The proposed amendment to §744.2401 (1) updates the rule title for better readability and understanding; (2) adds the requirement for all child-care operations to follow the meal patterns established by the CACFP; (3) reorganizes and clarifies language in the rule for better readability and understanding; (4) incorporates the requirement to allow second servings from certain food groups previously required in repealed §744.2403; (5) deletes language that allowed child-care operations to follow either CACFP meal patterns or Licensing meal requirements; (6) updates a citation; and (7) updates the numbering of rules accordingly.

The proposed repeal of §744.2403 deletes the rule as no longer necessary, because the content of the rule has been re-proposed in new §744.2403.

Proposed new §744.2403 (1) incorporates requirements from repealed §744.2403 into a chart to reorganize and clarify the rule and (2) restructures certain requirements in repealed §744.2403, regarding how much food to offer based on hours in care.

The proposed repeal of §744.2405 deletes the rule as no longer necessary, because all child-care operations are now required to follow the CACFP meal patterns, as noted in proposed §744.2401.

The proposed repeal of §744.2407 deletes the rule as no longer necessary, because all child-care operations are now required to follow the CACFP meal patterns, as noted in proposed §744.2401.

The proposed amendment to §744.2409 (1) updates grammar and punctuation for consistency throughout the chapter; (2) adds that a parent may sign an addendum to the enrollment agreement so that the parent may provide meals and snacks; and (3) updates a citation.

The proposed amendment to §744.2411 (1) updates the rule title for better readability and understanding; and (2) replaces "physician" with "health-care professional" for consistency throughout the chapter.

The proposed repeal of §744.2415 deletes the rule as no longer necessary, because all child-care operations are now required to follow the CACFP meal patterns, as noted in proposed §744.2401.

The proposed repeal of §744.2417 deletes the rule as no longer necessary, because all child care operations are now required to follow the CACFP meal patterns, as noted in proposed §744.2401.

The proposed amendment to §744.2421: (1) adds a requirement that children feed themselves according to their developmental level to be consistent with current best practice in child-care; and (2) updates the numbering of rules accordingly.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

(1) the proposed rules will not create or eliminate a government program;

(2) implementation of the proposed rules will not affect the number of HHSC employee positions;

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

(4) the proposed rules will not affect fees paid to HHSC;

(5) the proposed rules will create new rules;

(6) the proposed rules will expand and repeal existing rules;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there could be an adverse economic effect on small businesses and micro-businesses, but no adverse effect on rural communities.

Chapter 2006 of the Texas Government Code defines a small business as one that is for-profit with fewer than 100 employees. A micro-business is one that is for-profit with fewer than 20 employees. Based on data obtained in July 2020, CCR estimates that there are approximately 1,691 School-Age Programs and Before and After-School Programs required to comply with the rules. CCR conducted a survey of licensed child-care operations in 2019 to determine which operations met the definition of a small or micro-business and received responses and only received a response rate of approximately 1.5 percent of School-Age Programs and 1.1 percent of Before and After-School Programs, which is not statistically significant. However, data in July 2020 indicated that approximately 36.7 percent (or 621 programs) were for profit. In addition, based on a survey conducted in 2010 approximately 98 percent of those programs (or 609 programs) have less than 100 employees and qualify as small businesses and approximately 68 percent of those small businesses (or 414 programs) have less than 20 employees and qualify as micro-businesses.

The projected economic impact on micro-businesses is limited to proposed §744.2003, as this rule requires written procedures and an operational policy to be developed if an operation cares for a child under age five. Some operations have indicated a labor cost to bring the procedures and policy into compliance with the proposed rule. HHSC does not have sufficient information to determine these costs as the proposed rule does not impact all operations and developing the procedures and policy will vary greatly with individual business structure.

HHSC determined that there are no alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities that are consistent with ensuring the health and safety of children attending child-care centers in Texas.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT AND COSTS

Jean Shaw, Associate Commissioner for Child Care Regulation, has determined that for each year of the first five years the rules are in effect, the public benefit will be that the health of children attending child-care in Texas will be supported by physical activity, screen time, and nutrition standards that are aligned with national standards and best practices for early childhood education.

Trey Wood has also determined that for the first five years the rules are in effect, there could be an anticipated cost for persons required to comply with proposed §744.2003. The proposed rule requires child-care operations to develop an operational policy to include physical activity components.

Some operations have indicated a labor cost to bring the policy into compliance with the proposed rule. HHSC does not have sufficient information to determine these costs, as they will vary greatly with operation type and individual business structure.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Aimee Belden by email at Aimee.Belden@hhsc.state.tx.us.

Written comments on the proposal may be submitted to Aimee Belden, Rules Writer, Child Care Regulation, Texas Health and Human Services Commission, E-550, P.O. Box 149030, Austin, Texas 78714-9030; or by email to CCLRules@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R024" in the subject line.

SUBCHAPTER A. PURPOSE, SCOPE, AND DEFINITIONS

DIVISION 3. DEFINITIONS

26 TAC §744.123

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires

HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§744.123. What do certain words and terms mean when used in this chapter?

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or another subchapter or unless the context clearly indicates otherwise. In addition, the following words and terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

(1) Activity space--An area or room used for children's activities, including areas separate from a group's classroom.

(2) Administrative and clerical duties--Duties that involve the administration of an operation, such as bookkeeping, enrolling children, answering the telephone, and collecting fees.

(3) Admission--The process of enrolling a child in an operation. The date of admission is the first day the child is physically present at the operation.

(4) Adult--A person 18 years old and older.

(5) Age-appropriate--Activities, equipment, materials, curriculum, and environment that are developmentally consistent with the chronological age of the child being served.

(6) Attendance--When referring to a child's attendance, the physical presence of a child at the operation on any given day or at any given time, as distinct from the child's enrollment in the operation.

(7) Before or after-school [~~After-school~~] program--An operation that provides care before and after or before or after the customary school day and during school holidays, for at least two hours a day, three days a week, to children who attend pre-kindergarten through grade six.

(8) Caregiver--A person who is counted in the child to caregiver [~~child-caregiver~~] caregiver ratio, whose duties include the supervision, guidance, and protection of a child. As used in this chapter, a caregiver must meet the minimum education, work experience, and training qualifications required under Subchapter D of this chapter (relating to Personnel). A caregiver is usually an employee, but may also be a substitute, volunteer, or contractor, as outlined in Subchapter D, Division 5 of this chapter [(see Division 5 of Subchapter D)] (relating to Substitutes, Volunteers, and Contractors)[)].

(9) Certified Child-Care Professional Credential--A credential given by the National Early Childhood Program Accreditation to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(10) Certified lifeguard--A person who has been trained in life saving and water safety by a qualified instructor, from a recognized organization that [~~which~~] awards a certificate upon successful completion of the training. The certificate is not required to use the term "lifeguard," but you must be able to document that the certificate represents the type of training described.

(11) CEUs [~~(continuing education units)~~]-Continuing education units. A standard unit of measure for adult education and training activities. One CEU equals 10 [~~ten~~] clock hours of participation in an organized, continuing-education experience, under responsible, qualified direction and instruction. Although a person may obtain a

CEU in many of the same settings as clock hours, the CEU provider must meet the criteria established by the International Association for Continuing Education and Training to be able to offer the CEU.

(12) Child Development Associate Credential--A credential given by the Council for Professional Recognition to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(13) Clock hour--An actual hour of documented:

(A) Attendance at instructor-led training, such as seminars, workshops, conferences, early childhood classes, and other planned learning opportunities, provided by an individual or individuals [individual/s], as specified in §744.1319(a) of this chapter [title] (relating to Must the training for my caregivers and the director meet certain criteria?); or

(B) Self-instructional training that was created by an individual or individuals [individual/s], as specified in §744.1319(a) and (b) of this chapter, or self-study training.

(14) Corporal punishment--The infliction of physical pain on a child as a means of controlling behavior. This includes spanking, hitting, slapping, or thumping a child.

(15) Days--Calendar days, unless otherwise stated.

(16) Director--An adult you designate to have daily, on-site responsibility for your operation, including maintaining compliance with the minimum standards, rules, and laws. As this term is used in this chapter, a director may be an operation director, program director, or site director, unless the context clearly indicates otherwise.

(17) [(16)] Employee--A person an operation employs full-time or part-time to work for wages, salary, or other compensation. Employees are all of the operation staff, including caregivers, kitchen staff, office staff, maintenance staff, the assistant director, all directors, and the owner, if the owner is ever on site at the operation or transports a child.

[(17) Director--An adult you designate to have daily, on-site responsibility for your operation, including maintaining compliance with the minimum standards, rules, and laws. As this term is used in this chapter, a director may be an operation director, program director, or site director, unless the context clearly indicates otherwise.]

(18) Enrollment--The list of names or number of children who have been admitted to attend an operation for any given period of time; the number of children enrolled in an operation may vary from the number of children in attendance on any given day.

(19) Entrap--A component or group of components on equipment that forms angles or openings that may trap a child's head by being too small to allow the child's body to pass through, or large enough for the child's body to pass through but too small to allow the child's head to pass through.

(20) Field trips--Activities conducted away from the operation.

(21) Food service--The preparation or serving of meals or snacks.

(22) Frequent [Frequently]--More than two times in a 30-day period. Note: For [See] the definition of [fœr] "regularly or frequently present at an operation" as it applies to background checks, see [æt] §745.601 of this title (relating to What words must I know to understand this subchapter?).

(23) Garbage--Waste food or items that when deteriorating cause offensive odors and attract rodents, insects, and other pests.

(24) Governing body--A group of persons or officers of a corporation or other type of business entity having ultimate authority and responsibility for the operation.

(25) Group activities--Activities that allow children to interact with other children in large or small groups. Group activities include storytelling, finger plays, show and tell, organized games, and singing.

(26) Health-care professional--A licensed physician, a licensed advanced practice registered nurse (APRN), a licensed vocational nurse (LVN), a licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of the license. This does not include physicians, [medical doctœrs,] nurses, or other medical personnel who are not licensed [to prœctice] in the United States or in the country in which the person practices.

(27) Health check--A visual or physical assessment of a child to identify potential concerns about a child's health, including signs or symptoms of illness and injury, in response to changes in the child's behavior since the last date of attendance.

(28) High school equivalent-- [:]

(A) Documentation of a program recognized by the Texas Education Agency (TEA) or other public educational entity in another state, which offers similar training on reading, writing, and math skills taught at the high school level, such as a General Educational Development (GED) certificate; or

(B) Confirmation that the person received home-schooling that adequately addressed basic competencies such as basic reading, writing, and math skills, which would otherwise have been documented by a high school diploma.

(29) Individual activities--Opportunities for the child to work independently or to be away from the group, but supervised.

(30) Inflatable--An amusement ride or device, consisting of air-filled structures designed for use by children, as specified by the manufacturer, which may include bouncing, climbing, sliding, or interactive play. They are made of flexible fabric, kept inflated by continuous air flow by one or more blowers, and rely upon air pressure to maintain their shape.

(31) Instructor-led training--Training characterized by the communication and interaction that takes place between the student and the instructor. The training must include an opportunity for the student to interact with the instructor to obtain clarifications and information beyond the scope of the training materials. For such an opportunity to exist, the instructor must communicate with the student in a timely fashion, including answering questions, providing feedback on skills practice, providing guidance or information on additional resources, and proactively interacting with students. Examples of this type of training include, classroom training, web-based on-line facilitated learning, video-conferencing, or other group learning experiences.

(32) Janitorial duties--Those duties that involve the cleaning and maintenance of the operation's building, rooms, furniture, etc. Cleaning and maintenance include such duties as cleansing carpets, washing cots, and sweeping, vacuuming, or mopping a restroom or a classroom. Sweeping up after an activity or mopping up a spill in a classroom that is immediately necessary for the children's safety is not considered a janitorial duty.

(33) Local sanitation official--A sanitation official designated by the city or county government.

(34) Multi-site operations--Two or more operations owned by the same person or entity, but the operations have separate permits. These operations may have centralized business functions, record keeping, and leadership.

(35) Natural environment--Settings that are natural or typical ~~normal~~ for all children of the same ~~an~~ age ~~group~~ without regard to ability or disability. For example, a natural environment for learning social skills is a play group of peers. ~~[the primary natural group setting for a school-age child with a disability would be a play group, program, or whatever setting exists for school-age children without disabilities.]~~

(36) Nighttime care--Care given on a regular or frequent basis to children who are starting or continuing their night sleep, or to children who spend the night or part of the night at the operation between the hours of 9:00 p.m. and 6:00 a.m.

(37) Operation--A person or entity offering a before or after-school program or school-age program that is subject to Licensing's regulation. An operation includes the building and the premises where the program is offered, any person involved in providing the program, and any equipment used in providing the program.

(38) Operation director--A director at your operation who is not supervised by a program director. An operation that has an operation director cannot have a program director or a site director.

(39) Owner--The sole proprietor, partnership, corporation, or other type of business entity who owns the operation.

(40) Permit holder--The owner of the operation that is granted the permit.

(41) Permit is no longer valid--For purposes of this chapter, a permit remains valid through the renewal process. A permit only becomes invalid when your:

(A) Operation voluntarily closes;

(B) Operation must close because of an enforcement action in Chapter 45, Subchapter L of this title [Chapter 745] (relating to Enforcement Actions);

(C) Permit expires according to §745.481 of this title (relating to When does my permit expire?); or

(D) Operation must close because its permit is automatically revoked according to Texas ~~the~~ Human Resources Code §§42.048(e), 42.052(j), or 42.054(f).

(42) Physical activity (moderate)--Levels of activity for a child that are at intensities faster than a slow walk, but still allow the child to talk easily. Moderate physical activity increases heart rate and breathing rate.

(43) Physical activity (vigorous)--Rhythmic, repetitive physical movement for a child that uses large muscle groups, causing the child to breathe rapidly and only enabling the child to speak in short phrases. Typically, the child's heart rate is substantially increased and the child is likely to be sweating while engaging in the vigorous physical activity.

(44) Pre-kindergarten age child--A child who is three or four years of age before the beginning of the current school year.

(45) [(42)] Premises--Includes the operation, any lots on which the operation is located, any outside ground areas, any outside play areas, and the parking lot.

(46) [(43)] Program--The services and activities provided by an operation.

(47) [(44)] Program director--A director who oversees your program at multi-site operations and supervises a site director at each operation.

(48) [(45)] Regular--On a recurring, scheduled basis. Note: For the definition of "regularly or frequently present at an operation" as it applies to background checks, see §745.601 of this title.

[(46) Regularly or frequently present at an operation--See §745.601 of this title (relating to What words must I know to understand this subchapter?).]

(49) [(47)] Safety belt--A lap belt and any shoulder straps included as original equipment on or added to a vehicle.

(50) [(48)] Sanitize--The use of a product (usually a disinfecting solution) that is registered by the Environmental Protection Agency (EPA) which substantially reduces germs on inanimate objects to levels considered safe by public health requirements. Many bleach and hydrogen peroxide products are EPA-registered. You must follow the product's labelling instructions for sanitizing (paying attention to any instructions regarding contact time and toxicity on surfaces likely to be mouthed by children). For an EPA-registered sanitizing product or disinfecting solution that does not include labelling instructions for sanitizing (a bleach product, for example), you must follow these steps in order:

(A) Washing with water and soap;

(B) Rinsing with clear water;

(C) Soaking in or spraying on a disinfecting solution for at least two minutes. Rinsing with cool water only those items that children are likely to place in their mouths; and

(D) Allowing the surface or item to air-dry.

(51) [(49)] School-age child--A child who is five years of age and older[,] and is enrolled in or has completed kindergarten ~~[who will attend school at or away from the operation beginning in August or September of that year].~~

(52) [(50)] School-age program--An operation that provides supervision and recreation, skills instruction, or skills training for at least two hours a day and three days a week to children who attend pre-kindergarten through grade six. A school-age program operates before or after the customary school day and may also operate during school holidays, the summer period, or any other time when school is not in session.

(53) Screen time activity--An activity during which a child views media content on a cell or mobile phone, tablet, computer, television, video, film, or DVD. Screen time activities do not include video chatting with a child's family or assistive and adaptive computer technology used by a child with special care needs on a consistent basis.

(54) [(51)] Self-instructional training--Training designed to be used by one individual working alone and at the individual's own pace to complete lessons or modules. Lessons or modules commonly include questions with clear right and wrong answers. An example of this type of training is web-based training. Self-study training is also a type of self-instructional training.

(55) [(52)] Self-study training--Non-standardized training where an individual reads written materials, watches a training video, or listens to a recording to obtain certain knowledge that is required for annual training. Self-study training is limited to three hours of annual training per year.

(56) [(53)] Site director--A director who has on-site responsibility at a specific operation, but who is supervised by a program director.

(57) [(54)] Special care needs--A child with special care needs is a child who has a chronic physical, developmental, behavioral, or emotional condition and who also requires assistance beyond that required by a child generally to perform tasks that are within the typical chronological range of development, including the movement of large or [and/or] small muscles, learning, talking, communicating, self-help, social skills, emotional well-being, seeing, hearing, and breathing.

(58) [(55)] State or local fire marshal--A fire official designated by the city, county, or state government.

(59) [(56)] Universal precautions--An approach to infection control where all human blood and certain human bodily fluids are treated as if known to be infectious for HIV, HBV, and other blood-borne pathogens.

(60) [(57)] Water activities--Related to the use of swimming pools, splashing/wading pools, sprinkler play, or other bodies of water.

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

Filed with the Office of the Secretary of State on November 6, 2020.

TRD-202004663

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 438-3269



SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION

DIVISION 4. OPERATIONAL POLICIES

26 TAC §744.501

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§744.501. What written operational policies must I have?

You must develop written operational policies and procedures that at a minimum address each of the following:

- (1) Hours, days, and months of operation;
- (2) Procedures for the release of children;
- (3) Illness and exclusion criteria;

(4) Procedures for dispensing medication or a statement that medication is not dispensed;

(5) Procedures for handling medical emergencies;

(6) Procedures for parental notifications;

(7) Discipline and guidance that is consistent with Subchapter G of this chapter [title] (relating to Discipline and Guidance). A copy of Subchapter G may be used for your discipline and guidance policy, unless you use disciplinary and training measures specific to a skills-based program, as specified in §744.2109 of this chapter [title] (relating to May I use disciplinary measures that are fundamental to teaching a skill, talent, ability, expertise, or proficiency?);

(8) Suspension and expulsion of children;

(9) Meals and food service practices;

(10) Immunization requirements for children, including tuberculosis screening and testing if required by your regional Texas Department of State Health Services or local health authority;

(11) Enrollment procedures, including how and when parents will be notified of policy changes;

(12) Transportation, if applicable;

(13) Water activities, if applicable;

(14) Field trips, if applicable;

(15) Animals, if applicable;

(16) Procedures for providing and applying, as needed, insect repellent and sunscreen, including what types will be used, if applicable;

(17) Procedures [The procedures] for parents to review and discuss with the director any questions or concerns about the policies and procedures of the operation;

(18) Procedures [The procedures] for parents to visit the operation at any time during your hours of operation to observe their child, program activities, the building, the premises, and equipment without having to secure prior approval;

(19) Procedures [The procedures] for parents to participate in the operation's activities;

(20) Procedures [The procedures] for parents to review a copy of the operation's most recent Licensing inspection report and how the parent may access the minimum standards online;

(21) Instructions on how a parent may contact the local Licensing office, access the Texas Abuse and Neglect Hotline, and access the HHSC [DFPS] website;

(22) Emergency preparedness plan;

(23) Procedures for conducting health checks, if applicable; and

(24) Information on vaccine-preventable [Vaccine-preventable] diseases for employees, unless your operation is in the home of the permit holder, the director, or a caregiver. The policy must address the requirements outlined in §744.2581 of this chapter [title] (relating to What must a policy for protecting children from vaccine-preventable diseases include?).

