

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 1. ADMINISTRATION

PART 7. STATE OFFICE OF ADMINISTRATIVE HEARINGS

CHAPTER 159. RULES OF PROCEDURE FOR ADMINISTRATIVE LICENSE SUSPENSION HEARINGS

The State Office of Administrative Hearings (SOAH) proposes to amend Chapter 159, Rules of Procedure for Administrative License Suspension Hearings, consisting of Subchapter A, §159.3, 159.5, and 159.7; Subchapter B, §159.51; Subchapter C, §159.101 and §159.103; Subchapter D, §159.151; and Subchapter E, §159.213. SOAH also proposes new §159.105 under Subchapter C.

The existing subchapters have been developed to provide a uniform set of procedural rules to be followed in administrative license suspension hearings at SOAH. The proposed amendments and new rule are to make the language more understandable and to make the rules easier to use.

Thomas H. Walston, General Counsel, has determined that for the first five-year period the amendments and new rule are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules.

Mr. Walston, also has determined that for the first five-year period the amendments and new rule are in effect, the anticipated public benefit will be in providing clearer, more uniform, and better-organized procedures for participants in administrative license suspension hearings at SOAH. There will be no effect on small businesses as a result of enforcing the amendments and new rule, and there is no anticipated economic cost to individuals who are required to comply with the proposed amendments and new rule.

Written comments on the proposal must be submitted within 30 days after publication of the proposed sections in the *Texas Register* to Norma Lopez, Executive Assistant, State Office of Administrative Hearings, to P.O. Box 13025, Austin, Texas 78711-3025, by email to norma.lopez@soah.texas.gov, or by facsimile to (512) 463-7791.

SUBCHAPTER A. GENERAL

1 TAC §§159.3, 159.5, 159.7

The amendments are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to

adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments affect Government Code, Chapters 2001, 2003, and Transportation Code Chapter 524.

§159.3. Definitions.

In this chapter, the following terms have the meaning indicated:

(1) - (15) (No change.)

(16) Public place--Defined in Texas Penal Code §1.07 [Chapter 1,] and Texas Transportation Code §524.001[; Chapter 524].

(17) (No change.)

(18) The following terms are defined in 1 Texas Administrative Code §155.5 (relating to Definitions): Administrative Law Judge or judge; APA; authorized representative; Chief Judge; party; [law;] person; and SOAH.

§159.5. Computation of Time.

Time shall be computed in the manner provided in 1 Texas Administrative Code §155.7. [In computing time periods prescribed by this chapter or by a judge's order, the day of the act, event, or default on which the designated period of time begins to run is not included. The last day of the period is included, unless it is a Saturday, a Sunday, an official state holiday, or another day on which SOAH is closed, in which case the time period will be deemed to end on the next day that SOAH is open. When these rules specify a deadline or set a number of days for filing documents or taking other actions, the computation of time shall be by calendar days rather than business days, unless otherwise provided in this chapter or a judge's order. However, if the period within which to act is five days or less, the intervening Saturdays, Sundays, and legal holidays are not counted, unless this chapter or a judge's order otherwise specifically provides.]

§159.7. Other SOAH Rules of Procedure.

Other SOAH rules of procedure found at Chapters 155 of this title (relating to Rules of Procedure), 157 of this title (relating to Temporary Administrative Law Judges) and 161 of this title (relating to Requests for Records) may apply in contested cases under this chapter unless there are specific applicable procedures set out in this chapter. The rules that specifically apply include:

(1) Subchapter A, §§155.151 - 155.157 (relating to Assignment of Judges to Cases, Disqualification or Recusal of Judges, Powers and Duties, Orders, and Sanctioning Authority);

[(1) Subchapter D, §155.151 of this title (relating to Assignment of Judges to Cases);]

[(2) Subchapter D, §155.153 of this title (relating to Powers and Duties);]

(2) [(3)] Subchapter E, §155.201 of this title (relating to Representation of Parties);

(3) [(4)] Subchapter I, §155.417 of this title (relating to Stipulations);

(4) [(5)] Subchapter I, §155.425 of this title (relating to Procedure at Hearing);

(5) [(6)] Subchapter I, §155.431 of this title (relating to Conduct and Decorum);

(6) [(7)] §157.1 of this title (relating to Temporary Administrative Law Judges); and

(7) [(8)] §161.1 of this title (relating to Charges for Copies of Public Information).

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 June 6, 2016.

TRD-201602848

Thomas H. Walston

General Counsel

State Office of Administrative Hearings

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-1276



SUBCHAPTER B. REPRESENTATION

1 TAC §159.51

The amendments are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments affect Government Code, Chapters 2001, 2003, and Transportation Code Chapter 524.

§159.51. *Withdrawal of Counsel.*

(a) - (b) (No change.)

(c) If the motion to withdraw is granted, the withdrawing attorney shall immediately forward the notice of hearing, all additional information about settings and deadlines, and any discovery obtained for the case to a self-represented defendant or to the substitute attorney for a defendant who is represented.

~~[(c) If the motion to withdraw is granted, the withdrawing attorney shall immediately notify the defendant in writing of any additional settings or deadlines of which the attorney has knowledge at the time of the withdrawal and about which the attorney has not already notified the defendant.]~~

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 June 6, 2016.

TRD-201602849

Thomas H. Walston

General Counsel

State Office of Administrative Hearings

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-1276

SUBCHAPTER C. WITNESSES AND SUBPOENAS

1 TAC §§159.101, 159.103, 159.105

The amendments and new rule are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments and new rule affect Government Code, Chapters 2001, 2003, and Transportation Code Chapter 524.

§159.101. *Subpoenas Generally [Breath Test Operator and Technical Supervisor].*

(a) Scope.

(1) A subpoena may command a person to give testimony for an ALR hearing and/or produce designated documents or tangible things in the actual possession of that person.

(2) A subpoena must be issued on the form provided at www.soah.texas.gov.

(3) The party that causes a subpoena to be issued must take reasonable steps to avoid imposing undue burden or expense on the person served.

(4) A party or attorney that violates the requirements of this subchapter will be subject to sanctions as determined by the judge, including, but not limited to, the loss of authority to issue subpoenas for ALR hearings.

(5) If a party that requests or issues a subpoena fails to timely appear at the hearing, any subpoenaed witnesses will be released from the subpoena and the subpoena will have no continuing effect.

(b) Attorney-issued subpoenas. An attorney who is authorized to practice law in the State of Texas may issue up to two subpoenas for witnesses to appear at a hearing. One subpoena may be issued to compel the presence of the peace officer who was primarily responsible for the defendant's stop or initial detention and the other may be issued to compel the presence of the peace officer who was primarily responsible for finding probable cause to arrest the defendant. If the same officer was primarily responsible for both the defendant's stop and arrest, the attorney may issue only one subpoena.

(c) Subpoena request filed with judge.

(1) Not later than ten days prior to the hearing, a party may file a subpoena request with SOAH that demonstrates good cause to compel a witness's appearance in person or by telephone or video conference, when:

(A) a party intends to call more than two peace officers to testify as witnesses;

(B) a party seeks to compel the presence of witnesses who are not peace officers;

(C) a party seeks to compel the presence of the breath test operator or technical supervisor and, by affidavit based on personal knowledge, has established a genuine issue concerning the validity of the breath test that requires the appearance of the witness to resolve; or

(D) a defendant, who is not represented by an attorney, seeks to compel the presence of witnesses.

(2) A request for subpoena that is not granted prior to the hearing may be re-urged at the hearing. If the judge grants the request for a subpoena at the hearing, the hearing shall reconvene at a later date for the appearance of the witness.

(d) Judge's discretion. The decision to issue a subpoena, as described in subsection (c) of this section, shall be in the sound discretion of the judge assigned to the case. The judge shall refuse to issue a subpoena if:

(1) the testimony or documentary evidence is immaterial, irrelevant, or would be unduly repetitious; or

(2) good cause has not been demonstrated.

[(a) A request for the issuance of a subpoena for the appearance of a breath test operator or technical supervisor shall include an affidavit based on personal knowledge establishing a genuine issue concerning the validity of the breath test that requires the appearance of the witness to resolve. A request for subpoena that is not granted prior to the hearing may be re-urged at the hearing if the evidence raises such an issue. If the ALJ grants the request during the hearing, the hearing shall reconvene at a later date for the appearance of the witness.]

[(b) The provisions found at §159.103(a), (d), (f)(1), (3), and (4), (g)(3), (h) and (i) of this title (relating to Subpoenas) also apply to this section.]

§159.103. Issuance and Service of Subpoenas.

(a) A party that issues or is granted a subpoena shall be responsible for having the subpoena served. The subpoena may be served at any place within the State of Texas by any sheriff or constable of the State of Texas, or any person who is not a party to the case and is 18 years of age or older. A subpoena must be served by delivering a copy to the witness. If the witness is a party and is represented by an attorney of record in the proceeding, the subpoena may be served on the witness's attorney. A subpoena may also be served by accepted alternative methods established by a peace officer's law enforcement agency.

(b) A subpoena must be served at least five days before the hearing.

(c) After a subpoena is served upon a witness, the return of service of the subpoena must be filed at SOAH at least three days prior to the hearing. Upon the subpoenaed witness's appearance at the hearing, the party that issued the subpoena shall tender a witness fee check or money order in the amount of \$10 to the witness. In addition, if the witness traveled more than 25 miles round-trip to the hearing from the witness's office or residence, mileage reimbursement must also be tendered at the same time. The amount of mileage reimbursement will be that listed in the state mileage guide at <https://fm.x.cpa.state.tx.us/fm/travel/travelrates.php>.

(d) If the hearing is conducted telephonically, the party that issued the subpoena shall mail the witness fee check or money order to the witness within one day of the conclusion of the hearing unless the witness fails to appear at the hearing. Also within one day of the conclusion of the hearing, the party shall forward to SOAH a certification that the witness fee or money order was mailed to the witness.

(e) If a party that served a subpoena on a witness fails to appear at a hearing, that party shall mail the witness fee check or money order to the witness within one day from receipt of a default decision or any other order issued by the judge ordering payment of the fee and mileage reimbursement. Also within one day from receipt of the judge's order, the party shall forward to SOAH a certification that the witness fee or money order was mailed to the witness.

(f) If special equipment will be required in order to offer subpoenaed documents or tangible things, the party seeking their admis-

sion shall be required to supply the necessary equipment. The party requesting a subpoena duces tecum may be required to advance the reasonable costs of reproducing the documents or tangible things requested.

(g) Service upon opposing party.

(1) A party that issues a subpoena must serve the opposing party with a copy of the subpoena on the same date it is issued.

(2) A party that requests a subpoena from a SOAH judge must serve the opposing party with a copy of the request at the time it is filed with SOAH.

(3) When a subpoena has been served, and not less than three days prior to the hearing, a party that has served a subpoena must provide the opposing party with a copy of the return of service.

(4) If a party fails to serve a copy of a subpoena on the opposing party, the subpoena may be rendered unenforceable by the judge.

(h) Continuing effect. A properly issued subpoena remains in effect until the judge releases the witness or grants a motion to quash or for protective order. If a hearing is rescheduled and a subpoena is extended, and unless the judge specifically directs otherwise, the party that requested the continuance shall promptly notify any subpoenaed witnesses of the new hearing date.

[(a) Scope.]

[(1) A subpoena may command a person to give testimony for an ALR hearing and/or produce designated documents or tangible things in the actual possession of that person.]

[(2) The party who causes a subpoena to be issued must take reasonable steps to avoid imposing undue burden or expense on the person served.]

[(3) If a party that requests or issues a subpoena fails to timely appear at the hearing, any subpoenaed witnesses will be released.]

[(b) Attorney-issued subpoenas. An attorney who is authorized to practice law in the State of Texas may issue up to two subpoenas for witnesses to appear at a hearing. One subpoena may be issued to compel the presence of the peace officer who was primarily responsible for the defendant's stop or initial detention and the other may be issued to compel the presence of the peace officer who was primarily responsible for finding probable cause to arrest the defendant. If the same officer was primarily responsible for both the defendant's stop and arrest, the attorney may issue only one subpoena.]

[(c) Subpoena request filed with judge. No later than ten days prior to the hearing, a party may file a subpoena request with SOAH that demonstrates good cause to compel a witness's appearance in person or by telephone or video conference, when:]

[(1) a party intends to call more than two peace officers to testify as witnesses;]

[(2) a party seeks to compel the presence of witnesses who are not peace officers; or]

[(3) a defendant, who is not represented by an attorney, seeks to compel the presence of witnesses.]

[(d) Subpoena form. A subpoena must be issued on the form provided at www.soah.state.tx.us.]

[(e) Judge's discretion. The decision to issue a subpoena, as described in subsection (c) of this section, shall be in the sound discre-

tion of the judge assigned to the case. The judge shall refuse to issue a subpoena if:}]

[(1) the testimony or documentary evidence is immaterial, irrelevant, or would be unduly repetitious; or}]

[(2) good cause has not been demonstrated.}]

[(f) Service upon witness.}]

[(1) The party who issues or is granted a subpoena shall be responsible for having the subpoena served in accordance with Texas Rule of Civil Procedure 176.5, or by accepted alternative methods established by a peace officer's law enforcement agency.}]

[(2) A subpoena must be served at least five calendar days before the hearing.}]

[(3) After a subpoena issued by an attorney or judge is served upon a witness, the return of service of the subpoena must be filed at SOAH at least three calendar days prior to the hearing. Upon the subpoenaed witness's appearance at the hearing, the party who issued the subpoena shall tender a witness fee check or money order in the amount of \$10 to the witness. In addition, if the witness traveled more than 25 miles round-trip to the hearing from the witness's office or residence, mileage reimbursement must also be tendered at the same time. The amount of mileage reimbursement will be that listed in the state mileage guide at <https://fm.xcpa.state.tx.us/fm/travel/travelrates.php>.}]

[(4) If the hearing is conducted telephonically, the party who issued the subpoena shall mail the witness fee check or money order to the witness within one business day of the conclusion of the hearing unless the witness fails to appear at the hearing. Also within one business day of the conclusion of the hearing, the party shall forward to SOAH a certification that the witness fee or money order was mailed to the witness.}]

[(5) If a party who served a subpoena on a witness fails to appear at a hearing, that party shall mail the witness fee check or money order to the witness within one business day from receipt of a default decision or any other order issued by the Administrative Law Judge ordering payment of the fee and mileage reimbursement. Also within one business day from receipt of the Administrative Law Judge's order the party shall forward to SOAH a certification that the witness fee or money order was mailed to the witness.}]

[(6) A party that fails to tender a witness fee or mileage reimbursement or fails to forward the certification to SOAH, as set out above, will be subject to sanctions as determined by the Administrative Law Judge, including, but not limited to, the loss of authority to issue subpoenas for Administrative License Revocation hearings.}]

[(7) If special equipment will be required in order to offer subpoenaed documents or tangible things, the party seeking their admission shall be required to supply the necessary equipment. The party requesting a subpoena duces tecum may be required to advance the reasonable costs of reproducing the documents or tangible things requested.}]

[(g) Service upon opposing party.}]

[(1) A party that issues a subpoena under subsection (b) of this section must serve the opposing party with a copy of the subpoena on the same date it is issued.}]

[(2) A party that requests a subpoena under subsection (c) of this section must serve the opposing party with a copy of the request at the time it is filed with SOAH.}]

[(3) A party that serves a subpoena must provide the opposing party with a copy of the return of service when the subpoena has been served and no less than three calendar days prior to the hearing.}]

[(h) Continuing effect. A properly issued subpoena remains in effect until the judge releases the witness or grants a motion to quash or for protective order. If a hearing is rescheduled and a subpoena is extended, and unless the judge specifically directs otherwise, the party who requested the continuance shall promptly notify any subpoenaed witnesses of the new hearing date.}]

[(i) Motion to quash or for protective order.}]

[(1) On behalf of a subpoenaed witness, a party may move to quash a subpoena or for a protective order. A party that moves to quash a subpoena must serve the motion on the other party at the time the motion is filed with SOAH.}]

[(2) A party may seek an order from the judge at any time after the motion to quash or motion for protective order has been filed.}]

[(3) In ruling on motions to quash or for protection, the judge must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of privileged material or information, and protection from undue burden or expense. The judge also may impose reasonable conditions on compliance with a subpoena.}]

[(4) If a subpoena request is denied or if a subpoena is quashed, any witness fee or mileage reimbursement fee that has been tendered to a witness or filed with SOAH shall be returned to the party who tendered the fees.}]

§159.105. Motions to Quash or for Protective Order.

(a) On behalf of a subpoenaed witness, a party may move to quash a subpoena or for a protective order. A party that moves to quash a subpoena must serve the motion on the other party at the time the motion is filed with SOAH.

(b) A party may seek an order from the judge at any time after the motion to quash or motion for protective order has been filed.

(c) In ruling on motions to quash or for protection, the judge must provide a person served with a subpoena an adequate time for compliance, protection from disclosure of privileged material or information, and protection from undue burden or expense. The judge also may impose reasonable conditions on compliance with a subpoena.

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 June 6, 2016.

TRD-201602850

Thomas H. Walston

General Counsel

State Office of Administrative Hearings

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-1276



SUBCHAPTER D. DISCOVERY

1 TAC §159.151

The amendments are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government

Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments affect Government Code, Chapters 2001, 2003, and Transportation Code Chapter 524.

§159.151. Prehearing Discovery.

(a) A request for discovery may not be filed before the request for hearing has been received by the Department. [The scope of prehearing discovery in these proceedings is as follows:]

{(1) A defendant shall be allowed to review, inspect and obtain copies of any non-privileged documents or records in DPS's ALR file or in the possession of DPS's ALR Division. All requests for discovery must be in writing and shall be served upon DPS as prescribed in 37 TAC §17.16 (relating to Service on the Department of Certain Items Required to be Served on, Mailed to, or Filed with the Department). The request for discovery may not be filed with DPS sooner than the date of the request for hearing and may not be filed sooner than five days from the date of the notice of suspension. Upon a showing of harm by the defendant, and upon a showing of a proper request for discovery, no document in the ALR Division's actual possession will be admissible unless it was provided to the defendant within five business days of the receipt of the request for production. If the ALR Division does not have any or all the documents in its actual possession, it shall respond within five business days of defendant's request, setting out that it does not have the documents in its actual possession. DPS has a duty to supplement all its discovery responses within five business days from the time DPS's ALR Division receives possession of the discoverable documents. If a document is received by the defendant fewer than ten calendar days prior to the scheduled hearing, the judge shall grant a continuance on the request of a party. The judge may grant only one continuance for DPS's production of documents fewer than ten calendar days prior to the scheduled hearing.}

{(2) If a request for inspection, maintenance and/or repair records for the instrument used to test the defendant's specimen is made by the defendant, and those records are in the actual possession of DPS, DPS shall supply such records to the defendant within five days of receipt of the request, provided however, that the records to be provided shall be for the period covering 30 days prior to the test date and 30 days following the test date. If DPS fails to provide the properly requested records after the defendant has paid reasonable copying charges for the records, evidence of the breath specimen shall not be admitted into evidence.}

{(3) Depositions, interrogatories, and requests for admission shall not be permitted in ALR proceedings.}

{(4) Notwithstanding paragraph (1) of this section, if a party believes evidence from a third party is relevant and probative to the case, the party may request issuance of a subpoena duces tecum pursuant to §159.103 of this title (relating to Subpoenas) to have the evidence produced at the hearing. If a person subpoenaed under this section does not appear, the judge may grant a continuance to allow for enforcement of the subpoena.}

{(5) Notwithstanding anything to the contrary contained in this section, DPS has the right to request non-privileged documents from the defendant. Except in cases where sanctions may be sought for abuse of discovery under §155.157 of this title (relating to Sanctioning Authority), all requests from DPS shall be made under the provisions of this section.}

(b) No party shall file copies of discovery requests with SOAH.

(c) Depositions, interrogatories, and requests for admission shall not be permitted in ALR proceedings.

(d) Both parties have the right to review, inspect, and obtain copies of any non-privileged documents or records in the other party's possession.

(e) A request for discovery must be on a separate document from other pleadings and notices and clearly labeled as a request for discovery.

(f) A defendant's request for discovery from DPS's ALR Division shall be served in the manner specified in 37 Texas Administrative Code §17.16 (relating to Service on the Department of Certain Items Required to be Served on, Mailed to, or Filed with the Department). DPS's request shall be served on Defendant at the address of record.

(g) Except as provided in subsection (j) of this section, responses to discovery must be sent to the requesting parties within five days after receipt of the request.

(h) If a party does not have any or all of the documents in its actual possession, it shall respond within five days of the request, stating that it does not have the documents in its actual possession. A party must supplement all its discovery responses within five days from the time the party receives the discoverable documents.

(i) If a document sought through discovery is received by the requesting party fewer than ten days before the scheduled hearing, the judge may grant a continuance on the request of that party. The judge may grant only one continuance based on recently obtained discovery.

(j) A defendant may request inspection, maintenance and/or repair records for the instrument used to test the defendant's breath specimen for the period covering 30 days prior to the test date and 30 days following the test date. If the records are in the actual possession of DPS, DPS shall supply the records to the defendant within ten days of receipt of the request. If DPS fails to provide properly requested records after the defendant has paid reasonable copying charges for them, evidence of the breath specimen shall not be admitted into evidence.

(k) A party that seeks relevant, probative records from a third party may request issuance of a subpoena duces tecum pursuant to Subchapter C (relating to Witnesses and Subpoenas) to have the evidence produced at the hearing. If a person subpoenaed under this section does not appear, the judge may grant a continuance to allow for enforcement of the subpoena.

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 June 6, 2016.

TRD-201602851

Thomas H. Walston

General Counsel

State Office of Administrative Hearings

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-1276



SUBCHAPTER E. HEARING AND PREHEARING

1 TAC §159.213

The amendments are proposed under Government Code, Chapter 2003, §2003.050, which requires SOAH to adopt procedural rules that relate to the hearings it conducts, and Government Code, Chapter 2001, §2001.004, which requires agencies to adopt rules of practice setting forth the nature and requirements of formal and informal procedures.

The proposed amendments affect Government Code, Chapters 2001, 2003, and Transportation Code Chapter 524.

§159.213. *Failure to Attend Hearing and Default.*

(a) Upon proof by DPS that notice of the hearing on the merits was sent [mailed] to defendant's or, if defendant has legal representation, to defense counsel's last known address, and that notwithstanding such notice, defendant failed to appear, defendant's right to a hearing on the merits is waived. A rebuttable presumption that proper notice was given to defendant may be established by the introduction of a notice of hearing dated not less than 11 days prior to the hearing date and addressed to defendant's or defense counsel's last known address, as reflected on defendant's notice of suspension, request for hearing, driving record or similar documentation presented by DPS. Under those circumstances, the judge will proceed in defendant's absence and enter a default order upon DPS's motion.

(b) (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 June 6, 2016.

TRD-201602852

Thomas H. Walston

General Counsel

State Office of Administrative Hearings

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-1276



PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 354. MEDICAID HEALTH SERVICES

SUBCHAPTER A. PURCHASED HEALTH SERVICES

DIVISION 3. MEDICAID HOME HEALTH SERVICES

1 TAC §354.1039

The Texas Health and Human Services Commission (HHSC) proposes amendments to §354.1039, concerning Home Health Services Benefits and Limitations.

BACKGROUND AND JUSTIFICATION

Currently, §354.1039 requires that a prior authorization request for repairs of durable medical equipment (DME) or appliances must include a statement or medical information from the attending physician substantiating that the medical appliance or equipment continues to serve a specific medical purpose and an itemized estimated cost list of the repairs.