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

Filed with the Office of the Secretary of State on November 6, 2020.

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Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 438-3269



SUBCHAPTER F. DEVELOPMENTAL
ACTIVITIES AND EQUIPMENT
DIVISION 1. ACTIVITIES AND ACTIVITY
PLANS

26 TAC §§744.2001 - 744.2003, 744.2005, 744.2007

STATUTORY AUTHORITY

The amendments and new section are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendments and new section affect Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§744.2001. What [Must caregivers provide] planned activities must caregivers provide for children in their care?

[(a)] [Yes.] Caregivers must ensure children receive individual attention and care including:

- (1) Flexible programming according to each child's age, interest, and abilities;
- (2) Encouraging communication and expression of feelings in appropriate ways;
- (3) Study time for those children who choose to work on homework assignments;
- (4) Physical care routines appropriate to each child's developmental needs; and
- (5) A caregiver who is aware of the arrival and departure of each child, including dismissing children who ride the bus or walk home.

[(b)] In addition, the following activities must be included for programs where children are anticipated to be in care five or more consecutive hours in a day:

- [(1)] Outdoor play in which the children make use of both small and large muscles, both in the morning and afternoon, when weather permits;
- [(2)] A balance of active and quiet play, including group and individual activities;
- [(3)] Opportunities for active play both indoors and outdoors. Examples include active games such as tag and Simon says, dancing and creative movement to music and singing, simple games

and dramatic or imaginary play that encourages running, stretching, climbing, and walking;

[(4)] Regular meal and snack times as specified in Subchapter J of this Chapter (relating to Nutrition and Food Service);

[(5)] Supervised naptimes, or a period of rest for those children too old to nap;

[(6)] Both:

[(A)] Child-initiated activities, which are activities that the child chooses on the child's own initiative and that foster the child's independence. Child-initiated activities require equipment, materials, and supplies to be within the reach of a child; and

[(B)] Caregiver-initiated activities, which are activities that are directed or chosen by the caregiver;

[(7)] Sufficient time for activities and routines so that children can progress at their own developmental rate; and

[(8)] No long waiting periods between activities or prolonged periods during which children stand or sit.

[(e)] You must ensure that children who need special care due to disabling or limiting conditions receive the care recommended by a health-care professional or qualified professionals affiliated with the local school district or early childhood intervention program. These basic care requirements must be documented and on file for review at the operation during your hours of operation. Activities must integrate all children with or without special care needs. You may need to adapt equipment and vary methods to ensure that you care for children with special needs in a natural environment.]

§744.2002. What additional activities must caregivers provide when a child is in care for more than five consecutive hours in a day?

You must include the following activities for programs where you anticipate a child will be in care five or more consecutive hours in a day.

(1) Outdoor play in which the child makes use of both small and large muscles, as weather permits;

(2) A balance of active and quiet play, including group and individual activities;

(3) Opportunities for active play both indoors and outdoors. Examples include active games such as tag and Simon Says, dancing and creative movement to music and singing, simple games and dramatic or imaginary play that encourages running, stretching, climbing, and walking;

(4) Child-initiated activities where:

(A) The equipment, materials, and supplies are within reach of the child; and

(B) The child chooses the activity on the child's own initiative;

(5) Caregiver-initiated activities that the caregiver directs or chooses, at least two of which must promote movement;

(6) Regular meal and snack times as specified in Subchapter J of this Chapter (relating to Nutrition and Food Service);

(7) Supervised naptimes or rest times;

(8) Sufficient time for activities and routines so that the child can progress at the child's own developmental rate; and

(9) No long waiting periods between activities or prolonged periods during which a child stands or sits.

§744.2003. *What are the [Are there] additional requirements if my operation cares for a child [children] under the age of five?*

[Yes.] If your operation cares for a child [children] under the age of five, you must:

(1) Have [a] written procedures [plan] that include [includes] the following:

(A) How caregivers will supervise the child [children under the age of five will be supervised] while transitioning the child to and from restrooms, indoor and outdoor activity spaces, and spaces shared by other persons outside of the operation;

(B) How caregivers will meet the unique care needs of the child [children younger than five years old];

(C) How caregivers will meet the outdoor play and physical activity needs in §744.2002(1) and (3) of this division (relating to What additional activities must caregivers provide when a child is in care for more than five consecutive hours in a day), including:

(i) A minimum of two opportunities for outdoor play, weather permitting, for at least 60 total minutes when a child is in care for eight hours, although you may prorate this requirement if a child is in care for less than eight hours; and

(ii) A minimum of 90 minutes of moderate to vigorous active play when a child is in care for eight hours, although you may prorate this requirement if a child is in care for less than eight hours;

(D) [(C)] Under what circumstances the child [children under five years old] will be mixing with older children in the operation; and

(E) [(D)] Any modifications to space or equipment that will be made to accommodate the child [children under five years old].

(2) Have written policies that address the promotion of indoor and outdoor physical activity that are consistent with this division. Your policies must include:

(A) The benefits of physical activity and outdoor play;

(B) The duration of physical activity at your operation, both indoor and outdoor;

(C) The type of physical activity (structured and unstructured) that children may engage in at your operation;

(D) Each setting in which your physical activity program will take place;

(E) The recommended clothing and footwear that a child would require in order to participate in physical activities; and

(F) A plan to ensure physical activity occurs on days when extreme weather conditions prohibit or limit outdoor play.

(3) [(2)] Follow the policies and procedures [plan] and make the policies and procedures [the plan] available for review by:

(A) Licensing [and parents] upon request during your hours of operation; and

(B) Parents at enrollment and as needed thereafter.

§744.2005. *What [Must caregivers have] written activity plans must caregivers follow?*

(a) For programs with a child whom you anticipate to be in care for five or more consecutive hours in a day, you [You] must have a written activity plan that complies with §744.2002 of this division (relating to What additional activities must caregivers provide when a

child is in care for more than five consecutive hours in a day?) and §744.2003(1)(C) of this division (relating to What are the additional requirements if my operation cares for a child under the age of five?) [for programs with children who you anticipate to be in care for five or more consecutive hours in a day. The plan must outline the daily routines and specific activities for each group and the plan must be followed by the caregiver(s) responsible for that group.]

(b) A written activity plan must:

(1) Identify the age group the activity plan is designed for and list the dates (daily, weekly, or monthly) the plan covers;

(2) Outline the daily routines and specific activities for each group and the approximate times those activities will occur;

(3) Be followed by the caregiver or caregivers responsible for the relevant group of children; and

(4) Be inclusive for all children in the group regardless of special care needs.

[(b) The activity plan must be inclusive for all children in the group regardless of disabling or limiting conditions.]

(c) A written activity plan may include one or more screen time activities specified in §744.2007 of this division (relating to May I use a screen time activity with a child?), if you also include alternative activities for children who do not want to participate.

[(c) The plan must indicate the age group it is designed for and dates (daily, weekly, or monthly) the plan covers.]

§744.2007. *May I use a screen time activity [TV/video, computer, or video games for activities] with a child [children]?*

(a) You may use a screen time activity [TV/video, computer, or video games may be used] to supplement, but [may] not [be used] to replace, an activity [the activities] for children described in §744.2001 of this division [title] (relating to What planned activities must caregivers provide for children in their care? [Must caregivers provide planned activities for the children in their care?]) and §744.2002 of this division (relating to What additional activities must caregivers provide when a child is in care for more than five consecutive hours in a day?).

(b) If you use a screen time activity [TV/video, computer, or video games as an activity] for a child at the operation [children], you must ensure that the activity [they]:

(1) Is related to the planned activities that meet educational goals;

(2) Is [Are] age-appropriate; [and]

(3) [(2)] Does [Do] not exceed one hour [two hours] per day;

(4) Is not used during mealtime, snack times, naptimes, or rest times;

(5) Does not include advertising or violence; and

(6) Is turned off when not in use.

(c) A school-age child may use screen time without restriction for homework.

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

Filed with the Office of the Secretary of State on November 6, 2020.

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SUBCHAPTER G. DISCIPLINE AND GUIDANCE

26 TAC §744.2105

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§744.2105. *What types of discipline and guidance or punishment are prohibited?*

There must be no harsh, cruel, or unusual treatment of any child. The following types of discipline and guidance are prohibited:

- (1) Corporal punishment or threats of corporal punishment;
- (2) Punishment associated with food, naps, or toilet training;
- (3) Pinching, shaking, or biting a child;
- (4) Hitting a child with a hand or instrument;
- (5) Putting anything in or on a child's mouth;
- (6) Humiliating, ridiculing, rejecting, or yelling at a child;
- (7) Subjecting a child to harsh, abusive, or profane language;
- (8) Placing a child in a locked or dark room, bathroom, or closet; ~~and~~
- (9) Withholding active play or keeping a child inside as a consequence for behavior; and
- (10) ~~[(9)]~~ Requiring a child to remain silent or inactive for inappropriately long periods of time for the child's age.

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

Filed with the Office of the Secretary of State on November 6, 2020.

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SUBCHAPTER J. NUTRITION AND FOOD SERVICE

26 TAC §§744.2401, 744.2403, 744.2409, 744.2411, 744.2421

STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendments affect Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§744.2401. *What are the basic requirements for meal [~~snack~~] and snack times [~~mealtimes~~]?*

(a) You must serve all children regular meals and morning and afternoon snacks as specified in this subchapter.

(b) The meals and snacks must follow the meal patterns established by the U.S. Department of Agriculture (USDA) Child and Adult Care Food Program (CACFP) that is administered by the Texas Department of Agriculture. You must follow these patterns regardless of whether you are participating in the program for reimbursement.

(c) ~~[(b)]~~ If you serve breakfast [is served], you do not have to serve a morning snack [is not required].

(d) ~~[(e)]~~ A child must not go more than three hours without a meal or snack being offered, unless the child is sleeping.

(e) ~~[(d)]~~ You must serve enough food to allow children a second serving from the vegetable, fruit, grain, and milk groups. [If your operation is participating in the Child and Adult Care Food Program (CACFP) administered by the Texas Department of Agriculture, you may elect to meet those requirements rather than those specified in this section.]

(f) ~~[(e)]~~ You must ensure a supply of drinking water is readily available to each child ~~[and is served]~~ at every snack, mealtime, and after active play and is served in a safe and sanitary manner.

(g) ~~[(f)]~~ You must not serve beverages with added sugars, such as carbonated beverages, fruit punch, or sweetened milk.

(h) ~~[(g)]~~ You must not use food as a reward.

(i) ~~[(h)]~~ You must not serve a child a food identified on the child's food allergy emergency plan as specified in §744.2667 of this chapter ~~[title]~~ (relating to What is a food allergy emergency plan?).

§744.2403. *How often must I feed a child in my care?*

You must follow the guidelines in Figure 26 TAC §744.2403 when determining how often to feed a child in your care.

Figure: 26 TAC §744.2403

§744.2409. *May parents provide meals and [and/or] snacks for their child instead of my operation providing them?*

(a) Yes. However [;however], your enrollment agreement, or an addendum to the agreement, signed by the parent must include a statement that the parent:

(1) Is [is] choosing to provide the child's meals and [and/or] snacks from home;[-] and

(2) Understands [the parent understands] the operation is not responsible for its nutritional value or for meeting the child's daily food needs.

(b) If the parent provides a meal but not a snack, you are responsible for providing a snack as specified in this subchapter [§744.2407 of this title (relating to What kind of foods must I serve for snacks?)].

(c) You must provide safe and proper storage and service of the individual meals and snacks provided by parents.

(d) Snacks provided by a parent must not be shared with other children, unless:

(1) A parent is providing baked goods for a celebration or party being held at the operation; and

(2) You ensure that the shared snacks meet the needs of children who require special diets.

§744.2411. *What are the requirements for a child [How should my operation meet the needs of children] who requires [require] a special diet [diets] or does [do] not want to eat foods the operation serves?*

(a) You must have written approval from a health-care professional [physician] or a registered or licensed dietician in the child's records to serve a child a therapeutic or special diet. You must give this information to all employees preparing and serving food.

(b) You must discuss recurring eating problems with the child's parent.

(c) You may encourage but must not force children to eat.

(d) You must not serve nutrient concentrates and supplements such as protein powders, liquid protein, vitamins, minerals, and other nonfood substances without written instructions from a health-care professional [physician].

§744.2421. *Must I serve meals family style?*

(a) No, you do not have to use family-style meal service, although all meals and snack times must:

(1) Be unhurried; and]

(2) Allow children to feed themselves according to their developmental level; and

(3) [(2)] Include adult supervision of children.

(b) If meals and snacks are served family style, caregivers must supervise children to prevent cross-contamination of the food.

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

Filed with the Office of the Secretary of State on November 6, 2020.

TRD-202004668

Karen Ray
Chief Counsel
Health and Human Services Commission
Earliest possible date of adoption: December 20, 2020
For further information, please call: (512) 438-3269

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26 TAC §§744.2403, 744.2405, 744.2407, 744.2415, 744.2417
STATUTORY AUTHORITY

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The repeal affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§744.2403. *How often must I feed children in my care?*

§744.2405. *How do I know what a child's daily food needs are?*

§744.2407. *What kind of foods must I serve for snacks?*

§744.2415. *May I serve powdered milk?*

§744.2417. *May I serve fruit or vegetable juices?*

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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Karen Ray
Chief Counsel
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Earliest possible date of adoption: December 20, 2020
For further information, please call: (512) 438-3269

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CHAPTER 746. MINIMUM STANDARDS FOR CHILD-CARE CENTERS

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §§746.123, 746.501, 746.2203, 746.2205, 746.2207, 746.2417, 746.2507, 746.2607, 746.2707, 746.2805, 746.3209, 746.3301, 746.3309, 746.3311, and 746.3319; new §746.2206 and §746.3303; and the repeal of §§746.3303, 746.3305, 746.3307, 746.3315 and 746.3316 in Title 26, Texas Administrative Code, Chapter 746, Minimum Standards for Child Care Centers.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement Senate Bill (S.B.) 952, 86th Legislature, Regular Session, 2019, which adds Subsections 42.042(e-3), (e-4), and (e-5) to the Texas Human Resources Code (HRC). The new Subsections require HHSC Child

Care Regulation (CCR) to align the minimum standards for child-care centers and registered child-care homes with standards for physical activity and screen time in *Caring for Our Children* (COFC), 4th edition, and with the nutrition standards of the federal Child and Adult Care Food Program (CACFP).

SECTION-BY-SECTION SUMMARY

The proposed amendment to §746.123 (1) updates citations in the definitions for "caregiver," "clock hour," "permit is no longer valid," and "regular"; (2) updates grammar, language, and punctuation for better readability and understanding in the definitions for "certified lifeguard," "CEUs," "clock hour," "entrap," and "special care needs"; (3) updates the definition for "health-care professional" to clarify the definition excludes only persons not licensed in the U.S. or in the country in which the person practices; (4) updates the definition for "natural environment" to be consistent with the current definition in the Individuals with Disabilities Education Act, and provides an example to aid in clarity; (5) adds definitions for "physical activity (moderate)," "physical activity (vigorous)," and "screen time activity"; (6) adds a definition for "pre-kindergarten age child" to be consistent with other Licensing chapters; (7) updates the definition for "school-age child" for better understanding and consistency with other Licensing chapters; and (8) updates the numbering of the definitions accordingly.

The proposed amendment to §746.501 (1) updates citations; (2) updates language for better readability and increased consistency throughout the chapter; (3) adds a requirement for child-care centers to include operational policies for physical activity; (4) corrects the title of the agency; and (5) updates the numbering of rules accordingly.

The proposed amendment to §746.2203 (1) updates the rule title for better readability and understanding; (2) adds "operation" to the list of who may develop a written activity plan; (3) updates the rule to require compliance with proposed §746.2205; (4) deletes the requirement that the plan outline daily routines and specific activities, as that requirement is now included in proposed §746.2205; and (5) updates language regarding children with special needs to be consistent with terminology used elsewhere in the chapter.

The proposed amendment to §746.2205 (1) clarifies in the rule title that an activity plan must be written; (2) adds a requirement that the written activity plan outline the specific daily activities, as required by proposed §746.2206; (3) deletes requirements for outdoor play, active and quiet play, regular meal and snack times, supervised naptimes, and child and caregiver initiated activities, as these requirements are now included in proposed §746.2206; and (4) adds language regarding screen time activities to specify an activity plan may include one or more screen time activities.

Proposed new §746.2206 outlines the activities a child-care center must include in a written activity plan and requires the child-care center to include the approximate times of the activities in the plan. Requirements include outdoor play, moderate to vigorous active play, and caregiver-initiated activities that promote movement. Also included are previous activity requirements for quiet play, child-initiated activities, regular meal and snack times, and supervised naptimes or rest times that were incorporated from proposed §746.2205.

The proposed amendment to §746.2207 (1) replaces the phrase "TV/video, computer, or video games" with "screen time activity";

(2) reorganizes and clarifies language in the rule for better readability and understanding; (3) updates citations; (4) adds restrictions to screen time activities offered at the child-care center, including (A) reducing the amount of allotted screen time from two hours to one hour per day, and (B) requiring that screen time activities relate to educational goals, are not used during meal-times, snack times, naptimes, or rest times, do not include advertising or violence, and are turned off when not in use; and (5) adds flexibility for school-age children to use screen time without restriction for homework.

The proposed amendment to §746.2417 (1) updates the rule title for accuracy; (2) specifies that all required activities, not just outdoor play, be offered daily; (3) adds "weather permitting" to the requirement for outdoor play opportunities to be consistent with similar rules in the chapter; (4) adds a reference to proposed §746.2206 regarding outdoor play requirements; (5) adds a 15 minute time limit on an infant sitting in restricted devices, unless the infant is eating or being transported; (6) adds "supervised tummy time" as a physical activity for an infant and as an example of a large muscle activity; and (7) updates punctuation for consistency throughout the chapter.

The proposed amendment to §746.2507 (1) updates the rule title for accuracy; (2) specifies that all required activities, not just outdoor play, be offered daily; (3) updates language and punctuation for better readability and consistency throughout the chapter; (4) adds a reference to proposed §746.2206 regarding outdoor and active play requirements; and (5) expands active play requirements to include "moderate to vigorous active play."

The proposed amendment to §746.2607 (1) updates the rule title for accuracy; (2) specifies that all required activities, not just outdoor play, be offered daily; (3) updates language and punctuation for better readability and consistency throughout the chapter; (4) adds a reference to proposed §746.2206 regarding outdoor and active play requirements; and (5) expands active play requirements to include "moderate to vigorous active play."

The proposed amendment to §746.2707 (1) updates the rule title for accuracy; (2) specifies that all required activities, not just outdoor play, be offered daily; and (3) updates language and punctuation for better readability and consistency throughout the chapter.