The requirement for a statement from the attending physician is administratively burdensome on DME providers requesting prior authorization for the repair of a DME or appliance. In addition, it is not required by federal law. Therefore, HHSC proposes to remove this requirement.

SECTION-BY-SECTION SUMMARY

Proposed §354.1039(a)(4)(B)(iii)(I) removes the requirement that a request for repair of DME or appliances include a statement or medical information from the attending physician substantiating that the medical appliance or equipment continues to serve a specific medical purpose.

Other changes are made throughout the rule to correctly reference HHSC, correct punctuation and capitalization errors, and make other nonsubstantive changes for accuracy and readability.

FISCAL NOTE

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that during the first five-year period the amended rule is in effect, there will be no impact to costs and revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

HHSC has determined that there will be no adverse economic effect on small businesses or micro-businesses to comply with the amended rule. The proposal removes an administrative burden on providers; therefore, no small business or micro-business will be required to change current business practices to their detriment.

PUBLIC BENEFIT AND COST

Gary Jessee, State Medicaid Director, has determined that for each year of the first five years the rule is in effect, the public will benefit from the adoption of the rule. The anticipated public benefit will be that DME repair will be easier to obtain.

Ms. Rymal has also determined that there are no probable economic costs to persons who are required to comply with the amended rule.

HHSC has determined that the amended rule will not affect a local economy. There is no anticipated negative impact on local employment.

REGULATORY ANALYSIS

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. A "major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that this 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 §2007.043 of the Government Code.

PUBLIC COMMENT

Written comments on the proposal may be submitted to Kristie Kloss, Medical Benefits Policy Manager, 4900 North Lamar Boulevard, Mail Code H600, Austin, Texas 78751-2316; by fax to (512) 730-7472; or by e-mail to kristie.kloss@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas.

The proposed amendment implements Texas Human Resources Code Chapter 32 and Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§354.1039. Home Health Services Benefits and Limitations.

(a) The Health and Human Services Commission or its designee (HHSC) [State] determines authorization requirements and limitations for covered home health service benefits. The home health agency is responsible for obtaining prior authorization where specified for the healthcare service, supply, equipment, or appliance. Home health service benefits include the following:

(1) Skilled nursing. Nursing services provided by a registered nurse (RN) or [who is currently licensed by the Board of Nurse Examiners for the State of Texas and/or a] licensed vocational nurse (LVN) licensed by the Texas Board of Nursing [Vocational Nurse Examiners] provided on a part-time or intermittent basis and furnished through an enrolled home health agency are covered benefits. Billable nursing visits may also include:

(A) nursing visits required to teach the recipient, the primary caregiver, a family member and/or neighbor how to administer or assist in a service or activity that [which] is necessary to the care and/or treatment of the recipient in a home setting;

(B) RN visits for skilled nursing observation, assessment, and evaluation, provided a physician specifically requests that a nurse visit the recipient for this purpose.

(i) The physician's request must reflect the need for the assessment visit.

(ii) Nursing visits for the primary purpose of assessing a recipient's care needs to develop a plan of care are considered administrative and are not billable; and

(C) RN visits for general supervision of nursing care provided by a home health aide and/or others over whom the RN is administratively or professionally responsible.

(2) Home health aide services. Home health aide services to provide personal care under the supervision of an RN, a licensed physical therapist (PT), or an occupational therapist (OT) employed by the home health agency are covered benefits.

(A) The primary purpose of a home health aide visit must be to provide personal care services.

(B) Duties of a home health aide include the performance of simple procedures such as personal care, ambulation, exercise, range of motion, safe transfer, positioning, and household services essential to health care at home; assistance with medications that are ordinarily self-administered; reporting changes in the patient's condition and needs; and completing appropriate records.

(C) Written instructions for home health aide services must be prepared by an RN or therapist as appropriate.

(D) The requirements for home health aide supervision are as follows.

(i) When only home health aide services are being furnished to a recipient, an RN must make a supervisory visit to the recipient's residence at least once every 60 days. These supervisory visits must occur when the aide is furnishing patient care.

(ii) When skilled nursing care, PT, or OT are also being furnished to a recipient, an RN must make a supervisory visit to the recipient's residence at least every two weeks.

(iii) When only PT or OT is furnished in addition to the home health aide services, the appropriate skilled therapist may make the supervisory visits in place of an RN.

(E) Visits made primarily for performing housekeeping services are not covered services.

(3) Medical supplies. Medical supplies are covered benefits if they meet the following criteria.

(A) Medical supplies must be:

(i) documented in the recipient's plan of care as medically necessary and used for medical or therapeutic purposes;

(ii) supplied:

(I) through an enrolled home health agency in compliance with the recipient's plan of care; or

(II) [(iii)] [supplied] by an enrolled medical supplier under written, signed, and dated physician's prescription; and

(iii) [(iv)] prior authorized unless otherwise specified by HHSC [the department].

(B) Items which are not listed in subparagraph (C) of this paragraph may be medically necessary for the treatment or therapy of qualified recipients. If a prior authorization request is received for these items, consideration will be given to the request. Approval for reasonable amounts of the requested items may be given if circumstances justify the exception and the need is documented.

(C) Covered items include[; but are not limited to]:

(i) colostomy and ileostomy care supplies;

(ii) urinary catheters, appliances and related supplies;

(iii) pressure pads including elbow and heel protectors;

(iv) incontinent supplies to include incontinent pads or diapers for clients over the age of four for medical necessity as determined by the physician;

(v) crutch and cane tips;

(vi) irrigation sets;

(vii) supports and abdominal binders (not to include braces, orthotics, or prosthetics);

(viii) medicine chest supplies not requiring a prescription (not to include vitamins or personal care items such as soap or shampoos);

(ix) syringes, needles, IV tubing and/or IV administration setups including IV solutions generally used for hydration or prescriptive additives;

- (x) dressing supplies;
 - (xi) thermometers;
 - (xii) suction catheters;
 - (xiii) oxygen and related respiratory care supplies;
- or
- (xiv) feeding related supplies.

(4) Durable medical equipment (DME). Durable Medical Equipment must meet the following requirements to qualify for reimbursement under Medicaid home health services.

(A) DME must:

(i) be medically necessary and the appropriateness of the health care service, supply, equipment, or appliance prescribed by the physician for the treatment of the individual recipient and delivered in his place of residence must be documented in the plan of care and/or the request form;[-]

(ii) be prior authorized unless otherwise specified by HHSC [the department];

(iii) meet the recipient's existing medical and treatment needs;

(iv) be considered safe for use in the home; and

(v) be provided through an:

(I) enrolled home health agency under a current physician's plan of care; or

(II) [(vi)] [be provided through an] enrolled DME supplier under a written, signed, and dated physician's prescription.

(B) HHSC [The department] will determine whether DME will be rented, purchased, or repaired based upon the duration and use needs of the recipient.

(i) Periodic rental payments are made only for the lesser of:

(I) the period of time the equipment is medically necessary; or

(II) when the total monthly rental payments equal the reasonable purchase cost for the equipment.

(ii) Purchase is justified when the estimated duration of need multiplied by the rental payments would exceed the reasonable purchase cost of the equipment or it is otherwise more practical to purchase the equipment.

(iii) Repair of durable medical equipment and appliances will be considered based on the age of the item and the cost to repair the item.

(I) A request for repair of durable medical equipment or appliances must include [a statement of medical information from the attending physician substantiating that the medical appliance or equipment continues to serve a specific medical purpose and] an itemized estimated cost list of the repairs. Rental equipment may be provided to replace purchased medical equipment or appliances for the period of time it will take to make necessary repairs to purchased medical equipment or appliances.

(II) Repairs will not be authorized in situations where the equipment has been abused or neglected by the patient, patient's family, or caregiver.

(III) Routine maintenance of rental equipment is the responsibility of the provider.

(C) Covered medical appliances and equipment (rental, purchase, or repairs) include[; but are not limited to]:

(i) manual or powered wheelchairs;

(I) non-customized including medically justified seating, supports, and equipment; or

(II) customized, specifically tailored or individualized, powered wheelchairs including appropriate medically justified seating, supports and equipment not to exceed an amount specified by HHSC [the department].

(ii) canes, crutches, walkers, and trapeze bars;

(iii) bed pans, urinals, bedside commode chairs, elevated commode seats, bath chairs/benches/seats;

(iv) electric and non-electric hospital beds and mattresses;

(v) air flotation or air pressure mattresses and cushions;

(vi) bed side rails and bed trays;

(vii) reasonable and appropriate appliances for measuring blood pressure and blood glucose suitable to the recipient's medical situation to include replacement parts and supplies;

(viii) lifts for assisting recipient to ambulate within residence;

(ix) pumps for feeding tubes and IV administration; and

(x) respiratory or oxygen related equipment.

(D) Medical equipment or appliances not listed in subparagraph (C) of this paragraph may, in exceptional circumstances, be considered for payment when it can be medically substantiated as a part of the treatment plan that such service would serve a specific medical purpose on an individual case basis.

(5) Physical therapy. To be payable as a home health benefit, physical therapy services must:

(A) be provided by a physical therapist who is currently licensed by the Texas Board of Physical Therapy Examiners, or physical therapist assistant who is licensed by the Texas Board of Physical Therapy Examiners who assists and is supervised by a licensed physical therapist;

(B) be for the treatment of an acute musculoskeletal or neuromuscular condition or an acute exacerbation of a chronic musculoskeletal or neuromuscular condition;

(C) be expected to improve the patient's condition in a reasonable and generally predictable period of time, based on the physician's assessment of the patient's restorative potential after any needed consultation with the therapist; and

(D) not be provided when the patient has reached the maximum level of improvement. Repetitive services designed to maintain function once the maximum level of improvement has been reached are not a benefit. Services related to activities for the general good and welfare of patients such as general exercises to promote overall fitness and flexibility and activities to provide diversion or general motivation are not reimbursable.

(6) Occupational therapy. To be payable as a home health benefit, occupational therapy services must be:

(A) provided by one who is currently registered and licensed by the Texas Board of Occupational Therapy Examiners or by an occupational therapist assistant who is licensed to assist in the practice of occupational therapy and is supervised by an occupational therapist;

(B) for the evaluation and function-oriented treatment of individuals whose ability to function in life roles is impaired by recent or current physical illness, injury or condition; and

(C) specific goal directed activities to achieve a functional level of mobility and communication and to prevent further dysfunction within a reasonable length of time based on the therapist's evaluation and physician's assessment and plan of care.

(7) Insulin syringes and needles. Insulin syringes and needles must meet the following requirements to qualify for reimbursement under Medicaid home health services.

(A) Pharmacies enrolled in the Medicaid Vendor Drug Program may dispense insulin syringes and needles to eligible Medicaid recipients with a physician's prescription.

(B) Prior authorization is not required for an eligible recipient to obtain insulin syringes and needles.

(C) Insulin syringes and needles obtained in accordance with this section will be reimbursed through the Medicaid Vendor Drug Program.

(D) A physician's plan of care is not required for an eligible recipient to obtain insulin syringes and needles under this section.

(8) Diabetic supplies and related testing equipment. Diabetic supplies and related testing equipment must meet the following requirements to qualify for reimbursement under Medicaid home health services.

(A) Diabetic [~~diabetic~~] supplies and related testing equipment must be prescribed by a physician._[s]

(B) Prior [~~prior~~] authorization is required unless otherwise specified by HHSC. [~~the department; and~~]

(b) Home health service limitations include the following.

(1) Patient supervision.

(A) Patients must be seen by their physician within 30 days prior to the start of home health services. This physician visit may be waived when a diagnosis has already been established by the attending physician and the patient is currently undergoing active medical care and treatment. Such a waiver is based on the physician's statement that an additional evaluation visit is not medically necessary.

(B) Patients receiving home health care services must remain under the care and supervision of a physician who reviews and revises the plan of care at least every 60 days or more frequently as the physician determines necessary.

(2) Time limited prior authorizations.

(A) Prior authorizations for payment of home health services may be issued by HHSC [~~the department~~] for a service period not to exceed 60 days on any given authorization. Specific authorizations may be limited to a time period less than the established maximum. When the need for home health services exceeds 60 days, or when there is a change in the service plan, the provider must obtain prior approval and retain the physician's signed and dated orders with the revised plan of care.

(B) The provider shall be notified by HHSC [~~the department~~] in writing of the authorization (or denial) of requested services.

(C) Prior authorization requests for covered Medicaid home health services must include the following information:

(i) The Medicaid identification form with the following information:

(I) full name, age, and address;

(II) Medical Assistance Program Identification number;

(III) health insurance claim number (where applicable); and

(IV) Medicare number;

(ii) the physician's written, signed, and dated plan of care (submitted by the provider if requested);

(iii) the clinical record data (completed and submitted by provider if requested);

(iv) a description of the home or living environment;

(v) a composition of the family/caregiver;

(vi) observations pertinent to the overall plan of care in the home; and

(vii) the type of service the patient is receiving from other community or state agencies.

(D) If inadequate or incomplete information is provided, the provider will be requested to furnish additional documentation as required to make a decision on the request.

(3) Medication administration. Nursing visits for the purpose of administering medications are not covered if:

(A) the medication is not considered medically necessary to the treatment of the individual's illness;

(B) the administration of medication exceeds the therapeutic frequency or duration by accepted standards of medical practice;

(C) there is not a medical reason prohibiting the administration of the medication by mouth; or

(D) the patient, a primary caregiver, a family member, and/or a neighbor has been taught or can be taught to administer intramuscular (IM) and intravenous (IV) injections.

(4) Prior approval. Services or supplies furnished without prior approval, unless otherwise specified by HHSC [~~the department~~], are not benefits.

(5) Recipient residence. Services, equipment, or supplies furnished to a recipient who is a resident or patient in a hospital, skilled nursing facility, or intermediate care facility are not benefits.

(c) Home health services are subject to utilization review, which includes the following:

(1) the physician is responsible for retaining in the client's record a copy of the plan of care and/or a copy of the request form documenting the medical necessity of the health care service, supply, equipment, or appliance and how it meets the recipient's health care needs; and

(2) the home health services provider is responsible for documenting the amount, duration, and scope of services in the recipient's plan of care, the equipment/supply order request, and the client

record based on the physician's orders. This information is subject to retrospective review; and

(3) ~~HHSC [the State or its designated contractor]~~ may establish random and targeted utilization review processes to ensure the appropriate utilization of home health benefits and to monitor the cost effectiveness of home health services.

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 June 6, 2016.

TRD-201602846

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: July 17, 2016

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



CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER M. MISCELLANEOUS PROGRAMS

DIVISION 3. COMPREHENSIVE REHABILITATION SERVICES FOR INDIVIDUALS WITH A TRAUMATIC BRAIN INJURY OR TRAUMATIC SPINAL CORD INJURY

1 TAC §355.9040

The Texas Health and Human Services Commission (HHSC) proposes new Division 3, Comprehensive Rehabilitation Services for Individuals with a Traumatic Brain Injury or Traumatic Spinal Cord Injury, and new §355.9040, concerning Reimbursement Methodology for Comprehensive Rehabilitation Services Program, under Subchapter M.

BACKGROUND AND JUSTIFICATION

This rule establishes the reimbursement methodology for the Comprehensive Rehabilitation Services (CRS) program administered by the Texas Department of Assistive and Rehabilitative Services (DARS). HHSC, under its authority and responsibility to administer and implement rates, is proposing this rule to codify the reimbursement methodology for this program, which provides services to individuals with a traumatic brain injury (TBI) or traumatic spinal cord injury (SCI).

The proposed reimbursement methodology describes the method by which HHSC will determine the rates for TBI and SCI Inpatient Comprehensive Medical Rehabilitation Services, TBI and SCI Outpatient Services, Post-Acute Brain Injury (PABI) Residential Services, and PABI and Post-Acute SCI Non-Residential Services.

SECTION-BY-SECTION SUMMARY

Proposed §355.9040(a) describes the payment rate determination methodology for all four categories of service arrays in the CRS program.

Proposed §355.9040(b) makes information in the cost determination process rules applicable to this rule.

Proposed §355.9040(c) authorizes HHSC to require providers to submit cost reports, describes the rules a provider must follow in submitting such reports, and explains the means by which a contracted provider may be excused from submitting a cost report.

FISCAL NOTE

Rebecca Trevino, Chief Financial Officer for DARS, has determined that, during the first five-year period the rule is in effect, there will not be a fiscal impact to state government.

There are no fiscal implications for local governments as a result of enforcing or administering the rule. The rule will not affect a local economy or local employment for the first five years the proposed rule will be in effect.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of the rule. The implementation of the proposed rule does not require any changes in practice or additional cost to a contracted provider, and HHSC anticipates that the new methodology will lead to increased rates for those CRS providers that qualify as small or micro-businesses.

PUBLIC BENEFIT AND COST

Pam McDonald, Director of Rate Analysis for HHSC, has determined that for each of the first five years the rule is in effect, the expected public benefit is that the reimbursement methodology for the CRS program will be documented, consistent, and transparent.

Ms. McDonald does not anticipate that there will be any economic cost to persons who are required to comply with the proposed rule during the first five years the rule will be in effect.

REGULATORY ANALYSIS

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her private real 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 Andrew Wolfe in the HHSC Rate Analysis Department by telephone at (512) 707-6072. Written comments on the proposed rule may be submitted to Mr. Wolfe by facsimile at (512) 730-7475, by e-mail to andrew.wolfe@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 149030,

Austin, Texas, 78714-9030, within 30 days of publication of this proposal in the *Texas Register*.

STATUTORY AUTHORITY

The new rule is proposed under the Texas Government Code, §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority, and under §531.0055, which provides the Executive Commissioner with the authority to promulgate rules for the provision of health and human services by the health and human services agencies.

The new rule affects the Texas Government Code Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.9040. Reimbursement Methodology for Comprehensive Rehabilitation Services Program.

(a) Payment rate determination. Payment rates are determined based on the methodology described for each service array.

(1) Traumatic Brain Injury (TBI) and Spinal Cord Injury (SCI) Inpatient Comprehensive Medical Rehabilitation Services Array. The Texas Department of Assistive and Rehabilitative Services or its successor agency (DARS) negotiates contracts with inpatient facilities to provide services based on data from the Centers for Medicare & Medicaid Services (CMS) Healthcare Cost Report Information System (HCRIS).

(2) TBI and SCI Outpatient Services Array.

(A) For services and purchases for which a specific rate can be established without regard to the individual receiving the service or item, the Texas Health and Human Services Commission (HHSC) will establish Comprehensive Rehabilitation Services (CRS) fee-for-service rates based on a review of rates for similar services as presented in one or more of the following data sources: HHSC fee schedules, previous DARS fee schedules, Medicare fee schedules, other states' Medicaid fee schedules, and/or commercial insurance fee schedules.

(i) Where information on comparable rates is not available, HHSC will establish rates representing best value based on the factors listed in §391.103(2) of this title (relating to Definitions).

(ii) To ensure adequate access to services, DARS medical director, or optometric consultant may approve exceptions to established rates, with review by the HHSC Rate Analysis Department (RAD).

(B) For services and purchases for which a specific rate can be established without regard to the individual receiving the service or item, but for which a CRS rate has not yet been set at the time an individual's program planning team determines that the service is required, HHSC will establish an interim CRS rate.

(i) DARS will contact HHSC RAD to request an interim CRS rate.

(ii) HHSC RAD will determine the interim CRS rate based on the process in subparagraph (A) of this paragraph.

(iii) Claims paid at an interim rate established under this subparagraph will not be adjusted once a rate is formally adopted for that service.

(C) For services and purchases for which the cost of the service or item purchased is specific to the individual receiving the service or item, HHSC will establish a CRS rate at the time of purchase, based on best value, as defined by the reasonable and customary industry standards for each specific service or item purchased.

(3) Post-Acute Brain Injury (PABI) Residential Services Array. DARS will pay providers a per diem rate for each allowable

day of PABI Residential Service. DARS will also pay providers for such ancillary services as have been approved in the individual's program plan and received by the individual.

(A) The initial per diem rate is the sum of a base component, which covers room and board, administration, personal assistance, and facility and operations costs; a core service component, which covers core therapy services; and an additional amount for periodic required evaluations.

(i) HHSC determines the base component as follows:

(I) determine the rates for the small and medium classes of facilities in the Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions (ICF/IID) program as specified in §355.456 of this chapter (relating to Reimbursement Methodology);

(II) adjust the ICF/IID rates to account for the specific needs of the CRS population; and

(III) average the adjusted rates for individuals with limited, extensive, pervasive, and pervasive plus levels of need, weighting by the days of service for those individuals from the most recently reviewed and accepted ICF/IID cost reports.

(ii) HHSC determines the core service component by reviewing the rates or contracted payment amounts for similar services, including the five common core therapy services (Physical Therapy, Occupational Therapy, Speech/Language Therapy, Cognitive Rehabilitation Therapy, and Neuropsychological Therapy) paid by the following payers: HHSC, the Texas Department of Aging and Disability Services (DADS), DARS, Medicare, other states' Medicaid programs, and commercial insurance companies. Based on this review, HHSC determines an appropriate rate per hour that is multiplied by the hours in the tier structure below to determine the rate for each tier. Determination of the applicable tier for a day of service is governed by DARS program standards.

(I) Base - 0 hours.

(II) Base Plus - 0.5 hours.

(III) Tier 1 - 1.5 hours.

(IV) Tier 2 - 2.5 hours.

(V) Tier 3 - 3.5 hours.

(VI) Tier 4 - 4.5 hours.

(VII) Tier 5 - 5.5 hours.

(VIII) Tier 6 - 6.5 hours.

(IX) Tier 7 - 7.5 hours.

(X) Tier 8 - 8.5 hours.

(iii) HHSC determines the additional amount for periodic required evaluations by averaging the common core therapy evaluation rates, multiplying the average by 12, and dividing the product by the number of days in the rate year.

(B) If HHSC determines that adequate cost and services delivery data is available, HHSC may rebase the per diem rate components.

(i) For the base component, if HHSC deems it appropriate to require contracted providers to submit a cost report, HHSC will determine if cost data collected as described in subsection (c) of this section is reliable and sufficient to support development of a cost report-based rate. If such reliable and sufficient data is available,

HHSC may develop a reimbursement rate using that data to replace the initial base component.

(ii) For the core service component, HHSC will collect and evaluate detailed service delivery data. HHSC may rebase the core service component based on the detailed service delivery data.

(C) HHSC determines the ancillary services rates as described in paragraph (2) of this subsection.

(4) PABI and Post-Acute SCI Non-Residential Services Array. HHSC will set separate base rates for facility-based and community-based services, as described in subparagraph (A) of this paragraph. DARS will pay for each allowable billing increment, as defined by program standards. DARS will also pay for such core and ancillary services as have been approved in the individual's program plan and received by the individual.

(A) Initial rates will consist of an hourly base rate which covers administration, personal assistance, and facility and operations costs.

(i) For providers offering Non-Residential Services in a setting that is also a residential facility or shares space with a residential facility, HHSC determines the initial hourly base rate as follows:

(I) determine the rates for the small and medium classes of facilities in the ICF/IID program as specified in §355.456 of this chapter;

(II) adjust the ICF/IID rates to account for the specific needs of the CRS population and the base services to be provided in a Non-Residential facility-based setting;

(III) average the adjusted rates for individuals with limited, extensive, pervasive and pervasive plus levels of need, weighting by the days of service for those individuals from the most recently reviewed and accepted ICF/IID cost reports; and

(IV) divide the average by eight.