The proposed amendment to §746.2805 (1) expands the list of prohibited discipline and guidance measures to include withholding active play or keeping a child inside as a consequence for behavior and (2) updates the numbering of rules accordingly.

The proposed amendment to §746.3209 (1) updates language for better readability; and (2) adds requirements for screen time activities for children in nighttime care, including (A) a reference to the requirements in proposed §746.2207, and (B) the restriction of screen time activities in a cot, bed, or mattress, or one hour before bedtime.

The proposed amendment to §746.3301 (1) updates the rule title for better readability and understanding; (2) reorganizes and clarifies language in the rule for better readability and understanding; (3) adds the requirement for all child-care centers to follow the meal patterns established by the CACFP; (4) incorporates the requirement to allow second servings from certain food groups previously required in repealed §746.3305; (5) deletes language that allowed child-care centers to follow either CACFP meal patterns or Licensing meal requirements; (6) updates a citation; and (7) updates the numbering of rules accordingly.

The proposed repeal of §746.3303 deletes the rule as no longer necessary, because the content of the rule has been re-proposed in new §746.3303.

Proposed new §746.3303 (1) incorporates requirements from repealed §746.3303 into a chart to reorganize and clarify the rule and (2) restructures certain requirements in repealed §746.3303, regarding how much food to offer based on hours in care.

The proposed repeal of §746.3305 deletes the rule as no longer necessary, because all child-care centers are now required to follow the CACFP meal patterns, as noted in proposed §746.3301.

The proposed repeal of §746.3307 deletes the rule as no longer necessary, because all child-care centers are now required to follow the CACFP meal patterns, as noted in proposed §746.3301.

The proposed amendment to §746.3309 (1) updates grammar and punctuation for consistency throughout the chapter; (2) adds that a parent may sign an addendum to the enrollment agreement so that the parent may provide meals and snacks; and (3) updates a citation.

The proposed amendment to §746.3311 (1) updates the rule title for better readability and understanding and (2) replaces "physician" with "health-care professional" for consistency throughout the chapter.

The proposed repeal of §746.3315 deletes the rule as no longer necessary, because all child care centers are now required to follow the CACFP meal patterns, as noted in proposed §746.3301.

The proposed repeal of §746.3316 deletes the rule as no longer necessary, because all child care centers are now required to follow the CACFP meal patterns, as noted in proposed §746.3301.

The proposed amendment to §746.3319 (1) updates language in the rule for better readability; (2) adds a requirement that children feed themselves according to their developmental level to be consistent with current best practice in child-care; and (3) updates the numbering of rules accordingly.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to HHSC;
- (5) the proposed rules will create new rules;
- (6) the proposed rules will expand and repeal existing rules;
- (7) the proposed rules will not change the number of individuals subject to the rules; and
- (8) the proposed rules will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there could be an adverse economic effect on small businesses and micro-businesses, but no adverse effects on rural communities.

Chapter 2006 of the Texas Government Code defines a small business as one that is for-profit with fewer than 100 employees. A micro-business is one that is for-profit with fewer than 20 employees. Based on data obtained from the 2019 CCR Data Book, there are approximately 8,058 Licensed Child-Care Centers required to comply with the rules. CCR conducted a survey of licensed child-care operations in 2019 to determine which operations met the definition of a small or micro-business and received responses from approximately 9 percent of Licensed Child-Care Centers. Based on the results from that survey, CCR estimates that 59 percent of the centers (or 4,754 centers) are for profit. Of those centers, approximately 99 percent of the centers (or 4,706 centers) have less than 100 employees and qualify as small businesses and approximately 77 percent of those small businesses (or 3,623 centers) have less than 20 employees and qualify as micro-businesses.

The projected economic impact on small business and micro-businesses is limited to proposed §746.501, as this rule requires an operational policy to be developed. Some operations have indicated a labor cost to bring the policy into compliance with the proposed rule. HHSC does not have sufficient information to determine these costs as they will vary greatly with individual business structure.

HHSC determined that there are no alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities that are consistent with ensuring the health and safety of children attending child-care in Texas.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT AND COSTS

Jean Shaw, Associate Commissioner for Child Care Regulation, has determined that for each year of the first five years the rules are in effect, the public benefit will be that the health of children attending child-care in Texas will be supported by physical activity, screen time, and nutrition standards that are aligned with national standards and best practices for early childhood education.

Trey Wood has also determined that for the first five years the rules are in effect, there could be an anticipated cost for persons required to comply with proposed §746.501. This proposed rule requires child-care operations to develop an operational policy to include physical activity components.

Some operations have indicated a labor cost to bring the policy into compliance with the proposed rule. HHSC does not have sufficient information to determine these costs, as they will vary greatly with operation type and individual business structure.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Aimee Belden by email at Aimee.Belden@hhsc.state.tx.us.

Written comments on the proposal may be submitted to Aimee Belden, Rules Writer, Child Care Regulation, Texas Health and Human Services Commission, E-550, P.O. Box 149030, Austin, Texas 78714-9030; or by email to CCLRules@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R024" in the subject line.

SUBCHAPTER A. PURPOSE, SCOPE, AND DEFINITIONS

DIVISION 3. DEFINITIONS

26 TAC §746.123

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§746.123. What do certain words and terms mean when used in this chapter?

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or another subchapter or unless the context clearly indicates otherwise. In addition, the following words and terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

- (1) Activity space--An area or room used for children's activities, including areas separate from a group's classroom.
- (2) Administrative and clerical duties--Duties that involve the operation of a child-care center, such as bookkeeping, enrolling children, answering the telephone, and collecting fees.
- (3) Admission--The process of enrolling a child in a child-care center. The date of admission is the first day the child is physically present in the center.
- (4) Adult--A person 18 years old and older.

(5) Age-appropriate--Activities, equipment, materials, curriculum, and environment that are developmentally consistent with the chronological age of the child being served.

(6) Alternate care program--A program in which no child is in care for more than five consecutive days, and no child is in care for more than 15 days in one calendar month, regardless of the duration of each stay.

(7) Attendance--When referring to a child's attendance, the physical presence of a child at the child-care center's program on any given day or at any given time, as distinct from the child's enrollment in the child-care center.

(8) Bouncer seat--A stationary seat designed to provide gentle rocking or bouncing motion by an infant's movement, or by battery-operated movement. This type of equipment is designed for an infant's use from birth until the child can sit up unassisted.

(9) Caregiver--A person who is counted in the child to caregiver [child/caregiver] caregiver ratio, whose duties include the supervision, guidance, and protection of a child. As used in this chapter, a caregiver must meet the minimum education, work experience, and training qualifications required under Subchapter D of this chapter (relating to Personnel). A caregiver is usually an employee, but may also be a substitute, volunteer, or contractor, as outlined in Subchapter D, Division 5 of this chapter [(also see Division 5 of Subchapter D)] (relating to Substitutes, Volunteers, and Contractors)[].

(10) Certified Child-Care Professional Credential--A credential given by the National Early Childhood Program Accreditation to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(11) Certified lifeguard--A person who has been trained in life saving and water safety by a qualified instructor, from a recognized organization that [which] awards a certificate upon successful completion of the training. The certificate is not required to use the term "lifeguard," but the permit holder must be able to document that the certificate represents the type of training described.

(12) CEUs [~~(continuing education units)~~]-Continuing education units. A standard unit of measure for adult education and training activities. One CEU equals 10 [~~ten~~] clock hours of participation in an organized, continuing-education experience, under responsible, qualified direction and instruction. Although a person may obtain a CEU in many of the same settings as clock hours, the CEU provider must meet the criteria established by the International Association for Continuing Education and Training to be able to offer the CEU.

(13) Child--An infant, a toddler, a pre-kindergarten age child, or a school-age child.

(14) Child-care center--A child-care facility that is licensed to care for seven or more children for less than 24 hours per day, at a location other than the permit holder's home. If you were licensed before September 1, 2003, the location of the center could be in the permit holder's home.

(15) Child-care program--The services and activities provided by a child-care center.

(16) Child Development Associate Credential--A credential given by the Council for Professional Recognition to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(17) Clock hour--An actual hour of documented:

(A) Attendance at instructor-led training, such as seminars, workshops, conferences, early childhood classes, and other planned learning opportunities, provided by an individual or individuals [individual/s] as specified in §746.1317(a) of this chapter [title] (relating to Must the training for my caregivers and the director meet certain criteria?); or

(B) Self-instructional training that was created by an individual or individuals [individual/s], as specified in §746.1317(a) [§746.137(a)] and (b) of this chapter, or self-study training.

(18) Corporal punishment--The infliction of physical pain on a child as a means of controlling behavior. This includes spanking, hitting, slapping, or thumping a child.

(19) Days--Calendar days, unless otherwise stated.

(20) Employee--A person a child-care center employs full-time or part-time to work for wages, salary, or other compensation. Employees are all of the child-care center staff, including caregivers, kitchen staff, office staff, maintenance staff, the assistant director, the director, and the owner, if the owner is ever on site at the center or transports a child.

(21) Enrollment--The list of names or number of children who have been admitted to attend a child-care center for any given period of time; the number of children enrolled in a child-care center may vary from the number of children in attendance on any given day.

(22) Entrap--A component or group of components on equipment that forms angles or openings that may [could] trap a child's head by being too small to allow the child's body to pass through, or large enough for the child's body to pass through but too small to allow the child's head to pass through.

(23) Field trips--Activities conducted away from the child-care center.

(24) Food service--The preparation or serving of meals or snacks.

(25) Frequent--More than two times in a 30-day period. Note: For the definition of "regularly or frequently present at an operation" as it applies to background checks, see §745.601 of this title (relating to What words must I know to understand this subchapter?).

(26) Garbage--Waste food or items that when deteriorating cause offensive odors and attract rodents, insects, and other pests.

(27) Group activities--Activities that allow children to interact with other children in large or small groups. Group activities include storytelling, finger plays, show and tell, organized games, and singing.

(28) Health-care professional--A licensed physician, a licensed advanced practice registered nurse (APRN), a licensed vocational nurse (LVN), a licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of the license. This does not include physicians [medical doctors], nurses, or other medical personnel who are not licensed [to practice] in the United States or in the country in which the person practices.

(29) Health check--A visual or physical assessment of a child to identify potential concerns about a child's health, including signs or symptoms of illness and injury, in response to changes in the child's behavior since the last date of attendance.

(30) High school equivalent--[:]

(A) Documentation of a program recognized by the Texas Education Agency (TEA) or other public educational entity

in another state, which offers similar training on reading, writing, and math skills taught at the high school level, such as a General Educational Development (GED) certificate; or

(B) Confirmation that the person received home-schooling that adequately addressed basic competencies such as basic reading, writing, and math skills, which would otherwise have been documented by a high school diploma.

(31) Individual activities--Opportunities for the child to work independently or to be away from the group, but supervised.

(32) Infant--A child from birth through 17 months.

(33) Inflatable--An amusement ride or device, consisting of air-filled structures designed for use by children, as specified by the manufacturer, which may include bouncing, climbing, sliding, or interactive play. They are made of flexible fabric, kept inflated by continuous air flow by one or more blowers, and rely upon air pressure to maintain their shape.

(34) Instructor-led training--Training characterized by the communication and interaction that takes place between the student and the instructor. The training must include an opportunity for the student to interact with the instructor to obtain clarifications and information beyond the scope of the training materials. For such an opportunity to exist, the instructor must communicate with the student in a timely fashion, including answering questions, providing feedback on skills practice, providing guidance or information on additional resources, and proactively interacting with students. Examples of this type of training include classroom training, web-based on-line facilitated learning, video-conferencing, or other group learning experiences.

(35) Janitorial duties--Those duties that involve the cleaning and maintenance of the child-care center building, rooms, furniture, etc. Cleaning and maintenance include such duties as cleansing carpets, washing cots, and sweeping, vacuuming, or mopping a restroom or a classroom. Sweeping up after an activity or mopping up a spill in a classroom that is immediately necessary for the children's safety is not considered a janitorial duty.

(36) Local sanitation official--A sanitation official designated by the city or county government.

(37) Natural environment--Settings that are natural or typical [normal] for all children of the same [an] age [group] without regard to ability or disability. For example, a natural environment for learning social skills is a play group of peers [the primary natural group setting for a toddler with a disability would be a play group or whatever setting exists for toddlers without disabilities].

(38) Permit is no longer valid--For purposes of this chapter, a permit remains valid through the renewal process. A permit only becomes invalid when your center voluntarily closes or must close because of an enforcement action in Chapter 745, Subchapter L of this title [Chapter 745] (relating to Enforcement Actions).

(39) Physical activity (moderate)--Levels of activity for a child that are at intensities faster than a slow walk, but still allow the child to talk easily. Moderate physical activity increases the child's heart rate and breathing rate.

(40) Physical activity (vigorous)--Rhythmic, repetitive physical movement for a child that uses large muscle groups, causing the child to breathe rapidly and only enabling the child to speak in short phrases. Typically, the child's heart rate is substantially increased, and the child is likely to be sweating while engaging in vigorous physical activity.

(41) Pre-kindergarten age child--A child who is three or four years of age before the beginning of the current school year.

(42) [(39)] Premises--Includes the child-care center, any lots on which the center is located, any outside ground areas, any outside play areas, and the parking lot.

(43) [(40)] Regular--On a recurring, scheduled basis. Note: For the definition of "regularly or frequently present at an operation" as it applies to background checks, see §745.601 of this title [(relating to What words must I know to understand this subchapter?).]

(44) [(41)] Restrictive device--Equipment that places the body of a child in a position that may restrict airflow or cause strangulation; usually, the child is placed in a semi-seated position. Examples of restrictive devices are car seats, swings, bouncy seats, and high chairs.

(45) [(42)] Safety belt--A lap belt and any shoulder straps included as original equipment on or added to a vehicle.

(46) [(43)] Sanitize--The use of a product (usually a disinfecting solution) that is registered by the Environmental Protection Agency (EPA) which substantially reduces germs on inanimate objects to levels considered safe by public health requirements. Many bleach and hydrogen peroxide products are EPA-registered. You must follow the product's labeling instructions for sanitizing (paying particular attention to any instructions regarding contact time and toxicity on surfaces likely to be mouthed by children, such as toys and crib rails). For an EPA-registered sanitizing product or disinfecting solution that does not include labelling instructions for sanitizing (a bleach product, for example), you must follow these steps in order:

- (A) Washing with water and soap;
- (B) Rinsing with clear water;
- (C) Soaking in or spraying on a disinfecting solution for at least two minutes. Rinsing with cool water only those items that children are likely to place in their mouths; and
- (D) Allowing the surface or item to air-dry.

(47) [(44)] School-age child--A child who is five years of age and older[-] and is enrolled in or has completed kindergarten [who will attend school at or away from the child-care center in August or September of that year].

(48) Screen time activity--An activity during which a child views media content on a cell or mobile phone, tablet, computer, television, video, film, or DVD. Screen time activities do not include video chatting with a child's family or assistive and adaptive computer technology used by a child with special care needs on a consistent basis.

(49) [(45)] Self-instructional training--Training designed to be used by one individual working alone and at the individual's own pace to complete lessons or modules. Lessons or modules commonly include questions with clear right and wrong answers. An example of this type of training is web-based training. Self-study training is also a type of self-instructional training.

(50) [(46)] Self-study training--Non-standardized training where an individual reads written materials, watches a training video, or listens to a recording to obtain certain knowledge that is required for annual training. Self-study training is limited to three hours of annual training per year.

(51) [(47)] Special care needs--A child with special care needs is a child who has a chronic physical, developmental, behavioral, or emotional condition and who also requires assistance beyond that required by a child generally to perform tasks that are within the typical

chronological range of development, including the movement of large or [and/or] small muscles, learning, talking, communicating, self-help, social skills, emotional well-being, seeing, hearing, and breathing.

(52) [(48)] State or local fire marshal--A fire official designated by the city, county, or state government.

(53) [(49)] Toddler--A child from 18 months through 35 months.

(54) [(50)] Universal precautions--An approach to infection control where all human blood and certain human bodily fluids are treated as if known to be infectious for HIV, HBV, and other blood-borne pathogens.

(55) [(51)] Water activities--Related to the use of swimming pools, splashing or wading [splashing/wading] pools, sprinkler play, or other bodies of water.

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SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION

DIVISION 4. OPERATIONAL POLICIES

26 TAC §746.501

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§746.501. *What written operational policies must I have?*

(a) You must develop written operational policies and procedures that at a minimum address each of the following:

- (1) Hours, days, and months of operation;
- (2) Procedures for the release of children;
- (3) Illness and exclusion criteria;
- (4) Procedures for dispensing medication or a statement that medication is not dispensed;
- (5) Procedures for handling medical emergencies;

- (6) Procedures for parental notifications;
- (7) Discipline and guidance that is consistent with Subchapter L of this chapter [title] (relating to Discipline and Guidance). A copy of Subchapter L may be used for your discipline and guidance policy;
- (8) Suspension and expulsion of children;
- (9) Safe sleep policy for infants from birth through 12 months old [or younger] that is consistent with the rules in Subchapter H of this chapter (relating to Basic Requirements for Infants) that relate to sleep requirements and restrictions, including sleep positioning, and crib requirements and restrictions, including mattresses, bedding, blankets, toys, and restrictive devices;
- (10) Meals and food service practices;
- (11) Immunization requirements for children, including tuberculosis screening and testing if required by your regional Texas Department of State Health Services or local health authority;
- (12) Hearing and vision screening requirements;
- (13) Enrollment procedures, including how and when parents will be notified of policy changes;
- (14) Transportation, if applicable;
- (15) Water activities, if applicable;
- (16) Field trips, if applicable;
- (17) Animals, if applicable;
- (18) Promotion of indoor and outdoor physical activity that is consistent with Subchapter F of this chapter (relating to Developmental Activities and Activity Plan); your policies must include:
 - (A) The benefits of physical activity and outdoor play;
 - (B) The duration of physical activity at your operation, both indoor and outdoor;
 - (C) The type of physical activity (structured and unstructured) that children may engage in at your operation;
 - (D) Each setting in which your physical activity program will take place;
 - (E) The recommended clothing and footwear that a child would require in order to participate in physical activities; and
 - (F) A plan to ensure physical activity occurs on days when extreme weather conditions prohibit or limit outdoor play.
- (19) [(18)] Procedures for providing and applying, as needed, insect repellent and sunscreen, including what types will be used, if applicable;
- (20) [(19)] Procedures [The procedures] for parents to review and discuss with the child-care center director any questions or concerns about the policies and procedures of the child-care center;
- (21) [(20)] Procedures [The procedures] for parents to participate in the child-care center's operation and activities;
- (22) [(21)] Procedures [The procedures] for parents to review a copy of the child-care center's most recent Licensing inspection report and how the parent may access the minimum standards online;
- (23) [(22)] Instructions on how a parent may contact the local Licensing office, access the Texas Abuse and Neglect Hotline, and access the HHSC [DFPS] website;
- (24) [(23)] Your emergency preparedness plan;

(25) [(24)] Your provisions to provide a comfortable place with an adult sized seat in your center or within a classroom that enables a mother to breastfeed her child. In addition, your policies must inform parents that they have the right to breastfeed or provide breast milk for their child while in care;

(26) [(25)] Preventing and responding to abuse and neglect of children, including:

- (A) Required annual training for employees;
- (B) Methods for increasing employee and parent awareness of issues regarding child abuse and neglect, including warning signs that a child may be a victim of abuse or neglect and factors indicating a child is at risk for abuse or neglect;
- (C) Methods for increasing employee and parent awareness of prevention techniques for child abuse and neglect;
- (D) Strategies for coordination between the center and appropriate community organizations; and
- (E) Actions that the parent of a child who is a victim of abuse or neglect should take to obtain assistance and intervention, including procedures for reporting child abuse or neglect;

(27) [(26)] Procedures for conducting health checks, if applicable; and

(28) [(27)] Information on vaccine-preventable [Vaccine-preventable] diseases for employees, unless your center is in the home of the permit holder. The policy must address the requirements outlined in §746.3611 of this chapter [title] (relating to What must a policy for protecting children from vaccine-preventable diseases include?).

(b) You must also inform the parents that:

(1) They may visit the child-care center at any time during your hours of operation to observe their child, the program activities, the building, the premises, and the equipment without having to secure prior approval; and

(2) Under the Texas Penal Code any area within 1,000 [4000] feet of a child-care center is a gang-free zone, where criminal offenses related to organized criminal activity are subject to a harsher penalty. You may inform the parents by:

- (A) Providing this information in the operational policies;
- (B) Distributing the information in writing to the parents; or
- (C) Informing the parents verbally as part of an individual or group parent orientation.

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SUBCHAPTER F. DEVELOPMENTAL
ACTIVITIES AND ACTIVITY PLAN

26 TAC §§746.2203, 746.2205 - 746.2207

STATUTORY AUTHORITY

The amendments and new section authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendments and new section affect Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§746.2203. What [Must caregivers have] written activity plans must caregivers follow?

(a) ~~[Yes.]~~ Your operation, director, or each caregiver must develop a written activity plan that complies with §746.2205 of this subchapter (relating to What must a written activity plan include?).

(b) The caregivers ~~[plan must outline the daily routines and specific activities for each age group and the plan must be followed by the caregiver(s)]~~ responsible for the relevant ~~[that]~~ group of children must follow the plan.

(c) ~~[(b)]~~ The activity plan must include ~~[be inclusive for]~~ all children in the group regardless of special care needs ~~[disability or limiting conditions]~~.

§746.2205. What must a [should the] written activity plan include?

(a) A [The] written activity plan must [include at least the following]:

(1) Identify the group the activity plan is designed for and list the dates (daily, weekly, or monthly) the plan covers;

(2) Outline the specific daily [A variety of] activities, as required by §746.2206 of this subchapter (relating to What specific activities must I include in a written activity plan?);

~~[(3) Outdoor play in which the children make use of both small and large muscles; both in the morning and afternoon;]~~

~~[(4) A balance of active and quiet play including group and individual activities both indoors and outdoors;]~~

~~[(5) Regular meal and snack times;]~~

~~[(6) Supervised naptimes;]~~

~~[(7) Both;]~~

~~[(A) Child-initiated activities, which are those activities that the child chooses on the child's own initiative, and that foster the child's independence. Child initiated activities require equipment, materials, and supplies to be within the reach of a child; and as required by §746.2206 of this subchapter;]~~

~~[(B) Caregiver-initiated activities, which are those activities that are directed or chosen by the caregiver;]~~

(3) ~~[(8)]~~ Include sufficient [Sufficient] time for activities and routines so that children can progress at their own developmental rate; and

(4) ~~[(9)]~~ Not include [No] long waiting periods between activities or prolonged periods during which children stand or sit.

(b) A [The] written activity plan may include one or more screen time activities, as specified in §746.2207 of this subchapter (relating to May I use a screen time activity with a child?) ~~[(TV, videos, computer, or video games)]~~, if you also include alternative activities for children who [that] do not want to participate.

§746.2206. What specific activities must I include in a written activity plan?

You must include these daily activities and the approximate times they will occur in your written activity plan:

(1) A minimum of two daily opportunities for outdoor play, weather permitting, in which a child makes use of both small and large muscles:

(A) An infant birth through 12 months of age may engage in outdoor play for an amount of time as tolerated by the infant; and

(B) An infant 13 months through 17 months of age, a toddler, or a pre-kindergarten age child must engage in outdoor play for a minimum of 60 total minutes daily;

(2) A balance of active and quiet play that incorporates group and individual activities, both indoors and outdoors, and must include:

(A) A minimum of 60 minutes of moderate to vigorous active play for toddlers; and

(B) A minimum of 90 minutes of moderate to vigorous active play for pre-kindergarten age children;

(3) Child-initiated activities where:

(A) The equipment, materials, and supplies are within reach of the child; and

(B) The child chooses the activity on the child's own initiative;

(4) Caregiver-initiated activities that the caregiver directs or chooses, at least two of which must promote movement;

(5) Regular meal and snack times, as specified in Subchapter Q of this chapter (relating to Nutrition and Food Service); and

(6) Supervised naptimes or rest times.

§746.2207. May I use a screen time activity [TV/video, computer, or video games for activities] with a child [children]?

(a) You may not use a screen time activity [Activities using TV/video, computer, or video games are prohibited] for a child [children] under the age of two years.

(b) You may use a screen time activity [TV/video, computer, or video games may be used] to supplement, but [may] not [be used] to replace, an activity for a child who is [the activities for children ages] two years old or [and] older that is [provided as] described in §746.2507 of this chapter [title] (relating to What activities must I provide for a toddler [toddlers]?); §746.2607 of this chapter [title] (relating to What activities must I provide for a pre-kindergarten-age child [children]?); and §746.2707 of this chapter [title] (relating to What activities must I provide for a school-age child [children]?).

(c) If you use a screen time activity [TV/video, computer or video games as an activity] for a child at the center [children], you must ensure that the activity [they]:

(1) Is [Are] related to the planned activities that meet educational goals;

(2) Is [Are] age-appropriate; [and]

(3) Does [Do] not exceed one hour [two hours] per day; [.]

(4) Is not used during mealtime, snack times, naptimes, or rest times;

(5) Does not include advertising or violence; and

(6) Is turned off when not in use.

(d) A school-age child may use screen time without restriction for homework.

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SUBCHAPTER H. BASIC CARE REQUIREMENTS FOR INFANTS

26 TAC §746.2417

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§746.2417. What activities must I provide for an infant [infants]?

Daily activities [Activities] for an infant [infants] must include at least the following:

(1) Opportunities [Daily opportunities] for outdoor play, weather permitting, as specified in §746.2206 of this chapter (relating to What specific activities must I include in a written activity plan?) [as weather permits];

(2) Multiple opportunities to explore [each day] that ensure the infant is: [are]

(A) Outside [outside] of the crib; and

(B) Not seated in any restrictive device for more than 15 minutes, unless the infant is eating or being transported;

(3) Opportunities for physical activity, including supervised tummy time, reaching, grasping, pulling up, creeping, crawling, and walking in a safe, clean, uncluttered area;

(4) Opportunities for visual stimulation through nonverbal communication. Examples of age-appropriate equipment include large pictures of faces and familiar objects;[.] simple, soft, washable books

and toys; [.] unbreakable mirrors or mobiles attached to cribs visible from the baby's position; [.] and brightly patterned crib sheets;

(5) Opportunities for auditory stimulation. Examples of age-appropriate equipment or activities include verbal communication, soothing music, and musical or sounding toys;

(6) Opportunities for sensory stimulation. Examples of age-appropriate equipment include surfaces, fabrics, textured toys, washable dolls, and toy animals;

(7) Opportunities for small-muscle development. Examples of age-appropriate equipment include busy boxes, rattles, teething, grasping toys, shaking or squeezing toys, or cloth toys; and

(8) Opportunities for large-muscle development. Examples of age-appropriate equipment or activities include blankets or quilts for floor or supervised tummy time, crib and play gyms, variety of light-weight balls, and pillows or supportive equipment for those learning to sit up.

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SUBCHAPTER I. BASIC CARE REQUIREMENTS FOR TODDLERS

26 TAC §746.2507

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§746.2507. What activities must I provide for a toddler [toddlers]?

Daily activities [Activities] for a toddler [toddlers] must include at least the following:

(1) Opportunities [Daily morning and afternoon opportunities] for outdoor play, [when] weather permitting, as specified in §746.2206 of this chapter (relating to What specific activities must I include in a written activity plan?) [permits];

(2) Opportunities for thinking skills and sensory development. Examples of age-appropriate equipment or activities include shape or item [shape/item] sorting toys, stacking or nesting toys, puz-

zles with less than six pieces, washable board books, washable blocks, and snapping and take-apart toys;

(3) Opportunities for small-muscle development. Examples of age-appropriate equipment or activities include large-size washable crayons and markers, variety of paper and art materials, table or easel for art, large paintbrushes, non-toxic play-dough, large-sized washable toy transportation vehicles, toy animals, and toy people;

(4) Opportunities for large-muscle development. Examples of age-appropriate equipment or activities include low-climbing structures, small riding toys, toys for pushing or pulling, a variety of light-weight balls for indoor and outdoor play, and rhythm instruments;

(5) Opportunities for moderate to vigorous active play, both indoors and outdoors, as specified in §746.2206 of this chapter. Examples of age-appropriate equipment or activities include music, songs, simple games and dramatic or imaginary play that encourage movement such as dancing, running, climbing, stretching, walking, and marching;

(6) Opportunities for language development. Examples of age-appropriate equipment or activities include washable soft animals or puppets, simple picture books, and pictures of familiar items and places;

(7) Opportunities for social and emotional [social/emotional] development. Examples of age-appropriate equipment or activities include dress-up clothes and accessories, housekeeping equipment, unbreakable mirrors, washable dolls with accessories, items for practicing buttoning, zipping, lacing, and snapping, and baskets, tubs, and tote bags (not plastic bags) for carrying and toting; and

(8) Opportunities to develop self-help skills such as toiletting, hand washing, and self-feeding [feeding].

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SUBCHAPTER J. BASIC CARE REQUIREMENTS FOR PRE-KINDERGARTEN AGE CHILDREN

26 TAC §746.2607

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the

Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§746.2607. What activities must I provide for a pre-kindergarten age child [children]?

Daily activities [Activities] for a pre-kindergarten age child [children] must include at least the following:

(1) Opportunities [Daily morning and afternoon opportunities] for outdoor play, [when] weather permitting, as specified in §746.2206 of this chapter (relating to What specific activities must I include in a written activity plan?) [permits];

(2) Opportunities for thinking skills and sensory development. Examples of age-appropriate equipment or activities include sand and water [sand/water] play, blocks, framed puzzles with up to 30 pieces, variety of large stringing beads, and simple board games;

(3) Opportunities for small-muscle development. Examples of age-appropriate equipment or activities include large non-toxic crayons, markers, paint, water colors and various size brushes, adjustable easels, collage materials, chalkboard and chalk, clay or dough [clay/dough] and tools, workbench and accessories, round end scissors, glue and paste, different types of music and videos, rhythm instruments, and fingerplays;

(4) Opportunities for large-muscle development. Examples of age-appropriate equipment or activities include small wagons, light-weight balls of all sizes, small wheelbarrows, tricycles, push toys, swings, slides, climbing equipment, balance beam, hanging bars, and outdoor building materials;

(5) Opportunities for moderate to vigorous active play, both indoors and outdoors, as specified in §746.2206 of this chapter. Examples of age-appropriate equipment or activities include active games such as tag and hot potato, dancing and creative movement to music and singing, simple games and dramatic or imaginary play that encourages running, stretching, climbing, walking and marching;

(6) Opportunities for language development. Examples of age-appropriate equipment or activities include flannel board stories, puppets, and variety of storybooks, writing materials, and stories on tape;

(7) Opportunities for social and emotional [social/emotional] development. Examples of age-appropriate equipment or activities include dress-up clothes and accessories, mirrors, dolls, simple props for different themes, puppets, transportation toys, play animals, and table games; and

(8) Opportunities to develop self-help skills such as toiletting, hand washing, returning equipment to storage areas or containers, and serving and self-feeding [feeding].

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SUBCHAPTER K. BASIC CARE REQUIREMENTS FOR SCHOOL-AGE CHILDREN

26 TAC §746.2707

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§746.2707. What activities must I provide for a school-age child [ehildren]?

Daily activities [Activities] for a school-age child [ehildren] must include at least the following:

- (1) Study time for those children who choose to work on homework [assignments];
- (2) Opportunities [Daily morning and afternoon opportunities] for outdoor play, [when] weather permitting [permits];
- (3) Opportunities for thinking skills and sensory development. Examples of age-appropriate equipment or activities include sand and water play; construction materials and blocks [materials/blocks] blocks; puzzles with 50 or more pieces; pattern-making materials, such as wood, paper, plastic, beads, ceramic tiles, cloth, or cardboard; games that contain rules and require some skill or strategy; specific skill development materials, such as rulers, tape measures, telescopes, weather observation equipment, models of the solar system, and microscopes; books; and magazines;
- (4) Opportunities for small-muscle development. Examples of age-appropriate equipment or activities include art and craft materials, such as paints, markers, colored pencils, crayons, clay, weaving, or braiding materials; music and musical instruments of all types; and tape recorders or CD players [tape/CD recorders and players];
- (5) Opportunities for large-muscle development. Examples of age-appropriate equipment or activities include balls and sports equipment, such as kick balls, baseballs, soccer balls, basketballs, skates, and horseshoes; riding equipment, such as kick scooters or skateboards, with kneepads, elbow pads, and helmets; and outdoor and gym equipment, such as slides, swings, climbing apparatus, and upper-body equipment;
- (6) Opportunities for active play both indoors and outdoors. Examples of age-appropriate equipment or activities include active games such as tag and Simon Says [says], dancing and creative movement to music and singing, simple games and dramatic or imagi-

nary play that encourages running, stretching, climbing, and walking; and

(7) Opportunities for social and emotional [social/emotional] emotional development. Examples of age-appropriate equipment or activities include dolls with detailed, realistic accessories; role-play materials, including real equipment for library, hospital, post office, costumes, makeup and disguise materials; puppets and puppet show equipment; transportation toys, such as small vehicles or models; play and art materials; nature materials; and human and animal figurines.

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SUBCHAPTER L. DISCIPLINE AND GUIDANCE

26 TAC §746.2805

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§746.2805. What types of discipline and guidance or punishment are prohibited?

There must be no harsh, cruel, or unusual treatment of any child. The following types of discipline and guidance are prohibited:

- (1) Corporal punishment or threats of corporal punishment;
- (2) Punishment associated with food, naps, or toilet training;
- (3) Pinching, shaking, or biting a child;
- (4) Hitting a child with a hand or instrument;
- (5) Putting anything in or on a child's mouth;
- (6) Humiliating, ridiculing, rejecting, or yelling at a child;
- (7) Subjecting a child to harsh, abusive, or profane language;
- (8) Placing a child in a locked or dark room, bathroom, or closet; [and]

(9) Withholding active play or keeping a child inside as a consequence for behavior; and

(10) ~~(9)~~ Requiring a child to remain silent or inactive for inappropriately long periods of time for the child's age, including requiring a child to remain in a restrictive device.

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SUBCHAPTER P. NIGHTTIME CARE

26 TAC §746.3209

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§746.3209. *Must I provide activities for children in nighttime care?*

(a) ~~[Yes.]~~ Activities and routines must meet the unique needs of children in nighttime care. These may include quiet activities, such as homework, reading, puzzles, or board games; time for personal care routines and preparation for sleep, such as brushing teeth, washing hands and face, toileting, and changing clothes; and an evening meal, breakfast, and ~~[and/or]~~ snack as specified in Subchapter Q of this chapter (relating to Nutrition and Food Service).

(b) Screen time activities:

(1) Must meet the requirements of §746.2207 of this chapter (relating to May I use a screen time activity with a child?); and

(2) May not be used in a cot, bed, or mattress, or one hour before bedtime.

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

Filed with the Office of the Secretary of State on November 6, 2020.

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Karen Ray

Chief Counsel

Health and Human Services Commission

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For further information, please call: (512) 438-3269



SUBCHAPTER Q. NUTRITION AND FOOD SERVICE

26 TAC §§746.3301, 746.3303, 746.3309, 746.3311, 746.3319

STATUTORY AUTHORITY

The amendment and new section are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment and new section affect Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§746.3301. *What are the basic requirements for meal [~~snack~~] and snack times [~~meal~~times]?*

(a) You must serve all children ~~[ready for table food]~~ regular meals and morning and afternoon snacks as specified in this subchapter.

(b) The meals and snacks must follow the meal patterns established by the U.S. Department of Agriculture (USDA) Child and Adult Care Food Program (CACFP) that is administered by the Texas Department of Agriculture. You must follow these patterns regardless of whether you are participating in the program for reimbursement.

(c) ~~[(b)]~~ If you serve breakfast [is served], you do not have to serve a morning snack [is not required].

(d) ~~[(e)]~~ A child must not go more than three hours without a meal or snack being offered, unless the child is sleeping.

(e) ~~[(d)]~~ You must serve enough food to allow children second servings from the vegetable, fruit, grain, and milk groups. [If your child-care center is participating in the Child and Adult Care Food Program (CACFP) administered by the Texas Department of Agriculture, you may elect to meet those requirements rather than those specified in this section.]

(f) ~~[(e)]~~ You must ensure a supply of drinking water is always available to each child ~~[and is served]~~ at every snack, mealtime, and after active play and is served in a safe and sanitary manner.

(g) ~~[(f)]~~ You must not serve beverages with added sugars, such as carbonated beverages, fruit punch, or sweetened milk except for a special occasion such as a holiday or birthday celebration.

(h) ~~[(g)]~~ You must not use food as a reward.

(i) ~~[(h)]~~ You must not serve a child a food identified on the child's food allergy emergency plan, as specified in §746.3817 of this chapter ~~[title]~~ (relating to What is a food allergy emergency plan?).

§746.3303. *How often must I feed a child in my care?*

You must follow the guidelines in Figure 26 TAC §746.3303 when determining how often to feed a child in your care.

Figure: 26 TAC §746.3303

§746.3309. *May parents provide meals and [and/or] snacks for their child instead of my child-care center providing them?*

(a) Yes. However [~~however~~], your enrollment agreement, or an addendum to the agreement, signed by the parent must include a statement that the parent:

(1) Is [is] choosing to provide the child's meals and [and/or] snacks from home; and

(2) Understands [the parent understands] the child-care center is not responsible for its nutritional value or for meeting the child's daily food needs.

(b) If the parent provides a meal but not a snack, you are responsible for providing a snack as specified in this subchapter [~~§746.3307 of this title (relating to What kind of foods must I serve for snacks?)~~].

(c) You must provide safe and proper storage and service of the individual meals and snacks provided by parents.

(d) Snacks provided by a parent must not be shared with other children, unless:

(1) A parent is providing baked goods for a celebration or party being held at the center; and

(2) You ensure that the shared snacks meet the needs of children who require special diets.

§746.3311. *What are the requirements for a child [How should my child-care center meet the needs of children] who requires a [require] special diet [diets] or does [do] not want to eat foods that the center serves [we serve]?]*

(a) You must have written approval from a health-care professional, [physician] or a registered or licensed dietician, in the child's records to serve a child a therapeutic or special diet. You must give this information to all employees preparing and serving food.