(ii) For providers offering Non-Residential Services in the home of the individual receiving the service or in a community setting not connected or affiliated with a residential setting, HHSC determines the initial hourly base rate as follows:

(I) determine the case management and the other attendant care cost components (also known as the administration and facility cost area) of the habilitation base rate under the Community Living Assistance and Support Services (CLASS) program, as described in §355.505 of this chapter (relating to Reimbursement Methodology for the Community Living Assistance and Support Services Waiver Program); and

(II) adjust the rate to account for specific needs of the CRS population and the base services to be provided in a non-residential home or community setting.

(B) If HHSC deems it appropriate to require contracted providers to submit a cost report, HHSC will determine if cost data collected as described in subsection (c) of this section is reliable and sufficient to support development of a cost-report-based rate. If such reliable and sufficient data is available, HHSC may develop cost-report-based rates to replace the initial hourly base rates.

(C) HHSC will determine the rates for core services as described in paragraph (2)(A) of this subsection.

(D) HHSC will determine the rates for ancillary services as described in paragraph (2) of this subsection.

(b) Related information. The information in §355.101 of this chapter (relating to Introduction) and §355.105(g) of this chapter (relating to General Reporting and Documentation Requirements, Methods, and Procedures) applies to this section.

(c) Reporting of cost. To gather adequate financial and statistical information upon which to base reimbursement, HHSC may require a contracted provider to submit a cost report for any service provided through the CRS program.

(1) Cost Reports. If HHSC requires a provider to submit a cost report, the provider must follow the cost reporting guidelines in §355.105 of this chapter and the guidelines for determining whether a cost is allowable or unallowable in §355.102 of this chapter (relating to General Principles of Allowable and Unallowable Costs) and §355.103 of this chapter (relating to Specifications for Allowable and Unallowable Costs).

(2) Excusal from submission of a cost report. A provider is excused from the requirement to submit a cost report if the provider meets one or more of the conditions in §355.105(b)(4)(D) of this chapter.

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 June 6, 2016.

TRD-201602847

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: July 17, 2016

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



TITLE 22. EXAMINING BOARDS

PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS

CHAPTER 133. LICENSING

The Texas Board of Professional Engineers (Board) proposes amendments to §133.27, concerning Application for Temporary License for Engineers Currently Licensed Outside the United States; §133.41, concerning Supplementary Experience Record; and §133.43, concerning Experience Evaluation.

The proposed rule changes to §133.27 would implement a licensing agreement between the Texas Board of Professional Engineers and the Republic of Korea. South Korea (The Republic of Korea) is being added to the existing rule for Temporary Licenses that currently addresses Australia, Canada and Mexico. The agreement was signed on March 10, 2016.

The proposed rule changes to §133.41 and §133.43 would implement process changes related to enhancing engagement of Engineers in Training. These changes would allow a person to demonstrate enhanced competence and readiness for licensure on the license application by including information on the Supplementary Experience Record regarding additional training and participation in professional organizations. The standards for competence will be the same as under the current system, but this addition will allow an applicant to present additional accomplishments.

David Howell, P.E., Deputy Executive Director for the Board, has determined that for the first five-year period the proposed amendments are in effect there is no adverse fiscal impact for the state and local government as a result of enforcing or administering the sections as amended. There is no additional cost to licensees or other individuals. There is no adverse fiscal impact to the estimated 1,000 small or 6,400 micro businesses regulated by the Board. A Regulatory Flexibility Analysis is not needed because there is no adverse economic effect to small or micro businesses.

Mr. Howell also has determined that for the first five years the proposed amendments are in effect, the public benefit anticipated as a result of enforcing the proposed amendments is an improvement in the flexibility of the licensure processes and the ability to issue international temporary licenses to qualified engineers.

Any comments or request for a public hearing may be submitted no later than 30 days after the publication of this notice to David Howell, P.E., Deputy Executive Director, Texas Board of Professional Engineers, 1917 S. Interstate 35, Austin, Texas 78741, faxed to his attention at (512) 440-0417 or sent by email to rules@engineers.texas.gov.

SUBCHAPTER C. PROFESSIONAL ENGINEER LICENSE APPLICATION REQUIREMENTS

22 TAC §133.27

The amendments are proposed pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state.

No other statutes, articles or codes are affected by the proposed amendments.

§133.27. Application for Temporary License for Engineers Currently Licensed Outside the United States.

(a) Pursuant to §1001.311 of the Act, a temporary license may be issued under this section for applicants who:

(1) are citizens of Australia, Canada, the Republic of Korea or the United Mexican States;

(2) are seeking to perform engineering work in Texas for three years or less;

(3) are currently licensed or registered in good standing with Engineers Australia, [ø] at least one of the jurisdictions of Canada, the Korean Professional Engineers Association or the United Mexican States; and

(4) meet the following experience requirements:

(A) Applicant currently registered in Australia, [ø] Canada or the Republic of Korea shall have at least seven years of creditable engineering experience, three of which must be practicing as a registered or chartered engineer with Engineers Australia, the Korean Professional Engineers Association or Engineers Canada and one of which must be working with or show familiarity with U.S. codes, as evaluated by the board under §133.43 of this chapter (relating to Experience Evaluation).

(B) Applicant currently licensed in United Mexican States shall:

(i) meet the educational requirements of §1001.302(a)(1)(A) of the Act and have 12 or more years of creditable engineering experience, as evaluated by the board under §133.43 of this chapter; or

(ii) meet the educational requirements of §1001.302(a)(1)(B) of the Act and have 16 or more years of creditable engineering experience, as evaluated by the board under §133.43 of this chapter.

(b) The applicant applying for a temporary license from Australia, Canada, the Republic of Korea or the United Mexican States shall submit:

(1) an application in a format prescribed by the board;

(2) proof of educational credentials pursuant to §133.33 or §133.35 of this chapter (relating to Proof of Educational Qualifications);

(3) a supplementary experience record as required under §133.41(1) - (4) of this chapter (relating to Supplementary Experience Record) or a verified curriculum vitae and continuing professional development record;

(4) at least three reference statements as required under §133.51 and §133.53 of this chapter (relating to Reference Providers and Reference Statements);

(5) passing score of TOEFL as described in §133.21(c) of this chapter (relating to Application for Standard License);

(6) information regarding any criminal history including any judgments, deferred judgments or pre-trial diversions for a misdemeanor or felony provided in a format prescribed by the board, together with copies of any court orders or other legal documentation concerning the criminal charges and the resolution of those charges;

(7) documentation of submittal of fingerprints for criminal history record check as required by §1001.3035 of the Act;

(8) a statement describing any engineering practice violations, if any, together with documentation from the jurisdictional authority describing the resolution of those charges;

(9) submit a completed Texas Engineering Professional Conduct and Ethics examination;

(10) pay the application fee established by the board; and

(11) a verification of a license in good standing from one of the jurisdictions listed in subsection (a)(3) of this section.

(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.

Filed with the Office of the Secretary of State on May 31, 2016.

TRD-201602730

Lance Kinney, P.E.

Executive Director

Texas Board of Professional Engineers

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 440-7723



SUBCHAPTER E. EXPERIENCE

22 TAC §133.41, §133.43

The amendments are proposed pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state.

No other statutes, articles or codes are affected by the proposed amendments.

§133.41. *Supplementary Experience Record.*

Applicants shall submit a supplementary experience record to the board as a part of the application. The supplementary experience record is a written summary documenting all of the applicant's engineering experience used to meet the requirements for licensure. The NCEES record experience information may be accepted as all or part of a supplementary experience record.

(1) The supplementary experience record shall be written by the applicant and shall:

(A) provide an overall description of the nature and scope of the work with emphasis on detailed descriptions of the engineering work;

(B) clearly describe the engineering work that the applicant personally performed; ~~and~~

(C) delineate the role of the applicant in any group engineering activity; ~~and~~[-]

(D) include any relevant training or participation in engineering organizations or societies that contribute to the applicant's competence and readiness for licensure (consistent with the requirements listed in §137.17 of this title (relating to Continuing Education Program)).

(2) - (5) (No change.)

§133.43. *Experience Evaluation.*

(a) The board shall evaluate the nature and quality of the experience found in the supplementary experience record or the NCEES record experience information and shall determine if the work is satisfactory to the board for the purpose of issuing a license to the applicant. The board shall evaluate the supplementary experience record for evidence of the applicant's competency to be placed in responsible charge of engineering work of a similar character.

(1) (No change.)

(2) In the review of engineering experience, the board may consider additional elements including:

(A) whether the experience was sufficiently complex and diverse, and of an increasing standard of quality and responsibility;

(B) whether the quality of the engineering work shows minimum technical competency;

(C) whether the experience was gained in accordance with the provisions of the Act;

(D) whether the experience was gained in one dominant branch;

(E) whether non-traditional engineering experience such as sales or military service provides sufficient depth of practice;

(F) whether short engagements have had an impact upon professional growth; ~~and~~

(G) whether the applicant intends to practice or offer engineering services in Texas; ~~and~~[-]

(H) whether the experience was supplemented by training courses or participation in engineering organizations or societies that contribute to the applicant's competence and readiness for licensure (consistent with the requirements listed in §137.17 of this title (relating to Continuing Education Program)).

(3) (No change.)

(b) - (f) (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 May 31, 2016.

TRD-201602731

Lance Kinney, P.E.

Executive Director

Texas Board of Professional Engineers

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 440-7723



PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 273. GENERAL RULES

22 TAC §273.4

The Texas Optometry Board proposes amendments to §273.4 to set fees for license renewal of active Optometric Glaucoma Specialists. The addition to the fee will fund the agency's contribution to the costs of the Prescription Monitoring Program as set out in Senate Bill 195, Regular Session, 84th Legislature.

Chris Kloeris, executive director of the Texas Optometry Board, estimates that for the first five-year period the amendments are in effect, the Optometry Board will collect an additional \$21,815.15 each year, which will be transferred to the Texas State Board of Pharmacy. There will be no fiscal implications for local government as a result of enforcing or administering the amendments.

Chris Kloeris also has determined that for each of the first five years the amendments are in effect, the public benefit anticipated is that the Prescription Monitoring Program, which monitors overprescribing of controlled substances, will be adequately funded.

It is anticipated that there will be no economic costs for many of the licensees required to comply with the rule because Senate Bill 195 removes the requirement for state registration in order to administer or prescribe controlled substances. Many of the licensees affected by this amendment annually renewed the stated controlled substances registration, which has a higher annual renewal fee than the increase in the license renewal fee in this amendment. For those licensees with an Optometric Glaucoma Specialist license who do not have a state controlled substances registration, the costs will be a \$7.85 increase to the license renewal fee during fiscal year 2017 and thereafter.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

The agency licenses approximately 4,000 optometrists and therapeutic optometrists. A significant majority of licensees own or work in one or more of the 1,000 to 3,000 optometric practices which meet the definition of a small business. Some of these

practices meet the definition of a micro business. The agency does not license these practices.

ENVIRONMENT AND TAKINGS IMPACT ASSESSMENT

The agency has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure. The agency has determined that the proposed rule 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.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register*.

The amendment is proposed under the Texas Optometry Act, Texas Occupations Code, §351.151, §351.152, and Senate Bill 195, Regular Session, 84th Legislature. No other sections are affected by the amendments.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession. The agency interprets §351.152 as authorizing the agency to set license renewal fees, and Senate Bill 195, Regular Session, 84th Legislature, as authorizing the agency to increase renewal fees to fund the Prescription Monitoring Program.

§273.4. Fees (Not Refundable).

(a) - (f) (No change.)

(g) License Renewal.[:]

(1) Optometrist and Therapeutic Optometrist: \$208.00 plus \$1.00 fee required by House Bill 2985, 78th Legislature. Total fees: \$209.00. The license renewal fee includes \$10.00 to fund a program to aid impaired optometrists and optometry students as authorized by statute.

(2) Optometric Glaucoma Specialist: \$208.00 plus \$1.00 fee required by House Bill 2985, 78th Legislature and \$7.85 fee to fund the Prescription Monitoring Program authorized by Senate Bill 195, 84th Legislature. The inactive license renewal fee does not include the Prescription Monitoring Program fee. Total fees: \$216.85 active renewal; \$209.00 inactive renewal. The license renewal fee includes \$10.00 to fund a program to aid impaired optometrists and optometry students as authorized by statute.

(h) License fee for late renewal, one to 90 days late.[:]

(1) Optometrist and Therapeutic Optometrist: \$312.00 plus \$1.00 fee required by House Bill 2985, 78th Legislature. Total late license fees: \$313.00.

(2) Optometric Glaucoma Specialist: \$312.00 plus \$1.00 fee required by House Bill 2985, 78th Legislature and \$7.85 fee to fund the Prescription Monitoring Program authorized by Senate Bill 195, 84th Legislature. The inactive license renewal fee does not include the Prescription Monitoring Program fee. Total fees: \$320.85 active renewal; \$313.00 inactive renewal.

(i) License fee for late renewal, 90 days to one year late.[:]

(1) Optometrist and Therapeutic Optometrist: \$416.00 plus \$1.00 fee required by House Bill 2985, 78th Legislature. Total late license fees: \$417.00.

(2) Optometric Glaucoma Specialist: \$416.00 plus \$1.00 fee required by House Bill 2985, 78th Legislature and \$7.85 fee to fund the Prescription Monitoring Program authorized by Senate Bill 195, 84th Legislature. The inactive license renewal fee does not include the Prescription Monitoring Program fee. Total fees: \$424.85 active renewal; \$417.00 inactive renewal.

(j) - (n) (No change.)

(o) Retired License.

(1) Optometrist and Therapeutic Optometrist: \$208.00 plus \$1.00 fee required by House Bill 2985, 78th Legislature. Total fee: \$209.00.

(2) Optometric Glaucoma Specialist: \$208.00 plus, \$1.00 fee required by House Bill 2985, 78th Legislature and \$7.85 fee to fund the Prescription Monitoring Program authorized by Senate Bill 195, 84th Legislature. Total fee: \$216.85.

(p) - (q) (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 June 2, 2016.

TRD-201602807

Chris Kloeris

Executive Director

Texas Optometry Board

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 305-8500

TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 102. DISTRIBUTION OF TOBACCO SETTLEMENT PROCEEDS TO POLITICAL SUBDIVISIONS

25 TAC §102.3

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes an amendment to §102.3, concerning the distribution of tobacco settlement proceeds to political subdivisions.

BACKGROUND AND PURPOSE

The rule amendments provide updated language and offer clarification to enhance the understanding of the program rules for the distribution of tobacco settlement proceeds to political subdivisions. The rules are still needed due to the continued responsibilities for implementing the Health and Safety Code, §§12.131 - 12.139, and the responsibilities of the department under the "Agreement Regarding Disposition of Tobacco Settlement Proceeds" filed on July 24, 1998, in United States District Court,

Eastern District of Texas, in the case styled *The State of Texas v. The American Tobacco Co., et al.*, No. 5-96CV-91.

Government Code, §2001.039, requires each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 102.1 - 102.5 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Section 102.3(b)(2) was amended to give political subdivisions additional examples of expenditures that may not be counted as unreimbursed health care expenditures. Political subdivisions have frequently contacted the department regarding the proposed additional examples.

The amendment to §102.3(b)(2)(B) adds "printers and copiers" as additional examples of administrative equipment not directly related to the provision of health care services to the general public.

The amendment to §102.3(b)(2)(D) adds "rabies control" as an additional example of environmental services that may not be counted.

The amendment to §102.3(b)(2)(F) adds "time spent transporting inmates" as an example of a court procedure.

In §102.3(b)(2)(J), the word "and" was moved to the end of new subparagraph (L) because the list of examples was expanded.

The amendment to §102.3(b)(2)(K) adds "autopsies, burials, and mortician services" as new items not directly related to the provision of health care services to the general public.

The amendment to §102.3(b)(2)(L) adds "meal donation programs" as a new item not directly related to the provision of health care services to the general public.

In §102.3(b)(2), subparagraph (K) was amended to subparagraph (M) to accommodate new subparagraphs (K) and (L).

Section 102.3(f)(1) was amended to give political subdivisions consistent deadlines for submitting annual expenditure statements to the department.

The amendment to §102.3(f)(1)(A) changes the deadline for submitting annual expenditure statements by delivery, fax, or electronic mail from 5:00 p.m. to 11:59 p.m. on March 31 to accommodate electronic delivery of expenditure statements after regular business hours.

The amendment to §102.3(f)(1)(B) changes the deadline for postmarks of annual expenditure statements submitted by U.S. Postal Service or commercial mail carrier from midnight to 11:59 p.m. on March 31 to conform with the proposed new deadline in §102.3(f)(1)(A).

FISCAL NOTE

Elaine McHard, Manager, Funds Coordination and Management Branch, has determined that for each year of the first five years that the section will be in effect there will not be fiscal implications to state or local governments as a result of enforcing and administering the section as proposed.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. McHard has also determined that there will be no adverse economic impact on small businesses or micro-businesses re-

quired to comply with the section as proposed. This was determined by interpretation of the rule that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the section.

ECONOMIC COSTS TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no anticipated negative impact on local employment.

Eligible political subdivisions may receive a pro rata share of the annual distribution based on their unreimbursed health care expenditures in the previous calendar year as agreed under the Agreement Regarding Disposition of Tobacco Settlement Proceeds and defined in Health and Safety Code, §§12.131 - 12.139. The amount distributed is determined by the State Comptroller.

PUBLIC BENEFIT

In addition, Ms. McHard has also determined that for each year of the first five years the section is in effect, the public will benefit from adoption of the section. The public benefit anticipated is a clear understanding of the distribution of the tobacco proceeds. Also, there is additional information for the public regarding the disbursements of the funds.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. The proposed amendment does not have the specific intent of protecting the environment or reducing risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed amendment 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 Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Elaine McHard, Funds Coordination and Management Branch, Mail Code 4501, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, (512) 776-6789 or by email to Elaine.McHard@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*. Health and Safety Code, §12.138, states that rules must be submitted to the advisory committee and may not become effective before the rule is approved by the advisory committee. These rules were approved by the Tobacco Settlement Permanent Trust Account Administration Advisory Committee on November 5, 2015.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rule has been reviewed

by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The amendment is authorized under Health and Safety Code, §12.133, which requires the department to adopt rules governing the collection of information that relates to the political subdivisions' unreimbursed health care expenditures; and Government Code, §531.0055, and Health and Safety Code, §1001.75, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039 and Health and Safety Code, §12.139.

The amendment affects the Health and Safety Code, Chapters 12 and 1001; and Government Code, Chapter 531.

§102.3. Annual Claims.

(a) (No change.)

(b) Counties not wholly within a hospital district. For a county not wholly within a hospital district, the agreement further states that unreimbursed expenditures are to be calculated as "all unreimbursed amounts, including unreimbursed jail health care, expended by such county for health care services to the general public during that year, plus 15% of that total."

(1) (No change.)

(2) The following are examples for which expenditures may not be counted:

(A) (No change.)

(B) administrative supplies or equipment not directly related to the provision of health care services to the general public, such as computer paper, printers and copier machines;

(C) (No change.)

(D) environmental services such as mosquito control, water testing, ~~and~~ septic tank inspection, and rabies control;

(E) (No change.)

(F) time spent transporting inmates to and from court procedures, such as continued mental health commitments and medication hearings;

(G) - (I) (No change.)

(J) first responder services; ~~and~~

(K) autopsies, burials, and mortician services;

(L) meal donation programs; and

(M) ~~[(K)]~~ services to the extent to which the county has received reimbursement or funds through federal or state programs including, but not limited to, county indigent health care, tertiary medical care, emergency medical services grants, permanent fund for children and public health grants, public health block grants, Title XVIII of the Social Security Act (Medicare), Title XIX of the Social Security Act (Medicaid), or crime victims compensation fund.

(3) (No change.)

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

(f) Procedures.

(1) A political subdivision must submit a signed annual expenditure statement to the department, documenting its eligible expenditures for the preceding calendar year:

(A) by delivery, fax, or electronic mail received by the department no later than 11:59 ~~[5:00]~~ p.m. on March 31 of each year; or

(B) by U.S. Postal Service mail or commercial mail carrier with a postmark reflecting a date no later than 11:59 p.m. ~~[midnight]~~ on March 31 of each year. Private metered postmarks shall not be acceptable as proof of timely mailing.

(2) - (5) (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 June 6, 2016.

TRD-201602857

Lisa Hernandez

General Counsel

Department of State Health Services

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 776-6972



TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER O. STATE AND LOCAL SALES AND USE TAXES

34 TAC §3.286

The Comptroller of Public Accounts proposes amendments to §3.286, concerning seller's and purchaser's responsibilities, including nexus, permits, returns and reporting periods, and collection and exemption rules. The amendments implement statutory changes enacted in 2015 by the 84th Legislature and clarify agency policy regarding direct payment permit holders and prepayment discounts. House Bill 2358, 84th Legislature, 2015, added Tax Code, §151.0241 (Persons Performing Disaster- or Emergency-Related Work).

A new defined term is added to subsection (a) to implement House Bill 2358, 84th Legislature, 2015. New subsection (a)(3) is added to define the term "disaster- or emergency-related work." This definition is taken from Business & Commerce Code, §112.003, and incorporates the definitions of the terms "critical infrastructure" and "disaster- or emergency-related work." Subsequent paragraphs are renumbered accordingly. In addition, renumbered subsection (a)(4), defining the term "engaged in business," is amended to add new subparagraph (J) to implement House Bill 2358. New subparagraph (J) provides that certain out-of-state business entities who come to Texas for the sole purpose of repairing or replacing critical infrastructure damaged in a disaster or emergency are not engaged in business in this state. This provision is effective June 16, 2015.

Subsection (c)(1), relating to obtaining a sales and use tax permit, is amended to implement Senate Bill 853, 84th Legislature, 2015, which provides that a sales tax permit application filed electronically on a form prescribed by the comptroller is deemed to be signed by the applicant for purposes of Tax Code, §151.202(b)(5).

Subsection (d)(2)(B) is amended to reinstate the requirement that out-of-state sellers identify the tax on their bills or invoices as Texas tax. The following sentence was first added to the section in 1988: "Out-of-state sellers must identify the tax as Texas sales or use tax." See 13 TexReg 3988 (1988). During the drafting of the amendments to the section that were adopted effective June 3, 2015, the sentence was inadvertently deleted. Because the deletion was inadvertent, it was not explained or addressed in the preamble to the 2015 amendment. See 40 TexReg 3183 (2015) (addressing revisions to subsection (d)(2)(A) but not subsection (d)(2)(B)). The language is revised to describe out-of-state sellers as sellers who do not maintain a physical location in Texas.

Subsection (d)(2)(B) is further amended to memorialize current comptroller procedure that when an invoice or bill does not identify tax as Texas tax, it is presumed that the seller did not collect Texas tax. The subsection further explains that the presumption is rebuttable.

Subsection (f)(3), relating to extensions for persons located in a disaster area, is amended to use terminology consistent with House Bill 2358 and amended subsection (a). For example, the term "natural disaster area" is replaced with the phrase "an area designated in a state of disaster or emergency declaration."

Subsection (g)(8), relating to direct payment permit holders, is also revised. This subsection states that "prepayment procedures and discounts for timely filing, as discussed in subsection (h) of this section, do not apply to holders of direct payment permits." Because subsection (h) addresses discounts for timely filing and for prepayment, subsection (g)(8) is amended to replace the phrase "prepayment procedures" with the more accurate phrase "prepayment discounts."

Tom Currah, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Currah also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by conforming the rule to current statutes and clarifying agency policy. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

The amendments are proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendments implement Tax Code, §151.0241 ("Persons Performing Disaster Or Emergency-Related Work") and Business & Commerce Code, Chapter 112 et seq.