(b) You must discuss recurring eating problems with the child's parent.

(c) You may encourage but must not force children to eat.

(d) You must not serve nutrient concentrates and supplements such as protein powders, liquid protein, vitamins, minerals, and other nonfood substances without written instructions from a health-care professional [physician].

§746.3319. *Must I serve meals family style?*

(a) You [~~No, you~~] do not have to use family-style meal service, although all meals and snack times must:

(1) Be unhurried;

(2) Allow children to feed themselves according to their developmental level; and

(3) [~~2~~] Include adult supervision of children.

(b) If meals and snacks are served family style, caregivers must supervise children to prevent cross-contamination of the food.

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

Filed with the Office of the Secretary of State on November 6, 2020.

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Karen Ray
Chief Counsel
Health and Human Services Commission
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26 TAC §§746.3303, 746.3305, 746.3307, 746.3315, 746.3316
STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§746.3303. *How often must I feed a child in my care?*

§746.3305. *How do I know what a child's daily food needs are?*

§746.3307. *What kind of foods must I serve for snacks?*

§746.3315. *May I serve powdered milk?*

§746.3316. *May I serve fruit or vegetable juices?*

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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CHAPTER 747. MINIMUM STANDARDS FOR CHILD-CARE HOMES

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §§747.123, 747.501, 747.2103, 747.2105, 747.2317, 747.2407, 747.2507, 747.2607, 747.2705, 747.3009, 747.3101, 747.3109, 747.3111, and 747.3119; new §§747.2102, 747.2104, and 747.3103; and the repeal of §§747.3103, 747.3105, 747.3107, 747.3115 and 747.3116 in Title 26, Texas Administrative Code, Chapter 747, Minimum Standards for Child-Care Homes.

BACKGROUND AND PURPOSE

The purpose of the proposal is to implement Senate Bill (S.B.) 952, 86th Legislature, Regular Session, 2019, which adds Subsections 42.042(e-3), (e-4), and (e-5) to the Texas Human Resources Code (HRC). The new Subsections require HHSC Child Care Regulation (CCR) to align the minimum standards for child-

care centers and registered child-care homes with standards for physical activity and screen time in *Caring for Our Children* (CFOC), 4th edition, and with the nutrition standards of the federal Child and Adult Care Food Program (CACFP).

CCR is extending these requirements to School-Age and Before and After-School Programs in Chapter 744 and Licensed Homes in Chapter 747, so that the minimum standards for physical activity, nutrition, and screen time are congruent throughout Chapters 744, 746, and 747.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §747.123 (1) updates grammar, language, and punctuation for better readability and understanding in the definitions for "caregiver," "certified lifeguard," "CEUs," "clock hour," "entrap," "high school equivalent," "special care needs," and "water activities"; (2) updates citations in the definitions for "child-care home," "clock hour," "permit is no longer valid," "regular," and "self-study training"; (3) updates the definition for "health-care professional" to clarify the definition excludes only persons not licensed in the U.S. or in the country in which the person practices; (4) updates the definition for "natural environment" to be consistent with the current definition in the Individuals with Disabilities Education Act, and provides an example to aid in clarity; (5) adds definitions for "physical activity (moderate)," "physical activity (vigorous)," and "screen time activity"; (6) adds a definition for "pre-kindergarten age child" to be consistent with other Licensing chapters; (7) updates the definition for "school-age child" for better understanding and consistency with other Licensing chapters; and (8) updates the numbering of the definitions accordingly.

The proposed amendment to §747.501 (1) updates language for better readability and increased consistency throughout the chapter; (2) adds a requirement for child-care homes to include operational policies for physical activity; (3) corrects the title of the agency; (4) updates citations; and (5) updates the numbering of rules accordingly.

Proposed new §747.2102 adds a requirement for child-care homes to develop and follow a written activity plan that includes the components of proposed §747.2103 and includes all children.

The proposed amendment to §747.2103 (1) clarifies in the rule title that an activity plan must be written; (2) updates the rule to require that the written activity plan include the dates of the plan as well as the daily activities that are required by proposed §747.2104; (3) deletes the requirement for creative activities as it is included elsewhere in the chapter; (4) deletes requirements for outdoor play, active and quiet play, regular meal and snack times, supervised naptimes, and child and caregiver initiated activities, as these requirements are now included in proposed §747.2104; and (4) adds language regarding screen time activities to specify an activity plan may include one or more screen time activities.

Proposed new §747.2104 outlines the activities a child-care home must include in a written activity plan and provides options for outdoor and active play based on the number of caregivers and ages of children in care. Requirements include outdoor play, moderate to vigorous active play, and caregiver-initiated activities that promote movement. Also included are previous activity requirements for quiet play, child-initiated activities, regular meal and snack times, and supervised naptimes or rest times that were incorporated from proposed §747.2103.

The proposed amendment to §747.2105 (1) replaces the phrase "TV/video, computer, or video games" with "screen time activity"; (2) prohibits screen time activities for children under age two; (3) reorganizes and clarifies language in the rule for better readability and understanding; (4) updates citations; (5) adds restrictions to screen time activities offered at the child-care home, including (A) reducing the amount of allotted screen time from two hours to one hour per day, and (B) requiring that screen time activities relate to educational goals, are not used during mealtimes, snack times, naptimes, or rest times, do not include advertising or violence, and are turned off when not in use; and (5) adds flexibility for school-age children to use screen time without restriction for homework.

The proposed amendment to §747.2317 (1) updates the rule title for accuracy; (2) specifies that all required activities, not just outdoor play, be offered daily; (3) updates language and punctuation for consistency throughout the chapter; (4) adds a reference to proposed §747.2104 regarding outdoor play requirements; (5) adds a 15 minute time limit on an infant sitting in restricted devices, unless the infant is eating or being transported; and (6) adds "supervised tummy time" as a physical activity for infants and as an example of a large muscle activity.

The proposed amendment to §747.2407 (1) updates the rule title for accuracy; (2) specifies that all required activities, not just outdoor play, be offered daily; (3) updates language and punctuation for better readability and consistency throughout the chapter; (4) adds a reference to proposed §747.2104 regarding outdoor and active play requirements; and (5) expands active play requirements to include "moderate to vigorous active play."

The proposed amendment to §747.2507 (1) updates the rule title for accuracy; (2) specifies that all required activities, not just outdoor play, be offered daily; (3) updates language and punctuation for better readability and consistency throughout the chapter; (4) adds a reference to proposed §747.2104 regarding outdoor and active play requirements; and (5) expands active play requirements to include "moderate to vigorous active play."

The proposed amendment to §747.2607 (1) updates the rule title for accuracy; (2) specifies that all required activities, not just outdoor play, be offered daily; and (3) updates language and punctuation for better readability and consistency throughout the chapter.

The proposed amendment to §747.2705 (1) expands the list of prohibited discipline and guidance measures to include withholding active play or keeping a child inside as a consequence for behavior; and (2) updates the numbering of rules accordingly.

The proposed amendment to §747.3009 (1) updates language for better readability and consistency with other chapters and (2) adds requirements for screen time activities for children in nighttime care, including (A) a reference to the requirements in proposed §747.2105; and (B) the restriction of screen time activities in bed or one hour before bedtime.

The proposed amendment to §746.3101 (1) updates the rule title for better readability and understanding; (2) reorganizes and clarifies language in the rule for better readability and understanding; (3) adds the requirement for all child-care homes to follow the meal patterns established by the CACFP; (4) incorporates the requirement to allow second servings from certain food groups previously required in repealed §747.3105; (5) deletes language that allowed child-care homes to follow either CACFP meal patterns or Licensing meal requirements; (6) updates a citation; and (7) updates the numbering of rules accordingly.

The proposed repeal of §747.3103 deletes the rule as no longer necessary, because the content of the rule has been re-proposed in new §747.3103.

Proposed new §747.3103 (1) incorporates requirements from repealed §747.3103 into a chart to reorganize and clarify the rule and (2) restructures certain requirements in repealed §747.3103, regarding how much food to offer based on hours in care.

The proposed repeal of §747.3105 deletes the rule as no longer necessary, because all child-care homes are now required to follow the CACFP meal patterns, as noted in proposed §747.3101.

The proposed repeal of §747.3107 deletes the rule as no longer necessary, because all child-care homes are now required to follow the CACFP meal patterns, as noted in proposed §747.3101.

The proposed amendment to §747.3109 (1) updates grammar and punctuation for consistency throughout the chapter; (2) adds that a parent may sign an addendum to the enrollment agreement so that the parent may provide meals and snacks; and (3) updates a citation.

The proposed amendment to §747.3111 (1) updates the rule title for better readability and understanding; and (2) replaces "physician" with "health-care professional" for consistency throughout the chapter.

The proposed repeal of §747.3115 deletes the rule as no longer necessary, because all child care homes are now required to follow the CACFP meal patterns, as noted in proposed §747.3101.

The proposed repeal of §747.3116 deletes the rule as no longer necessary, because all child care centers are now required to follow the CACFP meal patterns, as noted in proposed §747.3101.

The proposed amendment to §747.3119 (1) updates language in the rule for better readability; (2) adds a requirement that meals and snack times be unhurried to increase consistency with other chapters; (3) adds a requirement that children feed themselves according to their developmental level, to be consistent with current best practice in child-care; and (4) updates the numbering of rules accordingly.

FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to HHSC;
- (5) the proposed rules will create new rules;
- (6) the proposed rules will expand and repeal existing rules;
- (7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there could be an adverse economic effect on small and micro-businesses, but no adverse economic effect on rural communities.

Chapter 2006 of the Texas Government Code defines a small business as one that is for-profit with fewer than 100 employees. A micro-business is one that is for-profit with fewer than 20 employees. Based on data obtained from the 2019 CCR Data Book, CCR estimates that there are approximately 4,914 Licensed and Registered Child-Care Homes required to comply with the rules. These homes are limited to caring for a maximum of 12 children. CCR assumes that all Licensed and Registered Child-Care Homes (4,914 homes) are for-profit homes with less than 20 employees and qualify as small businesses and micro-businesses.

The projected economic impact on micro-businesses is limited to proposed §747.501, as this rule requires an operational policy to be developed. Some operations have indicated a labor cost to bring the policy into compliance with the proposed rule. HHSC does not have sufficient information to determine these costs as they will vary greatly with individual business structure and experience.

HHSC determined that there are no alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities that are consistent with ensuring the health and safety of children attending child-care in Texas.

LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect local economy.

COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules do not impose a cost on regulated persons and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

PUBLIC BENEFIT AND COSTS

Jean Shaw, Associate Commissioner for Child Care Regulation, has determined that for each year of the first five years the rules are in effect, the public benefit will be that the health of children attending child-care in Texas will be supported by physical activity, screen time, and nutrition standards that are aligned with national standards and best practices for early childhood education.

Trey Wood has also determined that for the first five years the rules are in effect, there could be an anticipated cost for persons required to comply with proposed §747.501. The proposed rule requires child-care operations to develop an operational policy to include physical activity components.

Some operations have indicated a labor cost to bring the policy into compliance with the proposed rule. HHSC does not have sufficient information to determine these costs, as they will vary greatly with operation type and individual business structure.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist

in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Aimee Belden by email at Aimee.Belden@hhsc.state.tx.us.

Written comments on the proposal may be submitted to Aimee Belden, Rules Writer, Child Care Regulation, Texas Health and Human Services Commission, E-550, P.O. Box 149030, Austin, Texas 78714-9030; or by email to CCLRules@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 20R024" in the subject line.

SUBCHAPTER A. PURPOSE, SCOPE, AND DEFINITIONS

DIVISION 3. DEFINITIONS

26 TAC §747.123

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§747.123. What do certain words and terms mean when used in this chapter?

The words and terms used in this chapter have the meanings assigned to them under §745.21 of this title (relating to What do the following words and terms mean when used in this chapter?), unless another meaning is assigned in this section or another subchapter or unless the context clearly indicates otherwise. In addition, the following words and terms used in this chapter have the following meanings unless the context clearly indicates otherwise:

- (1) Activity space--An area or room used for children's activities.
- (2) Administrative and clerical duties--Duties that involve the operation of a child-care home, such as bookkeeping, enrolling children, answering the telephone, and collecting fees.
- (3) Admission--The process of enrolling a child in a child-care home. The date of admission is the first day the child is physically present in the home.
- (4) Adult--A person 18 years old and older.

(5) After-school hours--Hours before and after school, and days when school is not in session, such as school holidays, summer vacations, and teacher in-service days.

(6) Age-appropriate--Activities, equipment, materials, curriculum, and environment that are developmentally consistent with the chronological age of the child being served.

(7) Attendance--When referring to a child's attendance, the physical presence of a child at the child-care home on any given day or at any given time, as distinct from the child's enrollment in the child-care home.

(8) Bouncer seat--A stationary seat designed to provide gentle rocking or bouncing motion by an infant's movement, or by battery-operated movement. This type of equipment is designed for an infant's use from birth until the child can sit up unassisted.

(9) Caregiver--A person who is counted in the child to caregiver ~~[child/caregiver]~~ caregiver ratio, whose duties include the supervision, guidance, and protection of a child. As used in this chapter, a caregiver must meet the minimum education, work experience, and training qualifications required under Subchapter D of this chapter (relating to Personnel).

(10) Certified Child-Care Professional Credential--A credential given by the National Early Childhood Program Accreditation to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(11) Certified lifeguard--A person who has been trained in life saving and water safety by a qualified instructor, from a recognized organization that [which] awards a certificate upon successful completion of the training. The certificate is not required to use the term "lifeguard," but you must be able to document that the certificate represents the type of training described.

(12) CEUs ~~[(continuing education units)]~~--Continuing education units. A standard unit of measure for adult education and training activities. One CEU equals 10 ~~[ten]~~ clock hours of participation in an organized, continuing-education experience, under responsible, qualified direction and instruction. Although a person may obtain a CEU in many of the same settings as clock hours, the CEU provider must meet the criteria established by the International Association for Continuing Education and Training to be able to offer the CEU.

(13) Child--An infant, a toddler, a pre-kindergarten age child, or a school-age child.

(14) Child-care home--A registered or licensed child-care home, as specified in §747.113 of this chapter ~~[title]~~ (relating to What is a registered child-care home?) or §747.115 of this chapter ~~[title]~~ (relating to What is a licensed child-care home?). This term includes the program, home, grounds, furnishings, and equipment.

(15) Child-care program--The services and activities provided by a child-care home.

(16) Child Development Associate Credential--A credential given by the Council for Professional Recognition to a person working directly with children. The credential is based on assessed competency in several areas of child care and child development.

(17) Clock hour--An actual hour of documented:

(A) Attendance at instructor-led training, such as seminars, workshops, conferences, early childhood classes, and other planned learning opportunities, provided by an individual or individuals ~~[individual/s]~~ as specified in §747.1315(a) of this chapter ~~[title]~~ (relating to Must child-care training meet certain criteria?); or

(B) Self-instructional training that was created by an individual or individuals [individual/s], as specified in §747.1315(a) and (b) of this chapter, or self-study training.

(18) Corporal punishment--The infliction of physical pain on a child as a means of controlling behavior. This includes spanking, hitting, slapping, or thumping a child.

(19) Days--Calendar days, unless otherwise stated.

(20) Employee--An assistant caregiver, substitute caregiver, or any other person a child-care home employs full-time or part-time to work for wages, salary, or other compensation, including kitchen staff, office staff, maintenance staff, or anyone hired to transport a child.

(21) Enrollment--The list of names or number of children who have been admitted to attend a child-care home for any given period of time; the number of children enrolled in a child-care home may vary from the number of children in attendance on any given day.

(22) Entrap--A component or group of components on equipment that forms angles or openings that may trap a child's head by being too small to allow the child's body to pass through, or large enough for the child's body to pass through but too small to allow the child's head to pass through.

(23) Field trips--Activities conducted away from the child-care home.

(24) Food service--The preparation or serving of meals or snacks.

(25) Frequent--More than two times in a 30-day period. Note: For the definition of "regularly or frequently present at an operation" (child-care home) as it applies to background checks, see §745.601 of this title (relating to What words must I know to understand this subchapter?).

(26) Garbage--Waste food or items that when deteriorating cause offensive odors and attract rodents, insects, and other pests.

(27) Group activities--Activities that allow children to interact with other children in large or small groups. Group activities include storytelling, finger plays, show and tell, organized games, and singing.

(28) Health-care professional--A licensed physician, a licensed advanced practice registered nurse (APRN), a licensed vocational nurse (LVN), a licensed registered nurse (RN), or other licensed medical personnel providing health care to the child within the scope of the license. This does not include physicians, [medical doctors,] nurses, or other medical personnel who are not licensed [to practice] in the United States or in the country in which the person practices.

(29) Health check--A visual or physical assessment of a child to identify potential concerns about a child's health, including signs or symptoms of illness and injury, in response to changes in the child's behavior since the last date of attendance.

(30) High school equivalent-- [:]

(A) Documentation of a program recognized by the Texas Education Agency (TEA) or other public educational entity in another state, which offers similar training on reading, writing, and math skills taught at the high school level, such as a General Educational Development (GED) certificate; or

(B) Confirmation that the person received home-schooling that adequately addressed basic competencies such as basic reading, writing, and math skills, which would otherwise have been documented by a high school diploma.

(31) Individual activities--Opportunities for the child to work independently or to be away from the group, but supervised.

(32) Infant--A child from birth through 17 months.

(33) Inflatable--An amusement ride or device, consisting of air-filled structures designed for use by children, as specified by the manufacturer, which may include bouncing, climbing, sliding, or interactive play. They are made of flexible fabric, kept inflated by continuous air flow by one or more blowers, and rely upon air pressure to maintain their shape.

(34) Instructor-led training--Training characterized by the communication and interaction that takes place between the student and the instructor. The training must include an opportunity for the student to interact with the instructor to obtain clarifications and information beyond the scope of the training materials. For such an opportunity to exist, the instructor must communicate with the student in a timely fashion, including answering questions, providing feedback on skills practice, providing guidance or information on additional resources, and proactively interacting with students. Examples of this type of training include, classroom training, web-based on-line facilitated learning, video-conferencing, or other group learning experiences.

(35) Janitorial duties--Those duties that involve the cleaning and maintenance of the child-care home, building, rooms, furniture, etc. Cleaning and maintenance include such duties as cleansing carpets, washing cots, and sweeping, vacuuming, or mopping a restroom or a classroom. Sweeping up after an activity or mopping up a spill in a classroom that is immediately necessary for the children's safety is not considered a janitorial duty.

(36) Natural environment--Settings that are natural or typical [normal] for all children of the same [an] age [group] without regard to ability or disability. For example, a natural environment for learning social skills is a play group of peers. [the primary natural group setting for a toddler with a disability would be a play group or whatever setting exists for toddlers without disabilities.]

(37) Permit is no longer valid--For purposes of this chapter, a permit remains valid through the renewal process. A permit only becomes invalid when you:

(A) Home voluntarily closes;

(B) Home must close because of an enforcement action in [Subchapter L of] Chapter 745, Subchapter L of this title (relating to Enforcement Actions);

(C) Permit expires according to §745.481 of this title (relating to When does my permit expire?); or

(D) Home must close because its permit is automatically revoked according to the Human Resources Code §§42.048(e), 42.052(i), or 42.054(f).