§3.286. *Seller's and Purchaser's Responsibilities, including Nexus, Permits, Returns and Reporting Periods, and Collection and Exemption Rules.*

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Consignment sale--The sale, lease, or rental of tangible personal property by a seller who, under an agreement with another person, is entrusted with possession of tangible personal property with respect to which the other person has title or another ownership interest, and is authorized to sell, lease, or rent the tangible personal property without additional action by the person having title to or another ownership interest in the tangible personal property.

(2) Direct sales organization--A person that typically sells taxable items directly to purchasers through independent salespersons and not in or through a place of business. The term "independent salespersons" includes, but is not limited to, distributors, representatives, and consultants. Items are typically sold person-to-person through in-home product demonstrations, parties, catalogs, and one-on-one selling. The term includes, but is not limited to, direct marketing and multilevel marketing organizations.

(3) Disaster- or emergency-related work--Repairing, renovating, installing, building, rendering services, or performing other business activities relating to the repair or replacement of equipment and property, including buildings, offices, structures, lines, poles, and pipes, that:

(A) is owned or used by or for:

(i) a telecommunications provider or cable operator;

(ii) communications networks;

(iii) electric generation;

(iv) electric transmissions and distribution systems;

(v) natural gas and natural gas liquids gathering, processing, and storage, transmission and distribution systems; or

(vi) water pipelines and related support facilities, equipment, and property that serve multiple persons; and

(B) is damaged, impaired, or destroyed by a declared state disaster or emergency.

(4) [(3)] Engaged in business--A seller is engaged in business in this state if the seller:

(A) maintains, occupies, or uses in this state, permanently or temporarily, directly or indirectly, or through an agent by whatever name called, a kiosk, office, distribution center, sales or sample room or place, warehouse or storage place, or any other physical location where business is conducted;

(B) has any representative, agent, salesperson, canvasser, or solicitor who operates under the authority of the seller to conduct business in this state, including selling, delivering, or taking orders for taxable items;

(C) promotes a flea market, arts and crafts show, trade day, festival, or other event in this state that involves sales of taxable items;

(D) uses independent salespersons, who may include, but are not limited to, distributors, representatives, or consultants, in this state to make direct sales of taxable items;

(E) derives receipts from the sale, lease, or rental of tangible personal property that is located in this state or owns or uses tangible personal property that is located in this state, including a computer server or software to solicit orders for taxable items, unless the seller uses the server or software as a purchaser of an Internet hosting service;

(F) allows a franchisee or licensee to operate under its trade name in this state if the franchisee or licensee is required to collect sales or use tax in this state;

(G) otherwise conducts business in this state through employees, agents, or independent contractors;

(H) is formed, organized, or incorporated under the laws of this state and the seller's internal affairs are governed by the laws of this state, notwithstanding the fact that the seller may not be otherwise engaged in business in this state pursuant to this section; or

(I) holds a substantial ownership interest in, or is owned in whole or substantial part by, another person who:

(i) maintains a distribution center, warehouse, or similar location in this state and delivers property sold by the seller to purchasers in this state;

(ii) maintains a location in this state from which business is conducted, sells the same or substantially similar lines of products as the seller, and sells such products under a business name that is the same or substantially similar to the business name of the seller; or

(iii) maintains a location in this state from which business is conducted if the person with the location in this state uses its facilities or employees:

(I) to advertise, promote, or facilitate sales by the seller to purchasers; or

(II) to otherwise perform any activity on behalf of the seller that is intended to establish or maintain a marketplace for the seller in this state, including receiving or exchanging returned merchandise.

(iv) For purposes of this subparagraph only, "ownership" includes direct ownership, common ownership, or indirect ownership through a parent entity, subsidiary, or affiliate, and "substantial," with respect to ownership, constitutes an interest, whether direct or indirect, of at least 50% of:

(I) the total combined voting power of all classes of stock of a corporation;

(II) the beneficial ownership interest in the voting stock of the corporation;

(III) the current beneficial interest in the corpus or income of a trust;

(IV) the total membership interest of a limited liability company;

(V) the beneficial ownership interest in the membership interest of a limited liability company; or

(VI) the profits or capital interest of any other entity, including, but not limited to, a partnership, joint venture, or association.

(J) Effective June 16, 2015, a seller is not engaged in business in this state if the seller is an out-of-state business entity whose physical presence in this state is solely from the entity's performance of disaster- or emergency-related work during a disaster response period. An out-of-state business entity that remains in this state after a disaster response period has ended is engaged in business in this state if the entity conducts any of the activities described in subparagraphs (A) - (I) of this paragraph.

(i) For purposes of this subparagraph only, an "affiliate" is a member of a combined group as that term is described by Tax Code, §171.1014 (Combined Reporting; Affiliated Group Engaged in Unitary Business).

(ii) For purposes of this subparagraph only, a "disaster response period" is:

(I) the period that:

(-a-) begins on the 10th day before the date of the earliest event establishing a declared state of disaster or emergency by the issuance of an executive order or proclamation by the governor or a declaration of the president of the United States; and

(-b-) ends on the earlier of the 120th day after the start date or the 60th day after the ending date of the disaster or emergency period established by the executive order or proclamation or declaration, or on a later date as determined by an executive order or proclamation by the governor; or

(II) the period that, with respect to an out-of-state business entity:

(-a-) begins on the date that the out-of-state business entity enters this state in good faith under a mutual assistance agreement and in anticipation of a state of disaster or emergency, regardless of whether a state of disaster or emergency is actually declared; and

(-b-) ends on the earlier of the date that the work is concluded or the seventh day after the out-of-state business entity enters this state.

(iii) For purposes of this subparagraph only, a "mutual assistance agreement" is an agreement to which one or more business entities are parties and under which a public utility, municipally owned utility, or joint agency owning, operating, or owning and operating critical infrastructure used for electric generation, transmission, or distribution in this state may request that an out-of-state business entity perform work in this state in anticipation of a state of disaster or emergency.

(iv) For purposes of this subparagraph only, an "out-of-state business entity" is a foreign entity that:

(I) enters this state at the request of, or is an affiliate of, an in-state business entity and performs work in Texas under a mutual assistance agreement; or

(II) enters this state at the request of an in-state business entity, under a mutual assistance agreement, or is an affiliate of an in-state business entity and enters this state at the request of an in-state business entity, the state of Texas, or a political subdivision of this state to perform disaster- or emergency-related work in this state during the disaster response period, and:

(-a-) except with respect to the performance of disaster- or emergency-related work, has no physical presence in this state and is not authorized to transact business in this state immediately before a disaster response period; and

(-b-) is not registered with the secretary of state to transact business in this state, does not file a tax report with this state, or a political subdivision of this state, and does not have a

nexus with this state for the purpose of taxation during the tax year immediately preceding the disaster response period.

(5) [(4)] Internet hosting service--The provision to an unrelated user of access over the Internet to computer services using property that is owned or leased and managed by the service provider and on which the unrelated user may store or process the user's own data or use software that is owned, licensed, or leased by the unrelated user or service provider. The term does not include telecommunications services as defined in §3.344 of this title (relating to Telecommunications Services).

(6) [(5)] Itinerant vendor--A seller who does not operate a place of business in this state and who travels to various locations in this state to solicit sales.

(7) [(6)] Kiosk--A small, stand-alone area or structure that:

(A) is used solely to display merchandise or to submit orders for taxable items from a data entry device, or both;

(B) is located entirely within a location that is a place of business of another seller, such as a department store or shopping mall; and

(C) at which taxable items are not available for immediate delivery to a purchaser.

(8) [(7)] Nexus--Sufficient contact with or activity within this state, as determined by state and federal law, to require a person to collect and remit sales and use tax. A person does not have nexus in this state if the person has no connection with this state except the possession of a certificate of authority to do business in this state issued by the Texas Secretary of State.

(9) [(8)] Permit holder--A person to whom the comptroller has issued a sales and use tax permit. The term includes permitted sellers as well as permitted purchasers, but does not include a person who does not hold a Texas sales and use tax permit or whose sales and use tax permit is suspended, pursuant to subsection (l) of this section, or cancelled, pursuant to subsection (n) of this section, or a person who has not received a sales and use tax permit due to an unsigned or incomplete application.

(10) [(9)] Place of business--This term has the meaning given in §3.334 of this title (relating to Local Sales and Use Taxes).

(11) [(10)] Seller--Every retailer, wholesaler, distributor, manufacturer, or any other person who sells, leases, rents, or transfers ownership of tangible personal property or performs taxable services in this state for consideration. Seller is further defined as follows:

(A) A promoter of a flea market, trade day, or other event that involves the sales of taxable items is a seller responsible for the collection and remittance of the sales tax that dealers, salespersons, or individuals collect at such events, unless those persons hold active sales and use tax permits that the comptroller has issued.

(B) A direct sales organization that is engaged in business in this state is a seller responsible for the collection and remittance of the sales and use tax collected by the organization's independent salespersons.

(C) Pawnbrokers, storagemen, mechanics, artisans, or others who sell property to enforce a lien are sellers responsible for the collection and remittance of sales and use tax on the sale of such tangible personal property.

(D) A person engaged in business in this state who sells, leases, or rents tangible personal property owned by another person by

means of a consignment sale is a seller responsible for the collection and remittance of the sales tax on the consignment sale.

(E) An auctioneer who owns tangible personal property or to whom tangible personal property has been consigned is a seller responsible for the collection and remittance of the sales and use tax on tangible personal property sold at auction. For more information, auctioneers should refer to §3.311 of this title (relating to Auctioneers, Brokers, and Factors).

(12) [(11)] Taxable item--Tangible personal property and taxable services. Except as otherwise provided in Tax Code, Chapter 151, the sale or use of a taxable item in electronic form instead of on physical media does not alter the item's tax status.

(A) Tangible personal property means property that can be seen, weighed, measured, felt, or touched or that is perceptible to the senses in any other manner, including a computer program as defined in §3.308 of this title (relating to Computers--Hardware, Software, Services, and Sales) and a telephone prepaid calling card, as defined in §3.344 of this title.

(B) Taxable services are those identified in Tax Code, §151.0101.

(b) Who must have a sales and use tax permit.

(1) Sellers. Each seller who is engaged in business in this state, including itinerant vendors, persons who own or operate a kiosk, and sellers operating temporarily in this state, must apply to the comptroller and obtain a sales and use tax permit for each place of business operated in this state.

(2) Out-of-state sellers. Each out-of-state seller who has nexus with this state and is engaged in business in this state must apply to the comptroller and obtain a sales and use tax permit. An out-of-state seller is responsible for the collection and remittance of sales and use tax on all sales of taxable items made in this state until the seller ceases to have nexus with this state. An out-of-state seller ceases to have nexus with this state when the seller no longer has, and no longer intends to engage in activities that would create, nexus with this state. For example, an out-of-state seller who enters the state each year to participate in an annual trade show does not cease to have nexus with this state between one trade show and the next. In contrast, an out-of-state seller who discontinues the product line that it marketed and sold in this state, and who does not anticipate entering the state to solicit new business, has ceased to have nexus with this state. An out-of-state seller is required to maintain, for at least four years after the out-of-state seller ceases to have nexus with this state, all records required by subsection (j) of this section, including sufficient documentation to verify the date on which the out-of-state seller ceased to have nexus with this state. For more information regarding reporting periods, refer to subsection (g) of this section.

(3) Direct sales organizations. Independent salespersons of direct sales organizations are not required to hold sales and use tax permits to sell taxable items for direct sales organizations. Direct sales organizations engaged in business in this state are sellers responsible for holding sales and use tax permits and for the collection and remittance of sales and use tax on all sales of taxable items by their independent salespersons. See subsection (d)(3) of this section for more information about the collection and remittance of sales and use tax by direct sales organizations.