(38) Physical activity (moderate)--Levels of activity for a child that are at intensities faster than a slow walk, but still allow the child to talk easily. Moderate physical activity increases the child's heart rate and breathing rate.

(39) Physical activity (vigorous)--Rhythmic, repetitive physical movement for a child that uses large muscle groups, causing the child to breathe rapidly and only enabling the child to speak in short phrases. Typically, the child's heart rate is substantially increased, and the child is likely to be sweating while engaging in vigorous physical activity.

(40) Pre-kindergarten age child--A child who is three or four years of age before the beginning of the current school year.

(41) [(38)] Regular--On a recurring, scheduled basis. Note: For the definition of "regularly or frequently present at an operation" (child-care home) as it applies to background checks, see §745.601 of this title [(relating to What words must I know to understand this subchapter?)].

(42) [(39)] Restrictive device--Equipment that places the body of a child in a position that may restrict airflow or cause strangulation; usually, the child is placed in a semi-seated position. Examples of restrictive devices are car seats, swings, bouncy seats, and high chairs.

(43) [(40)] Safety belt--A lap belt and any shoulder straps included as original equipment on or added to a vehicle.

(44) [(41)] Sanitize--The use of a product (usually a disinfecting solution) that is registered by the Environmental Protection Agency (EPA) which substantially reduces germs on inanimate objects to levels considered safe by public health requirements. Many bleach and hydrogen peroxide products are EPA-registered. You must follow the product's labelling instructions for sanitizing (paying particular attention to any instructions regarding contact time and toxicity on surfaces likely to be mouthed by children, such as toys and crib rails). For an EPA-registered sanitizing product or disinfecting solution that does not include labelling instructions for sanitizing (a bleach product, for example), you must follow these steps in order:

- (A) Washing with water and soap;
- (B) Rinsing with clear water;

(C) Soaking in or spraying on a disinfecting solution for at least two minutes. Rinsing with cool water only those items that children are likely to place in their mouths; and

- (D) Allowing the surface or item to air-dry.

(45) [(42)] School-age child--A child who is five years of age and older[,] and is enrolled in or has completed kindergarten [who will attend school at or away from the child-care home beginning in August or September of that year].

(46) Screen time activity--An activity during which a child views media content on a cell or mobile phone, tablet, computer, television, video, film, or DVD. Screen time activities do not include video chatting with a child's family or assistive and adaptive computer technology used by a child with special care needs on a consistent basis.

(47) [(43)] Self-instructional training--Training designed to be used by one individual working alone and at the individual's own pace to complete lessons or modules. Lessons or modules commonly include questions with clear right and wrong answers. An example of this type of training is web-based training. Self-study training is also a type of self-instructional training.

(48) [(44)] Self-study training--Non-standardized training where an individual reads written materials, watches a training video, or listens to a recording to obtain certain knowledge that is required for annual training. Self-study training is limited to three hours of annual training per year [, see §747.1305(g) and §747.1309(j) of this title (relating to What topics must annual training for caregivers include? and What topics must my annual training include?)], respectively].

(49) [(45)] Special care needs--A child with special care needs is a child who has a chronic physical, developmental, behavioral, or emotional condition and who also requires assistance beyond that required by a child generally to perform tasks that are within the typical chronological range of development, including the movement of large or [and/or] small muscles, learning, talking, communicating, self-help, social skills, emotional well-being, seeing, hearing, and breathing.

(50) [(46)] State or local fire marshal--A fire official designated by the city, county, or state government.

(51) [(47)] Toddler--A child from 18 months through 35 months.

(52) [(48)] Universal precautions--An approach to infection control where all human blood and certain human bodily fluids are treated as if known to be infectious for HIV, HBV, and other blood-borne pathogens.

(53) [(49)] Water activities--Related to the use of swimming pools, splashing or wading [splashing/wading] pools, sprinkler play, or other bodies of water.

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SUBCHAPTER B. ADMINISTRATION AND COMMUNICATION

DIVISION 4. OPERATIONAL POLICIES

26 TAC §747.501

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§747.501. *What written operational policies must I have?*

You must develop written operational policies and procedures that at a minimum address each of the following:

- (1) Procedure for the release of children;
- (2) Illness and exclusion criteria;
- (3) Procedures for dispensing medication, or a statement that medication is not dispensed;
- (4) Procedures for handling medical emergencies;
- (5) Discipline and guidance policy that is consistent with Subchapter L of this title (relating to Discipline and Guidance). A copy of Subchapter L may be used for your discipline and guidance policy;
- (6) Safe sleep policy for infants from birth through 12 months old [or younger] that is consistent with the rules in Subchapter

[subchapter] H of this chapter (relating to Basic Requirements for Infants) that relate to sleep requirements and restrictions, including sleep positioning, and crib requirements and restrictions, including mattresses, bedding, blankets, toys, and restrictive devices;

(7) Animals, if applicable;

(8) Promotion of indoor and outdoor physical activity that is consistent with Subchapter F of this chapter (relating to Developmental Activities and Activity Plan). Your policies must include:

(A) The duration of physical activity at your home, both indoor and outdoor;

(B) The recommended clothing and footwear that a child would require to participate in physical activities; and

(C) A plan to ensure physical activity occurs on days when extreme weather conditions prohibit or limit outdoor time.

(9) [(8)] Procedures [The procedures] for parents to visit the child-care home any time during your hours of operation to observe their child, program activities, the home, the premises, and equipment without having to secure prior approval;

(10) [(9)] Procedures [The procedures] for parents to review a copy of the child-care home's most recent Licensing inspection report and how the parent may access the minimum standards online;

(11) [(10)] Instructions on how a parent may contact the local Licensing office, access the Texas Abuse and Neglect Hotline, and access the HHSC [DFPS] website;

(12) [(11)] Your emergency preparedness plan;

(13) [(12)] Procedures for conducting health checks, if applicable; and

(14) [(13)] Information on vaccine-preventable [Vaccine-preventable] diseases for employees, if your licensed child-care home is not located in your own residence. The policy must address the requirements outlined in §747.3411 of this chapter [title] (relating to What must a policy for protecting children from vaccine-preventable diseases include?).

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SUBCHAPTER F. DEVELOPMENTAL ACTIVITIES AND ACTIVITY PLAN

26 TAC §§747.2102 - 747.2105

STATUTORY AUTHORITY

The amendments and new section authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provi-

sion of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendments and new section affect Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§747.2102. What written activity plans must I follow?

(a) You must develop and follow a written activity plan that complies with §747.2103 of this subchapter (relating to What must a written activity plan include?).

(b) The activity plan must include all children in the group regardless of special care needs.

§747.2103. What must a written [the] activity plan include?

(a) A written [Your] activity plan must [include at least the following]:

(1) List the dates (daily, weekly, or monthly) the plan covers;

[(1) A variety of creative activities that encourages the use of a child's imagination. Creative activities include dramatic play, block building, stories and books, science and nature activities, and music and art activities;]

(2) Outline the specific daily activities, as required by §747.2104 of this subchapter (relating to What specific activities must I include in a written activity plan?);

[(2) Outdoor play in which the children make use of both small and large musesels, both in the morning and afternoon;]

[(3) A balance of active and quiet play, including group and individual activities both indoors and outdoors;]

[(4) Regular meal and snack times as specified in Subchapter Q of this Chapter (relating to Nutrition and Food Service);]

[(5) Supervised naptimes, or a period of rest for those children too old to nap;]

[(6) A variety of:

[(A) Child-initiated activities, which are those activities that the child chooses on the child's own initiative, and that foster the child's independence. Child initiated activities require equipment, materials, and supplies to be within the reach of a child; and]

[(B) Caregiver-initiated activities, which are those activities that are directed or chosen by the caregiver;]

(3) [(7)] Include sufficient [Sufficient] time for activities and routines so that children can progress at their own developmental rate; and

(4) [(8)] Not include [No] long waiting periods between activities or prolonged periods during which children stand or sit.

(b) A written [The] activity plan may include one or more screen time activities, as specified in §747.2105 of this subchapter (relating to May I use a screen time activity with a child?) [(T.V., videos, computer, or video games)], if you also include alternative activities for children who [that] do not want to participate.

§747.2104. What specific activities must I include in a written activity plan?

(a) You must include these daily activities in your written activity plan:

(1) A minimum of two daily opportunities for outdoor play, weather permitting, in which a child makes use of both small and large muscles;

(2) A balance of active and quiet play that incorporates group and individual activities both indoors and outdoors;

(3) Child-initiated activities where:

(A) The equipment, materials, and supplies are within reach of the child; and

(B) The child chooses the activity on the child's own initiative;

(4) Caregiver-initiated activities that the caregiver directs or chooses, at least two of which must promote movement;

(5) Regular meal and snack times as specified in Subchapter Q of this Chapter (relating to Nutrition and Food Service); and

(6) Supervised naptimes or rest times.

(b) Your written activity plan must also include the approximate times that each child may engage in outdoor play and moderate to vigorous active play, as provided in Figure 26 TAC §747.2104(b). Figure: 26 TAC §747.2104(b)

(c) Children in your care must be able to engage in outdoor and active play for the times provided in subsection (b) of this section if your home:

(1) Has more than one caregiver; or

(2) Only cares for one age range of children described in subsection (b)(1) and (b)(2) of this section. For example, if your home does not care for an infant birth through 12 months of age, you must allow the children in your care to engage in outdoor play for 60 total minutes.

(d) If your home only has one caregiver and cares for more than one age range of children described in subsection (b)(1) and (b)(2) of this section, children in care must engage in outdoor and active play for the time required for the younger age group.

§747.2105. May I use a screen time activity [TV/video, computer, and video games for activities] with a child [children]?

(a) You may not use a screen time activity for a child under the age of two years.

(b) [(a)] You may use a screen time activity [TV/video, computer, and video games may be used] to supplement, but [may] not [be used] to replace, an activity with [the activities for] a child who is two years old or older that is [children] described in [§747.2317 of this title (relating to What activities must I provide for infants?); §747.2407 of this chapter [title] (relating to What activities must I provide for a toddler [toddlers]?), §747.2507 of this chapter [title] (relating to What activities must I provide for a pre-kindergarten age child [children]?), and §747.2607 of this chapter [title] (relating to What activities must I provide for a school-age child [children]?).

(c) [(b)] If you use a screen time activity [TV/video, computer, or video games as an activity] for a child at your home [children], you must ensure that the activity [they]:

(1) Is [Are] related to the planned activities that meet educational goals;

(2) Is age-appropriate; [Are age appropriate; and]

(3) Does [Do] not exceed one hour [two hours] per day;

(4) Is not used during mealtime, snack times, naptimes, or rest times;

(5) Does not include advertising or violence; and

(6) Is turned off when not in use.

(d) A school-age child may use screen time without restriction for homework.

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SUBCHAPTER H. BASIC CARE REQUIREMENTS FOR INFANTS

26 TAC §747.2317

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§747.2317. What activities must I provide for an infant [infants]?

Daily activities [Activities] for an infant [infants] must include at least the following:

(1) Opportunities [Daily opportunities] for outdoor play, [as] weather permitting, as specified in §747.2104 of this chapter (relating to What specific activities must I include in a written activity plan?) [permits];

(2) Multiple opportunities to explore [each day] that ensure the infant is: [are]

(A) Outside [outside] of the crib; and

(B) Not seated in any restrictive device for more than 15 minutes, unless the infant is eating or being transported;

(3) Opportunities for physical activity, including supervised tummy time, reaching, grasping, pulling up, creeping, crawling, and walking in a safe, clean, uncluttered area;

(4) Opportunities for visual stimulation through nonverbal communication. Examples of age-appropriate equipment include large pictures of faces and familiar objects; [s] simple, soft, washable books and toys; [s] unbreakable mirrors or mobiles attached to cribs visible from the baby's position; [s] and brightly patterned crib sheets;

(5) Opportunities for auditory stimulation. Examples of age-appropriate equipment or activities include verbal communication, soothing music, and musical or sounding toys;

(6) Opportunities for sensory stimulation. Examples of age-appropriate equipment include surfaces, fabrics, textured toys, [øf] washable dolls, and toy animals;

(7) Opportunities for small-muscle development. Examples of age-appropriate equipment or activities include busy boxes, rattles, teethingers, grasping toys, shaking or squeezing toys, or cloth toys; and

(8) Opportunities for large-muscle development. Examples of age-appropriate equipment or activities include blankets or quilts for floor or supervised tummy time, crib and play gyms, variety of light-weight balls, or pillows or supportive equipment for those learning to sit up.

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SUBCHAPTER I. BASIC CARE REQUIREMENTS FOR TODDLERS

26 TAC §747.2407

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§747.2407. What activities must I provide for a toddler [toddlers]?

Daily activities [Activities] for a toddler [toddlers] must include at least the following:

(1) Opportunities [Daily morning and afternoon opportunities] for outdoor play, [when] weather permitting, as specified in §747.2104 of this chapter (relating to What specific activities must I include in a written activity plan?) [permits];

(2) Opportunities for thinking skills and sensory development. Examples of age-appropriate equipment or activities include shape or item [shape/item] sorting toys, stacking or nesting toys, puzzles with less than six pieces, washable board books, washable blocks, snapping and take apart toys;

(3) Opportunities for small-muscle development. Examples of age-appropriate equipment or activities include large-size washable crayons and markers, variety of paper and art materials, table or easel for art, large paintbrushes, non-toxic play-dough, toddler-sized washable cars and trucks, toy animals, and toy people;

(4) Opportunities for large-muscle development. Examples of age-appropriate equipment or activities include low climbing structures, small riding toys, toys for pushing or pulling, variety of light-weight balls for indoor [indoors] and outdoor [outdoors] play, and rhythm instruments;

(5) Opportunities for moderate to vigorous active play, both indoors and outdoors, as specified in §747.2104 of this chapter. Examples of age-appropriate activities include music, songs, simple games and dramatic or imaginary play that encourage movement such as dancing, running, climbing, stretching, walking, and marching;

(6) Opportunities for language development. Examples of age-appropriate equipment or activities include washable, soft animals or puppets, simple picture books, and pictures of familiar items and places;

(7) Opportunities for social and emotional [social/emotional] development. Examples of age-appropriate equipment or activities include dress-up [dress up] clothes and accessories, housekeeping equipment, unbreakable mirrors, washable dolls with accessories, items for practicing buttoning, zipping, lacing, and snapping, and baskets, tubs, and tote bags (not plastic bags) for carrying and toting; and

(8) Opportunities to develop self-help skills such as toiletting, hand washing, and self-feeding [feeding themselves].

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SUBCHAPTER J. BASIC CARE REQUIREMENTS FOR PRE-KINDERGARTEN AGE CHILDREN

26 TAC §747.2507

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§747.2507. *What activities must I provide for a pre-kindergarten age child [ehildren]?*

Daily activities [Activities] for a pre-kindergarten age child [ehildren] must include at least the following:

(1) Opportunities [Daily morning and afternoon opportunities] for outdoor play, [when] weather permitting, as specified in §747.2104 of this chapter (relating to What specific activities must I include in a written activity plan?) [permits];

(2) Opportunities for thinking skills and sensory development. Examples of age-appropriate equipment or activities include sand and water [sand/water] play, blocks, framed puzzles with up to 30 pieces, variety of large[-] stringing beads, and simple board games;

(3) Opportunities for small-muscle development. Examples of age-appropriate equipment or activities include large non-toxic crayons, markers, paint, water colors and various size brushes, adjustable easels, collage materials, chalkboard and chalk, clay or dough [clay/dough] and tools, workbench and accessories, round-end scissors, glue and paste, different types of music and videos, rhythm instruments, and fingerplays [finger plays];

(4) Opportunities for large-muscle development. Examples of age-appropriate equipment or activities include small wagons, light-weight balls of all sizes, small wheelbarrows, tricycles, push toys, swings, slides, climbing equipment, balance beam, hanging bars, and outdoor building materials;

(5) Opportunities for moderate to vigorous active play, both indoors and outdoors, as specified in §747.2104 of this chapter. Examples of age-appropriate active play include active games such as tag and hot potato, dancing and creative movement to music and singing, simple games and dramatic or imaginary play that encourages running, stretching, climbing, walking, and marching;

(6) Opportunities for language development. Examples of age-appropriate equipment or activities include flannel board stories, puppets, and variety of storybooks, writing materials, and stories on tape;

(7) Opportunities for social and emotional [social/emotional] emotional development. Examples of age-appropriate equipment or activities include dress up clothes and accessories, mirrors, dolls, simple props for different themes, puppets, transportation toys, toy animals, and table games; and

(8) Opportunities to develop self-help skills such as toileting, hand washing, returning equipment to storage areas or containers, and serving and self-feeding [feeding themselves].

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SUBCHAPTER K. BASIC CARE REQUIREMENTS FOR SCHOOL-AGE CHILDREN

26 TAC §747.2607

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§747.2607. *What activities must I provide for a school-age child [ehildren]?*

Daily activities [Activities] for a school-age child [ehildren] must include at least the following:

(1) Study time for those who choose to do homework;

(2) Opportunities [Daily morning and afternoon opportunities] for outdoor play, [when] weather permitting [permits];

(3) Opportunities for thinking skills and sensory development. Examples of age-appropriate equipment or activities include sand and water play; construction materials and blocks [materials/blocks]; puzzles with 50 or more pieces; pattern-making materials, such as wood, paper, plastic, beads, ceramic tiles, cloth, or cardboard; games that contain rules and require some skill or strategy; specific skill development materials such as rulers, tape measures, telescopes, weather observation equipment, models of the solar system, and microscopes; books; and magazines;

(4) Opportunities for small-muscle development. Examples of age-appropriate equipment or activities include art and craft materials, such as paints, markers, colored pencils, crayons, clay, weaving, or braiding materials; music and musical instruments of all types; and tape recorders or CD [tape/CD recorders and] players;

(5) Opportunities for large-muscle development. Examples of age-appropriate equipment or activities include [through] balls and sports equipment, such as kick balls, baseballs, soccer balls, basketballs, skates, and horseshoes; riding equipment, such as kick scooters or skateboards [-; skate boards], with knee pads, elbow pads, and helmets; and outdoor and gym equipment, such as slides, swings, climbing apparatus, and upper-body equipment;

(6) Opportunities for active play both indoors and outdoors. Examples of age-appropriate active play include active games such as tag and Simon Says [says], dancing and creative movement to music and singing, simple games, and dramatic or imaginary play that encourages running, stretching, climbing, and walking; and

(7) Opportunities for social and emotional [social/emotional] development. Examples of age-appropriate equipment or activities include dolls with detailed, realistic accessories; role-play materials, including real equipment for library, hospital, post office, costumes, makeup, and disguise materials; puppets and puppet show equipment; transportation toys, such as small vehicles or models; play and art materials; nature materials; and human and animal figurines.

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SUBCHAPTER L. DISCIPLINE

26 TAC §747.2705

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§747.2705. What types of discipline and guidance or punishment are prohibited?

There must be no harsh, cruel, or unusual treatment of any child. The following types of discipline and guidance are prohibited:

- (1) Corporal punishment or threats of corporal punishment;
- (2) Punishment associated with food, naps, or toilet training;
- (3) Pinching, shaking, or biting a child;
- (4) Hitting a child with a hand or instrument;
- (5) Putting anything in or on a child's mouth;
- (6) Humiliating, ridiculing, rejecting, or yelling at a child;
- (7) Subjecting a child to harsh, abusive, or profane language;
- (8) Placing a child in a locked or dark room, bathroom, or closet; and
- (9) Withholding active play or keeping a child inside as a consequence for behavior; and

(10) ~~(9)~~ Requiring a child to remain silent or inactive for inappropriately long periods of time for the child's age, including requiring a child to remain in a restrictive device.

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SUBCHAPTER P. NIGHTTIME CARE

26 TAC §747.3009

STATUTORY AUTHORITY

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The amendment affects Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§747.3009. Must I provide activities for children in nighttime care?

(a) Activities and routines must meet the unique needs of children in nighttime [~~night~~] care. These may include quiet activities, such as homework, reading, puzzles, or board games; time for personal care routines and preparation for sleep, such as brushing teeth, washing hands and face, toileting, and changing clothes; and an evening meal, breakfast, and [~~and/or~~] snack as specified in Subchapter Q of this chapter (relating to Nutrition and Food Service).

(b) Screen time activities:

(1) Must meet the requirements in §747.2105 of this chapter (relating to May I use a screen time activity with a child?); and

(2) May not be used in a cot, bed, or mattress, or one hour before bedtime.

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SUBCHAPTER Q. NUTRITION AND FOOD SERVICE

26 TAC §§747.3101, 747.3103, 747.3109, 747.3111, 747.3119

STATUTORY AUTHORITY

The amendments and new section are authorized by Texas Government Code §531.0055, which provides that the Executive

Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The amendments and new section affect Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§747.3101. What are the basic requirements for meal [snack] and snack times [mealtimes]?

(a) You must serve all children ~~[ready for table food]~~ regular meals and morning and afternoon snacks as specified in this subchapter.

(b) The meals and snacks must follow the meal patterns established by the U.S. Department of Agriculture (USDA) Child and Adult Care Food Program (CACFP) that is administered by the Texas Department of Agriculture. You must follow these patterns regardless of whether you are participating in the program for reimbursement.

(c) ~~[(1)]~~ If you serve breakfast ~~[is served]~~, you do not have to serve a morning snack ~~[is not required]~~.

(d) ~~[(2)]~~ A child must not go more than three hours without a meal or snack being offered, unless the child is sleeping.

~~[(3)]~~ If your child-care home is participating in the Child and Adult Care Food Program (CACFP) administered by the Texas Department of Agriculture, you may elect to meet those requirements rather than those specified in this subsection.

(e) You must serve enough food to allow children second servings from the vegetable, fruit, grain, and milk groups.

(f) ~~[(b)]~~ You must ensure a supply of drinking water is always available to each child ~~[and is served]~~ at every snack, mealtime, and after active play ~~and is served~~ in a safe and sanitary manner.

(g) ~~[(e)]~~ You must not serve beverages with added sugars, such as carbonated beverages, fruit punch, or sweetened milk except for a special occasion such as a holiday or birthday celebration.

(h) ~~[(d)]~~ You must not use food as a reward.

(i) ~~[(e)]~~ You must not serve a child a food identified on the child's food allergy emergency plan as specified in §747.3617 of this chapter ~~[title]~~ (relating to What is a food allergy emergency plan?).

§747.3103. How often must I feed a child in my care?

You must follow the guidelines in Figure 26 TAC §747.3103 when determining how often to feed a child in your care.

Figure: 26 TAC §747.3103

§747.3109. May parents provide meals and ~~[and/or]~~ snacks for their children instead of my child-care home providing them?

(a) Yes. However ~~[; however]~~, your enrollment agreement, or an addendum to the agreement, signed by the parent must include a statement that the parent:

(1) Is ~~[is]~~, choosing to provide the child's meals ~~and~~ ~~[and/or]~~ snacks from home; and

(2) Understands ~~[the parent understands]~~ the child-care home is not responsible for its nutritional value or for meeting the child's daily food needs. ~~[;]~~

(b) If the parent provides a meal but not a snack, you are responsible for providing a snack as specified in this subchapter. ~~[§747.3107 of this title (relating to What kind of foods must I serve for snacks?);]~~

(c) You must provide safe and proper storage and service of the individual meals and snacks provided by parents. ~~[; and]~~

(d) Snacks provided by a parent must not be shared with other children, unless:

(1) A parent is providing baked goods for a celebration or party being held at the home; and

(2) You ensure that the shared snacks meet the needs of children who require special diets.

§747.3111. What are the requirements for a child ~~[How do I meet the needs of children]~~ who requires a ~~[require]~~ special diet ~~[diets]~~ or ~~does~~ ~~[do]~~ not want to eat foods I serve?

(a) You must have written approval from a health-care professional ~~[physician]~~ or a registered or licensed dietician in the child's records to serve a child a therapeutic or special diet.

(b) You must discuss recurring eating problems with the child's parent.

(c) You may encourage, but not force children to eat.

(d) You must not serve nutrient concentrates and supplements such as protein powders, liquid protein, vitamins, minerals, and other nonfood substances without written instructions from a health-care professional.

§747.3119. Must I serve meals family style?

(a) You ~~[No, you]~~ do not have to use family style meal service, although all meals and snack times must:

(1) Be unhurried;

(2) Allow children to feed themselves according to their developmental level; and

(3) Include ~~[include]~~ adult supervision of children.

(b) If meals and snacks are served family style, you must supervise children to prevent cross-contamination of the food.

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

Filed with the Office of the Secretary of State on November 6, 2020.

TRD-202004704

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 438-3269



26 TAC §§747.3103, 747.3105, 747.3107, 747.3115, 747.3116

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and §531.02011, which transferred the regulatory functions of the Texas Department of Family and Protective Services to HHSC. In addition, Texas Human Resources Code §42.042(a) requires HHSC to adopt rules to carry out the requirements of Chapter 42 of the Texas Human Resources Code.

The repeals affect Texas Government Code §531.0055 and Texas Human Resources Code §42.042.

§747.3103. *How often must I feed children in my care?*

§747.3105. *How do I know what a child's daily food needs are?*

§747.3107. *What kind of foods must I serve for snacks?*

§747.3115. *May I serve powdered milk?*

§747.3116. *May I serve fruit or vegetable juices?*

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

Filed with the Office of the Secretary of State on November 6, 2020.

TRD-202004705

Karen Ray

Chief Counsel

Health and Human Services Commission

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 438-3269



TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE JUSTICE DEPARTMENT

CHAPTER 380. RULES FOR STATE-OPERATED PROGRAMS AND FACILITIES SUBCHAPTER C. PROGRAM SERVICES DIVISION 4. HEALTH CARE SERVICES

37 TAC §380.9183

The Texas Juvenile Justice Department (TJJD) proposes to amend §380.9183, concerning Health Care Services for Youth.

SUMMARY OF CHANGES

The amendments to §380.9183 will clarify the manner in which youth in halfway houses receive medical care, including that: 1) nurses provide case management; 2) medical, psychiatric, and dental services are completed by providers in the community; and 3) fees for services are covered through Medicaid or by TJJD.

Changes to §380.9183 will also: 1) specify that several statements regarding health care arrangements apply to TJJD institutions but not to TJJD halfway houses; 2) clarify that procedures for medical care outside of TJJD's normal criteria must be approved by the TJJD medical director in consultation with the executive director *or designee*; 3) establish that the *facility administrator* (instead of the medical provider or psychiatric provider) may authorize medical and pharmacological intervention when required in a life-threatening situation; and 4) clarify that TJJD staff immediately notifies a youth's parent/guardian if *emergency surgery* is recommended.

In addition, changes in §380.9183 relating to medical concerns reported by youth will include the following: 1) clarifying that at *TJJD institutions*, staff contact a nurse if a youth reports a health

concern or if the staff is concerned about a youth's health; and 2) adding that, at TJJD halfway houses, staff call the primary care physician or 911.

FISCAL NOTE

Emily Anderson, Chief Financial Officer, has determined that, for each year of the first five years the amended rule is in effect, there will be no significant fiscal impact for state government or local governments as a result of enforcing or administering the rule.

PUBLIC BENEFITS/COSTS

Scott LePor, TJJD Medical Director, has determined that, for each year of the first five years the amended rule is in effect, the public benefit anticipated as a result of administering the rule will be to provide for better transitioning of youth from halfway houses back into the community.

Ms. Anderson has also determined that there will be no effect on small businesses, micro-businesses, or rural communities. There is no anticipated economic cost to persons who are required to comply with the rule as proposed. No private real property rights are affected by adoption of this rule.

GOVERNMENT GROWTH IMPACT

TJJD has determined that, during the first five years the amended rule is in effect, the rule will have the following impacts.

- (1) The amended rule does not create or eliminate a government program.
- (2) The amended rule does not require the creation or elimination of employee positions at TJJD.
- (3) The amended rule does not require an increase or decrease in future legislative appropriations to TJJD.
- (4) The amended rule does not impact fees paid to TJJD.
- (5) The amended rule does not create a new regulation.
- (6) The amended rule does not expand, limit, or repeal an existing regulation.
- (7) The amended rule does not increase or decrease the number of individuals subject to the rules' applicability.
- (8) The amended rule will not positively or adversely affect this state's economy.

PUBLIC COMMENTS

Comments on the proposal may be submitted within 30 days after publication of this notice to Josh Bauermeister, Policy Writer, Texas Juvenile Justice Department, P.O. Box 12757, Austin, Texas, 78711, or via e-mail to policy.proposals@tjtd.texas.gov.

STATUTORY AUTHORITY

The amended rule is proposed under Section 242.003, Human Resources Code, which requires TJJD to adopt rules appropriate to the proper accomplishment of TJJD's functions and to adopt rules for governing TJJD schools, facilities, and programs.

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

§380.9183. *Health Care Services for Youth.*

- (a) Purpose. This rule establishes basic criteria, standards, and guidelines for delivering health care services to youth assigned to residential facilities operated by the Texas Juvenile Justice Department (TJJD) and to certain identified contract-care [eontract care] programs.

(b) Definitions. See §380.9175 of this title for definitions of certain terms in this rule.

(c) Criteria for Medical Care.

(1) Medical providers provide primary medical care according to the following criteria [established by the TJJJ medical director]:

- (A) lifesaving treatment;
- (B) limb-saving treatment;
- (C) reasonable care to relieve pain;
- (D) reasonable care for a degenerative condition;
- (E) preventive services, including age-appropriate immunizations; and
- (F) treatment for medical conditions that, [which] if left untreated, could result in serious bodily harm.

(2) Procedures outside these criteria for medical care must be approved by the TJJJ medical director in consultation with TJJJ's executive director or designee.

(d) Criteria for Dental Care.

(1) The dentist ensures [assures] equitable access to basic preventive services and essential treatment procedures when disease, significant malfunction, or injury occurs. Treatment priorities, in order, are:

- (A) emergency/urgent--treatment for conditions that will worsen or become life-threatening or acute without immediate intervention;[-]
- (B) interceptive--intermediate treatment for asymptomatic advanced hard- or soft-tissue disease or loss of masticatory function;[-]
- (C) rehabilitative--definitive treatment for chronic hard- or soft-tissue disease or loss of masticatory function; and[-]
- (D) elective or special needs.

(2) The attending dentist may deviate from this prioritization if necessary to protect a youth's overall health.

(3) TJJJ provides neither orthodontic braces nor maintenance of orthodontic braces for youth. However, if a youth has orthodontic braces when admitted to TJJJ, TJJJ provides necessary care to prevent injury to the mouth.

(A) The youth's parent/guardian is responsible for the maintenance and adjustment of orthodontic braces after notification of TJJJ policy.

(B) TJJJ staff may assist youth and parents/guardians in making orthodontic appointments, if needed. Appointments are usually made with the treating orthodontist, although a local orthodontist who agrees to examine and treat the youth may be used.

(C) TJJJ staff may provide transportation for orthodontic care if the staff can accommodate traveling the distance required to return a youth to the treating orthodontist.

(e) Services.

(1) TJJJ administers at least the following services, either directly or through contractual arrangements:

- (A) physical examinations and treatment;
- (B) dental examinations and treatment;

- (C) treatment of injuries;
- (D) mental health evaluations;
- (E) immunizations;
- (F) laboratory and diagnostic tests;
- (G) administration of prescription or non-prescription medication for an illness or condition;
- (H) substance use disorder [chemical dependency] evaluations; and
- (I) examination following use of physical force and/or following decontamination resulting from using oleoresin capsicum spray (pepper spray).

(2) Each TJJJ institution [TJJJ-operated facility] and certain identified contract-care [contract care] programs have a health services administrator designated to act as the local health authority. The local health authority provides coordination and/or supervision of medical services for youth.

(3) Contract health care professionals provide health care services in the infirmary at each TJJJ institution for youth who need increased observation or medical care, but who do not need hospitalization.

(4) At TJJJ [H] institutions:

- (A) nurses are available seven days a week to triage youth health concerns and respond to on-site [onsite] emergencies;
- (B) nurses conduct a regularly scheduled [regularly-scheduled] sick call five days a week to address non-urgent[;] sick-call requests;
- (C) medical and psychiatric providers deliver services on-site [onsite] or via telemedicine or [r] telepsychiatry at least once weekly; and
- (D) dental staff provide [provides] services on-site [on site] on a routine basis.

(5) At TJJJ [H] halfway houses:

- (A) nurses provide case management; and
- ~~[(A) nurses provide on-site case management and consultation on a regularly scheduled basis and are available by telephone as needed;]~~
- (B) medical, psychiatric, and dental services are completed by providers in the community. Fees for services are covered through Medicaid funding or by TJJJ.
- ~~[(B) medical and psychiatric providers deliver services to youth via telemedicine/telepsychiatry and/or at the nearest institution as needed; and]~~
- ~~[(C) dental services are provided at the nearest institution.]~~

(6) When admitted to TJJJ, all youth receive a:

- (A) health screening;
- (B) physical examination, unless a physical examination was performed and documented within the past 90 days;
- (C) mental health screening and evaluation;
- (D) dental screening and examination, unless a dental screening and examination were [have been] performed and documented within the past 180 days; and

(E) vision and hearing screening.

(7) If the vision screening indicates the youth needs a new prescription for eyewear, state-issued prescription eyewear is provided. Youth placed in high-restriction facilities are prohibited from wearing contact lenses, except when medically necessary and when glasses are ineffective for correcting vision.

(8) If the youth fails the hearing screening, the youth is referred to an audiologist for evaluation and treatment as needed.

(9) If the dentist determines a dental cleaning is necessary, the procedure is scheduled, performed by a dental hygienist, and documented in the electronic health [~~medical~~] record.

(10) Youth receive physical and dental examinations annually and treatment as needed, in accordance with (c) and (d) above.

(11) In facilities housing females, obstetrical and gynecological services are available on-site or by referral.

(12) Family planning services are available by referral for youth who request information.

(f) Limitation of Services.

(1) TJJD is not responsible for medical costs incurred by a youth:

(A) on furlough or conditional placement status with a parent, relative, or guardian;

(B) on parole status, unless the youth's placement is in a TJJD-operated/contract residential program;

(C) on escape or abscond [~~escape/abscond~~] status; or

(D) in a detention center or a county facility.

(2) Pharmaceutical, cosmetic, and medical experiments are prohibited. This policy does not preclude individual treatment of a youth who needs a specific medical procedure that is not generally available.

(g) Health Care Requirements.

(1) Facilities housing more than 25 youth must have a central medical room with medical examination facilities.

(2) When youth are in the infirmary, they are supervised by a TJJD staff member at all times.

(3) The physician or dentist at each facility is the decision authority for clinical decisions under their respective areas of responsibility.

(4) The medical provider develops the youth's medical plan of care.

(5) At TJJD institutions, a [A] medical provider is available once each week to provide health care services to youth and to respond to youths' health concerns.

(6) Youth complaints about services they did or did not receive are processed through the youth grievance system in accordance with §380.9331 of this title.

(7) At [In] each TJJD institution [~~TJJD-operated residential program~~], the superintendent, health services administrator, medical provider, and dentist must have regularly scheduled meetings to review health care services at the facility, including any concerns, problems, or barriers related to providing health care. If concerns are identified, a corrective action plan is developed, implemented, and monitored to ensure that issues are adequately addressed.

(8) A youth who, by history or examination, has a serious or life-threatening medical condition may be placed on medical alert status by a medical provider. A nurse may temporarily place a youth on medical alert status until a medical provider can be notified.

(9) The facility administrator [~~medical provider or psychiatric provider~~] may authorize medical and pharmacological intervention when required in a life-threatening situation, consistent with §380.9181 of this title. When intervention requires psychotropic medication, the authorization must meet criteria in §380.9192 of this title.

(10) Each TJJD-operated residential program and certain identified contract-care [~~contract care~~] programs post emergency medical procedures including, but not limited to, how to contact the on-call nurse, if applicable, and medical, dental, and psychiatric providers in an emergency.

(11) Pharmaceutical procedures comply with federal and state laws and accepted industry practices about the acquisition, storage, administration, and documentation of prescription drugs.

(h) Medical Concerns Reported by Youth.

(1) Any youth may request a sick call for the evaluation of health care concerns.

(2) At TJJD institutions, [TJJD] staff [may] contact a nurse if a youth reports a health concern or if the staff is concerned about a youth's health status. At TJJD halfway houses, staff call the primary care physician or 911.

(i) Emergency Room Referrals. At TJJD institutions, emergency [Emergency] room referrals may be authorized only by a medical provider, health services administrator or designee, or the medical or nursing director. In a life-threatening situation, non-medical personnel may contact 911 in accordance with medical emergency procedures.

(j) Notification. TJJD staff immediately notifies a youth's parent/guardian [~~parents or guardians~~] if a serious illness or injury occurs or emergency surgery is recommended.

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

Filed with the Office of the Secretary of State on November 3, 2020.

TRD-202004609

Christian von Wupperfeld

General Counsel

Texas Juvenile Justice Department

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 490-7278



PART 15. TEXAS FORENSIC SCIENCE COMMISSION

CHAPTER 651. DNA, CODIS, FORENSIC ANALYSIS, AND CRIME LABORATORIES SUBCHAPTER C. FORENSIC ANALYST LICENSING PROGRAM

37 TAC §651.209

The Texas Forensic Science Commission ("Commission") proposes an amendment to 37 Texas Administrative Code §651.209, which describes the requirements for forensic analyst license reinstatement. The amendments provide an exemption from elevated coursework requirements for license candidates who have expired and are reinstating a license after an indefinite period of absence from employment at an accredited laboratory. Candidates must be employed at an accredited laboratory to be eligible for licensure. Under the current rules, if a person departs employment from an accredited laboratory and his or her license expires, the candidate may be subject to elevated college coursework and other requirements that did not exist when the candidate was initially licensed. The amendments are necessary to reflect adoptions made by the Commission at its October 23, 2020, quarterly meeting. The amendments are made in accordance with the Commission's forensic analyst licensing authority under Code of Criminal Procedure, Article 38.01 §4-a, which directs the Commission to adopt rules to establish the qualifications for a forensic analyst license and the Commission's rulemaking authority under Code of Criminal Procedure, Article 38.01 §3-a, which directs the Commission to adopt rules necessary to implement Code of Criminal Procedure Article 38.01.

Fiscal Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendment is in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposal. The amendment does not expand any forensic analyst licensing requirement under the current program, but rather exempts license candidates reinstating a license from any elevated coursework requirements that took effect after the candidate was initially licensed.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendment does not impose any direct costs or fees on municipalities in rural communities.

Public Benefit/Cost Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission has also determined that for each year of the first five years the proposed amendment is in effect, the anticipated public benefit will be that licensees with a gap in employment for family reasons, inability to find employment or otherwise, will not be penalized with elevated coursework requirements but will only be subject to requirements in place at the time they were initially licensed.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code §2006.002(c) and (f). Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendment will not have an adverse economic effect on any small or micro business because there are no anticipated economic costs to any person or laboratory who is required to comply with the rule as proposed. The rule does not propose any change in fees or cost for licensure.

Takings Impact Assessment. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute

a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for the first five-year period, implementation of the proposed amendment will have no government growth impact as described in Title 34, Part 1, Texas Administrative Code §11.1. Pursuant to the analysis required by Government Code §2001.221(b), 1) the proposed rule does not create or eliminate a government program; 2) implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions; 3) implementation of the proposed rule does not increase or decrease future legislative appropriations to the agency; 4) the proposed rule does not require an increase or decrease in fees paid to the agency; 5) the proposed rule does not create a new regulation; 6) the proposed rule does not increase or decrease the number of individuals subject to the rule's applicability; and 7) the proposed rule has a neutral effect on the state's economy. The amendment does not expand any forensic analyst licensing requirement under the current program, but rather exempts license candidates reinstating a license from any elevated coursework requirements that took effect after the candidate was initially licensed.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Tomlin, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by December 20, 2020, to be considered by the Commission.

Statutory Authority. The amendment is proposed under Code of Criminal Procedure, Article 38.01 §3-a, which directs the Commission to adopt rules necessary to implement Article 38.01, and Article 38.01 §4-a(d), which directs the Commission to adopt rules to establish the qualifications for a forensic analyst license.

Cross reference to statute. The adoption affects 37 Texas Administrative Code §651.209.

§651.209. Forensic Analyst and Forensic Technician License Reinstatement.

(a) The Commission may reinstate an inactive or expired [analyst's] Forensic Analyst or Technician License upon fulfillment of the following requirements by the licensee:

(1) submission of a signed Did Not Practice form provided by the Commission, stating that the licensee has not represented himself or herself as a forensic analyst in Texas, whether through testimony, interpretation, technical review or forensic analysis during the inactive license period;

(2) payment of a \$220 license reinstatement fee; and

(3) updating of current continuing forensic education requirements status with the Commission.

(b) Specific Coursework and Minimum Education Requirements. A Forensic Analyst or Technician reinstating a license under this section are subject to specific coursework and minimum education requirements in place at the time the Commission initially granted his or her license.

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

Filed with the Office of the Secretary of State on November 4, 2020.

TRD-202004634

Leigh Tomlin

Associate General Counsel

Texas Forensic Science Commission

Earliest possible date of adoption: December 20, 2020

For further information, please call: (512) 784-0037



37 TAC §651.216

The Texas Forensic Science Commission ("Commission") proposes an amendment to 37 Texas Administrative Code §651.216 which describes disciplinary actions the Commission may take against a license holder or applicant for a license. The amendments specify factors the Commission may consider in determining whether to take adverse action against a license holder or applicant. The amendments are necessary to reflect adoptions made by the Commission at its October 23, 2020, quarterly meeting. The amendments are made in accordance with the Commission's forensic analyst licensing authority under Code of Criminal Procedure, Article 38.01 §4-a, which directs the Commission to adopt rules to establish the qualifications for a forensic analyst license and the Commission's rulemaking authority under Code of Criminal Procedure, Article 38.01 §3-a, which directs the Commission to adopt rules necessary to implement Code of Criminal Procedure Article 38.01.

Fiscal Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendment is in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposal. The amendments do not expand any forensic analyst licensing requirement or fee, but rather specify certain factors the Commission may consider in determining the appropriate disciplinary action against a license holder or license applicant who commits misconduct or violates a rule or order of the Commission. Any adverse action taken by the Commission does not include the assessment of fees or fines or impose any additional costs.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendment does not impose any direct costs or fees on municipalities in rural communities.

Public Benefit/Cost Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission has also determined that for each year of the first five years the proposed amendment is in effect, the anticipated public benefit will be the establishment of clear notice for license holders and license applicants regarding the factors considered by the Commission in determining whether to assess disciplinary action or deny a license. Any adverse action taken by the Commission does not include the assessment of fees or fines or impose any additional costs.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code §2006.002(c) and (f). Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendment will not have an ad-

verse economic effect on any small or micro business because there are no anticipated economic costs to any person or laboratory who is required to comply with the rule as proposed. The amendments do not expand any forensic analyst licensing requirement or fee, but rather specify certain factors the Commission may consider in determining the appropriate disciplinary action against a license holder or denial of a license. Any adverse action taken by the Commission does not include the assessment of fees or fines or impose any additional costs.

Takings Impact Assessment. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for the first five-year period, implementation of the proposed amendment will have no government growth impact as described in Title 34, Part 1, Texas Administrative Code §11.1. Pursuant to the analysis required by Government Code §2001.221(b), 1) the proposed rule does not create or eliminate a government program; 2) implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions; 3) implementation of the proposed rule does not increase or decrease future legislative appropriations to the agency; 4) the proposed rule does not require an increase or decrease in fees paid to the agency; 5) the proposed rule does not create a new regulation; 6) the proposed rule does not increase or decrease the number of individuals subject to the rule's applicability; and 7) the proposed rule has a neutral effect on the state's economy. The amendment do not expand any forensic analyst licensing requirement under the current program, but rather expressly addresses factors already considered in disciplinary action determinations by the Commission to provide better clarity to license holders and license applicants.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Tomlin, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by December 20, 2020, to be considered by the Commission.

Statutory Authority. The amendment is proposed under Code of Criminal Procedure, Article 38.01 §3-a, which directs the Commission to adopt rules necessary to implement Article 38.01, and Article 38.01 §4-a(d), which directs the Commission to adopt rules to establish the qualifications for a forensic analyst license.

Cross reference to statute. The adoption affects 37 Texas Administrative Code §651.216.

§651.216. Disciplinary Action.

(a) The Commission may take disciplinary action against a license holder or applicant for a license under certain limited circumstances as set forth in Article 38.01, Code of Criminal Procedure.

(b) **Professional Misconduct Finding.** On a determination by the Commission that a license holder or applicant for a license has committed professional misconduct in accordance with the definition provided in §651.202 of this subchapter (relating to Definitions) and under Article 38.01, Code of Criminal Procedure or violated Article 38.01,

Code of Criminal Procedure, or a rule or order of the Commission under Article 38.01, Code of Criminal Procedure, the Commission may:

- (1) revoke or suspend the person's license;
- (2) refuse to renew the person's license;
- (3) reprimand the license holder; or
- (4) deny the person a license.

(c) Probation. The Commission may place on probation a person whose license is suspended. If a license suspension is probated, the Commission may require the license holder to:

- (1) report regularly to the Commission on matters that are the basis of the probation; or
- (2) continue or review continuing professional education until the license holder attains a degree of skill satisfactory to the Commission in those areas that are the basis of the probation.

(d) Factors in Determining Possible Adverse Action.

(1) In determining the appropriate disciplinary action against a license holder or in assessing whether a prospective applicant shall be granted a license, the Commission may consider the following factors:

- (A) the seriousness of the violation;
- (B) the prevalence of misconduct by the individual;
- (C) the individual's conduct history, including any investigative history by the Commission;
- (D) the harm or potential harm to the laboratory or criminal justice system as a whole;
- (E) attempted concealment of the act by the individual;
- (F) any other relevant factors.

(2) The Commission considers the following factors in determining whether a less severe or less restrictive disciplinary action is warranted:

- (A) candor in addressing the violation, including self-reported and voluntary admissions of the misconduct or violation;
- (B) acknowledgement of wrongdoing and willingness to cooperate with the Commission;
- (C) changes made by the individual to ensure compliance and prevent future misconduct;
- (D) rehabilitative potential;
- (E) other relevant circumstances reducing the seriousness of the misconduct; or
- (F) other relevant circumstances lessening responsibility for the misconduct.

(3) The license holder or license applicant shall have the burden to present evidence regarding any mitigating factors that may apply.

(4) This rule shall not be construed to deny any licensee or applicant subject to disciplinary action by the Commission the right to introduce mitigating evidence in a hearing before the Judicial Branch Certification Commission. This rule also shall not be construed to deny the Texas Forensic Science Commission the right to introduce any evidence supporting any of the factors described above in a hearing before the Judicial Branch Certification Commission

(e) [(d)] Disciplinary Proceedings by the Judicial Branch Certification Commission. The Commission shall give written notice by certified mail of a determination described by subsection (a) of this section to a license holder who is the subject of the determination. The notice must:

- (1) include a brief summary of the alleged misconduct or violation;
 - (2) state the disciplinary action taken by the Commission;
- and

(3) inform the license holder of the license holder's right to a hearing before the Judicial Branch Certification Commission on the occurrence of the misconduct or violation, the imposition of the disciplinary action, or both.

(f) [(e)] Hearing Request. Not later than the 20th day after the date the license holder receives the notice under subsection (d) of this section, the license holder may request a hearing by submitting a written request to the Judicial Branch Certification Commission. If the license holder fails to timely submit a request, the Commission's disciplinary action becomes final and is not subject to review by the Judicial Branch Certification Commission.

(g) [(f)] Judicial Branch Certification Commission Hearing. If the license holder requests a hearing, the Judicial Branch Certification Commission shall conduct a hearing to determine whether there is substantial evidence to support the determination under subsection (a) of this section that the license holder committed professional misconduct or violated this subchapter or a Commission rule or order under this subchapter. If the Judicial Branch Certification Commission upholds the determination, the Judicial Branch Certification Commission shall determine the type of disciplinary action to be taken. The Judicial Branch Certification Commission shall conduct the hearing in accordance with the procedures provided by Subchapter B, Chapter 153, Government Code, as applicable, and the rules of the Judicial Branch Certification Commission.

(h) [(g)] License Status.

(1) If a license holder makes timely and sufficient application for the renewal of a license, the existing license does not expire until the application has been finally determined by the Commission. If the application is denied or the terms of the new license are limited, the existing license does not expire until the last day for seeking review of a Commission decision or a later date fixed by order of the Judicial Branch Certification Commission or Administrative Regional Presiding Judges.

(2) A revocation, suspension, annulment, or withdrawal of a license is not effective unless, before institution of Commission proceedings:

(A) the Commission gives notice by personal service or by registered or certified mail to the license holder of facts or conduct alleged to warrant the intended action; and

(B) the license holder is given an opportunity to show compliance with all requirements of law for the retention of the license.

(3) A Forensic Analyst License remains valid unless it expires without timely application for renewal, is amended, revoked, suspended, annulled or withdrawn, or the denial of a renewal application becomes final. The term or duration of a license is tolled during the period the license is subjected to review by the Judicial Branch Certification Commission or Administrative Regional Presiding Judges. However, the term or duration of a license is not tolled if, during review by the Judicial Branch Certification Commission or Administra-

tive Regional Presiding Judges, the licensee engages in the activity for which the license was issued.

(i) ~~[(h)]~~ Interpreters for Deaf or Hearing Impaired Parties and Witnesses.

(1) In an appeal of a disciplinary action by the Commission, the Commission shall provide an interpreter whose qualifications are approved by the Texas Department of Assistive and Rehabilitative Services to interpret the proceedings for a party or subpoenaed witness who is deaf or hearing impaired.

(2) In this section, "deaf or hearing impaired" means having a hearing impairment, whether or not accompanied by a speech impairment, that inhibits comprehension of the proceedings or communication with others.

(j) ~~[(i)]~~ Informal Disposition of Disciplinary Action Appeals. Unless precluded by law, an informal disposition may be made of an appeal of a disciplinary action by the Commission by:

- (1) stipulation;
- (2) agreed settlement;
- (3) consent order; or
- (4) default.

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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Leigh Tomlin

Associate General Counsel

Texas Forensic Science Commission

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For further information, please call: (512) 784-0037



37 TAC §651.221

The Texas Forensic Science Commission ("Commission") proposes an amendment to 37 Texas Administrative Code §651.221, which describes the requirements for a laboratory license issued for purposes of ensuring the availability of uncommon forensic analysis, timeliness of forensic analysis, and/or service to counties with limited access to forensic analysis. Under the current rule, a laboratory (and its employed analysts) may qualify for licensure under this provision where either (1) a Texas customer requests a type of forensic analysis that is not widely available in accredited forensic laboratories; or (2) the request is necessary to ensure the availability of timely forensic analyses in counties for which access to forensic analyses is limited. The Commission amends the provision to remove qualifying provision (2), because the provision is no longer necessary due to prior rule revisions addressing the same issue. The Commission offers a *De Minimis* Texas Casework license program (37 Texas Administrative Code §651.220) that became effective August 24, 2020, for laboratories that may have otherwise qualified under this provision. The Commission also offers a Temporary License (37 Texas Administrative Code §651.211) for forensic analysts who may have otherwise qualified for licensure under this category. The amendments are necessary to reflect adoptions made by the Commission

at its October 23, 2020, quarterly meeting. The amendments are made in accordance with the Commission's forensic analyst licensing authority under Code of Criminal Procedure, Article 38.01 §4-a, which directs the Commission to adopt rules to establish the qualifications for a forensic analyst license and the Commission's rulemaking authority under Code of Criminal Procedure, Article 38.01 §3-a, which directs the Commission to adopt rules necessary to implement Code of Criminal Procedure Article 38.01.

Fiscal Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for each year of the first five years the proposed amendment is in effect, there will be no fiscal impact to state or local governments as a result of the enforcement or administration of the proposal. There will be no anticipated effect on local employment or the local economy as a result of the proposal. The amendment does not expand any forensic analyst licensing requirement under the current program, but rather removes the option for a laboratory (and its employed analysts) to qualify for licensure where a request for the forensic analysis is necessary to ensure the availability of timely forensic analyses in counties for which access to forensic analyses is limited. This option is already available under the *De Minimis* Texas Casework license program and the Commissions Temporary License program.

Rural Impact Statement. The Commission expects no adverse economic effect on rural communities as the proposed amendment does not impose any direct costs or fees on municipalities in rural communities.

Public Benefit/Cost Note. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission has also determined that for each year of the first five years the proposed amendment is in effect, the anticipated public benefit will be better clarity to laboratories and forensic analysts on the appropriate category of licensure. The Commission offers the *De Minimis* Texas Casework License and the Temporary License for laboratories that may have otherwise qualified under provision (2). There are no anticipated economic costs to persons required to comply with the proposed rule.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. As required by the Government Code §2006.002(c) and (f). Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that the proposed amendment will not have an adverse economic effect on any small or micro business because there are no anticipated economic costs to any person or laboratory who is required to comply with the rule as proposed. The costs for licensure either under the removed provision (2) or the *De Minimis* Texas Casework License are the same.

Takings Impact Assessment. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Government Growth Impact Statement. Leigh M. Tomlin, Associate General Counsel of the Texas Forensic Science Commission, has determined that for the first five-year period, implementation of the proposed amendment will have no government growth impact as described in Title 34, Part 1, Texas Ad-

ministrative Code §11.1. Pursuant to the analysis required by Government Code §2001.221(b), 1) the proposed rule does not create or eliminate a government program; 2) implementation of the proposed rule does not require the creation of new employee positions or the elimination of existing employee positions; 3) implementation of the proposed rule does not increase or decrease future legislative appropriations to the agency; 4) the proposed rule does not require an increase or decrease in fees paid to the agency; 5) the proposed rule does not create a new regulation; 6) the proposed rule does not increase or decrease the number of individuals subject to the rule's applicability; and 7) the proposed rule has a neutral effect on the state's economy. The amendment does not expand any forensic analyst licensing requirement under the current program, but rather requires a laboratory (and its employed analysts) to qualify for licensure under either the *De Minimis* Texas Casework license program or the Commission's Temporary License program.

Request for Public Comment. The Texas Forensic Science Commission invites comments on the proposal from any member of the public. Please submit comments to Leigh M. Tomlin, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701 or leigh@fsc.texas.gov. Comments must be received by December 20, 2020, to be considered by the Commission.

Statutory Authority. The amendment is proposed under Code of Criminal Procedure, Article 38.01 §3-a, which directs the Commission to adopt rules necessary to implement Article 38.01, and Article 38.01 §4-a(d), which directs the Commission to adopt rules to establish the qualifications for a forensic analyst license.

Cross reference to statute. The adoption affects 37 Texas Administrative Code §651.221.

§651.221. Laboratory License for Purpose of Ensuring Availability of Uncommon Forensic Analysis; Timeliness of Forensic Analysis, and/or Service to Counties with Limited Access for Forensic Analysis.

(a) Application. A laboratory may apply to the Commission for a license under this section on a form provided by the Commission. The Commission's Licensing Advisory Committee, and/or the Commission Director or Designee shall review each application and make a determination regarding whether to grant a laboratory license under this section where the laboratory demonstrates[;]

~~[(1)] a Texas customer requests a type of forensic analysis that is not widely available in accredited forensic laboratories. [; or]~~

~~[(2) the request is necessary to ensure the availability of timely forensic analyses in counties for which access to forensic analyses is limited.]~~

(b) Uncommon Forensic Analysis License for Individual Analysts and Technicians. All forensic analysts and technicians employed by a laboratory determined by the Commission's Licensing Advisory

Committee, and/or the Commission Director or Designee to meet the criteria for a license under this section shall be licensed upon fulfillment of the following requirements of the licensed laboratory:

(1) submit to Commission staff a list of the names of each individual analyst or technician to be licensed indicating the forensic discipline(s) for which each analyst or technician is qualified to perform independent casework; and

(2) certify on a form provided by the Commission that each individual named:

(A) has read and understands the Code of Professional Responsibility in this subchapter;

(B) has completed all training materials related to *Brady v. Maryland* discovery obligations and the Michael Morton Act (Code of Criminal Procedure, Article 39.14) as provided by the Commission; and

(C) has participated in the Mandatory Legal and Professional Responsibility Training described in 651.208(e)(1) - (2) of this subchapter (relating to Forensic Analyst and Forensic Technician License Renewal).

(c) Disclosures Required by Uncommon Forensic Analysis License [Analyses, Timeliness of Forensic Analyses, and/or Service to Counties with Limited Access to Forensic Analysis Licensed Laboratories]. Laboratories licensed under this section must comply with all disclosure obligations required under this chapter.

(d) License Term. A laboratory license and corresponding licenses granted under this section shall expire two (2) years from the date of issuance.

(e) Fees. A laboratory licensed under this section must pay the requisite license fee for uncommon forensic analyses for all of the laboratory's licensed forensic analysts and technicians as set forth in this subchapter.

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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Leigh Tomlin

Associate General Counsel

Texas Forensic Science Commission

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