(4) Non-permitted purchasers. Persons who are not required to have a sales and use tax permit or who do not have a direct payment permit are still responsible for paying to the comptroller sales or use tax due on purchases of taxable items from sellers who do not

collect and remit tax. See subsection (g)(9) of this section for return and payment information and §3.346 of this title (relating to Use Tax).

(5) Non-permitted sellers. Failure to obtain a sales and use tax permit does not relieve a seller required by this section or other applicable law to have a sales and use tax permit from the obligation to properly collect and remit sales and use taxes. Sellers whose sales and use tax permits are suspended, pursuant to subsection (l) of this section, or cancelled, pursuant to subsection (n) of this section, and sellers who have not received sales and use tax permits due to unsigned or incomplete applications, are still responsible for properly collecting and remitting sales and use taxes. See subsection (g) of this section for return and payment information.

(c) Obtaining a sales and use tax permit.

(1) A seller must complete an application that the comptroller furnishes and must return that application to the comptroller, together with bond or other security that may be required by §3.327 of this title (relating to Taxpayer's Bond or Other Security). A seller who files an electronic application furnished by the comptroller is deemed to have signed the application and is not required to print and mail a signed application to the comptroller. A separate sales and use tax permit under the same taxpayer account number is issued to the applicant for each place of business. Sales and use tax permits are issued without charge.

(2) Each seller must apply for a sales and use tax permit. An individual or sole proprietor must be at least 18 years of age unless the comptroller allows an exception from the age requirement. The sales and use tax permit cannot be transferred from one seller to another. The sales and use tax permit is valid only for the seller to whom it was issued and for the transaction of business only at the address that is shown on the sales and use tax permit. If a seller operates two or more types of business at the same location, then only one sales and use tax permit is required.

(3) The sales and use tax permit must be conspicuously displayed at the place of business for which it is issued. A permit holder that has traveling sales persons who operate from a central office needs only one sales and use tax permit, which must be displayed at that office.

(4) All sales and use tax permits of the seller will have the same taxpayer account number; however, each place of business will have a different outlet number. The outlet numbers assigned may not necessarily correspond to the number of business locations operated by the seller.

(d) Collecting sales and use tax due.

(1) Bracket system.

(A) Each seller must collect sales or use tax on each separate retail sale in accordance with the statutory bracket system in Tax Code, §151.053. The practice of rounding off the amount of sales or use tax that is due on the sale of a taxable item is prohibited. Copies of the bracket system should be displayed in each place of business so both the seller and the purchaser may easily use them.

(B) The sales and use tax applies to each total sale, not to each item of each sale. For example, if two items are purchased at the same time and each item is sold for \$.07, then the seller must collect the tax on the total sum of \$.14. Sales and use tax must be reported and remitted to the comptroller as provided by Tax Code, §151.410. When sales and use tax is collected properly under the bracket system, the seller is not required to remit any amount that is collected in excess of the sales and use tax due. Conversely, when the sales and use tax collected under the bracket system is less than the sales and use tax due

on the seller's total receipts, the seller is required to remit sales and use tax on the total receipts even though the seller did not collect sales and use tax from the purchasers.

(2) Sales and use tax due is debt of the purchaser; document requirements.

(A) The sales and use tax due is a debt of the purchaser to the seller until collected. Unpaid sales or use tax is recoverable by the seller in the same manner as the original sales price of the taxable item itself, if unpaid, would be recoverable. The comptroller may proceed against either the seller or purchaser, or against both, until all applicable tax, penalty, and interest due has been paid.

(B) The amount of sales and use tax due must be separately stated on the bill, contract, or invoice to the purchaser or there must be a written statement to the purchaser that the stated price includes sales or use tax. Contracts, bills, or invoices that merely state that "all taxes" are included are not specific enough to relieve either party to the transaction of its sales and use tax responsibilities. The total amount that is shown on such documents is presumed to be the taxable item's sales price, without sales and use tax included. The seller or purchaser may overcome the presumption by using the seller's records to show that sales or use tax was included in the sales price. Sellers located outside of Texas must identify the tax as Texas sales or use tax on their bill, contract, or invoice to the purchaser. If the out-of-state seller does not identify the tax as Texas sales or use tax at the time of the transaction, the seller is presumed not to have collected Texas sales or use tax. Either the seller or the purchaser may overcome the presumption by submitting evidence that clearly demonstrates that the Texas sales or use tax was remitted to the comptroller.

(3) Direct sales organizations. A direct sales organization is responsible for the collection and remittance of the sales and use tax on all sales of taxable items in this state by the independent salespersons who sell the organization's product or service as explained in this paragraph. See subsection (b)(3) of this section for information about sales and use tax permits required to be held by direct sales organizations.

(A) If an independent salesperson purchases a taxable item from a direct sales organization after taking the purchaser's order, then the direct sales organization must collect from the independent salesperson, and remit to the comptroller, the sales and use tax on the actual sales price for which the independent salesperson sold the taxable item to the purchaser.

(B) If an independent salesperson purchases a taxable item from a direct sales organization before the purchaser's order is taken, then the direct sales organization must collect from the independent salesperson, and remit to the comptroller, the sales and use tax based on the organization's suggested retail sales price of the taxable item.

(C) Taxable items that are sold to an independent salesperson for the salesperson's use are taxed based on the actual sales price for which the item was sold to the salesperson at the tax rate in effect for the salesperson's location.

(D) Incentives, including rewards, gifts, and prizes.

(i) Direct sales organizations owe sales and use tax on the cost of all taxable items used as incentives that are transferred to a recipient in this state, including purchasers, independent salespersons, and persons who host a direct sales event.

(ii) Direct sales organizations must collect sales or use tax on the total amount of consideration received in exchange for taxable items, including items purchased with hostess points or similar

forms of compensation paid to a person for hosting a direct sales event and items that are earned by the host based on the volume of purchases. The redemption of reward points in exchange for taxable items is subject to sales tax under Tax Code, §151.005(2). See also §3.283 of this title (relating to Bartering Clubs and Exchanges).

(4) Printers. A printer is a seller of printed materials and is required to collect sales and use tax on sales of those materials in this state. A printer who is engaged in business in this state, however, is not required to collect the sales and use tax if:

(A) the printed materials are produced by a web offset or rotogravure printing process;

(B) the printer delivers those materials to a fulfillment house or to the United States Postal Service for distribution to third parties who are located both inside and outside of this state; and

(C) the purchaser issues a properly completed exemption certificate that contains the statement that the printed materials are for multistate use and the purchaser agrees to pay to this state all the sales and use taxes that are or may become due to the state on the taxable items that are purchased under the exemption certificate. See subsection (g)(4) of this section for additional reporting requirements.

(5) Fundraisers by exempt entities. Regardless of the contractual terms between a for-profit entity and a non-profit exempt entity relating to the sale of taxable items, other than amusement services, as part of any fundraiser, the for-profit entity will be considered the seller of the items under Tax Code, §151.024, must be a permit holder, and is responsible for the proper collection and remittance of any sales or use tax due. The exempt entity and its representatives will be considered as representatives of the for-profit entity. The for-profit entity may advertise in a sales catalog or state on each invoice that sales and use tax is included, as provided under paragraph (2) of this subsection, or may require that the sales and use tax be calculated and collected by its representatives based on the sales price of each taxable item. Fundraisers conducted by exempt entities in this manner do not qualify as a tax-free sale day. For more information on exempt entities and tax-free sales days, see §3.322 of this title (relating to Exempt Organizations). For more information on amusement services, see §3.298 of this title (relating to Amusement Services).

(6) Local sales and use tax. A seller who has nexus with this state and is engaged in business in this state is required to properly collect and remit local sales and use tax even if no sales and use tax permit is required at the location where taxable items are sold. For more information on the proper collection of local taxes, see §3.334 of this title.

(e) Sales and use tax returns and remitting tax due.

(1) Forms prescribed by the comptroller. Sales and use tax returns must be filed on forms that the comptroller prescribes. The fact that a person does not receive or obtain the correct forms from the comptroller does not relieve a person of the responsibility to file a sales and use tax return and to remit the required sales and use tax.

(2) Signatures. Sales and use tax returns must be signed by the person who is required to file the sales and use tax return or by the person's duly authorized agent, but need not be verified by oath.

(3) Permit holders.

(A) Each permit holder is required to file a sales and use tax return for each reporting period, even if the permit holder has no sales or use tax to report for the reporting period.

(B) Each permit holder must remit sales and use tax on all receipts from sales or purchases of nonexempt taxable items, less any applicable discounts as provided by subsection (h) of this section.

(C) Each permit holder shall file a single sales and use tax return together with the tax payment for all businesses that operate under the same taxpayer number. The sales and use tax return for each reporting period must reflect the total sales, taxable sales, and taxable purchases for each outlet.

(D) Consolidated reporting by affiliated entities is not allowed. Each legal entity engaged in business in this state is responsible for filing a separate sales and use tax return.

(4) Electronic returns and remittances. Certain persons must file returns and transfer payments electronically as provided by Tax Code, §111.0625 and §111.0626. For more information, see §3.9 of this title (relating to Electronic Filing of Returns and Reports; Electronic Transfer of Certain Payments by Certain Taxpayers).

(f) Due dates.

(1) General rule. Sales and use tax returns and remittances are due no later than the 20th day of the month following each reporting period end date unless otherwise provided by this section. Sales and use tax returns and remittances that are due on Saturdays, Sundays, or legal holidays may be submitted on the next business day.

(A) Sales and use tax returns submitted by mail must be postmarked on or before the due date to be considered timely.

(B) Sales and use tax returns filed electronically must be completed and submitted by 11:59 p.m., central time, on the due date to be considered timely.

(2) Due dates for payments made using an electronic funds transfer method approved by the comptroller are provided at §3.9(c) of this title.

(3) Extensions for persons located in an [a natural disaster] area designated in a state of disaster or state of emergency declaration. The comptroller may grant an extension of not more than 90 days to make or file a sales and use tax return or pay sales and use tax that is due by a person located in an [a natural disaster] area designated in an executive order or proclamation issued by the governor declaring a state of disaster or state of emergency, or an area that the president of the United States declares a major disaster or emergency, if [whom] the comptroller finds the person to be a victim of the [natural] disaster or emergency. The person owing the sales and use tax may file a written request for an extension at any time before the expiration of 90 days after the original due date. If an extension is granted, interest on the unpaid tax does not begin to accrue until the day after the day on which the extension expires, and penalties are assessed and determined as though the last day of the extension were the original due date. [The term "natural disaster area" has the meaning given in §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).]

(g) Reporting periods.

(1) Quarterly filers. Permit holders who have less than \$1,500 in state sales and use tax per quarter to report may file sales and use tax returns quarterly. The quarterly reporting periods end on March 31, June 30, September 30, and December 31.

(2) Yearly filers. Permit holders who have less than \$1,000 in state sales and use tax to report during a calendar year may file yearly sales and use tax returns upon authorization from the comptroller.

(A) Authorization to file sales and use tax returns on a yearly basis is conditioned upon the correct and timely filing of prior returns.

(B) Authorization to file sales and use tax returns on a yearly basis will be denied if a permit holder's liability exceeded \$1,000 in the prior calendar year.

(C) A permit holder who files on a yearly basis without authorization is liable for applicable penalty and interest on any previously unreported quarter.

(D) Authority to file on a yearly basis is automatically revoked if a permit holder's state sales and use tax liability is greater than \$1,000 during a calendar year. The permit holder must file a sales and use tax return for that month or quarter, depending on the amount, in which the sales and use tax payment or liability is greater than \$1,000. On that return, the permit holder must report all sales and use taxes that are collected and all accrued liability for the year, and must file monthly or quarterly, as appropriate, thereafter for as long as the yearly sales and use tax liability is greater than \$1,000.

(E) Once each year, the comptroller reviews all accounts to confirm yearly filing status and to authorize permit holders who meet the filing requirements to file yearly sales and use tax returns.

(F) Yearly filers must report on a calendar year basis. The sales and use tax return and payment are due on or before January 20 of the next calendar year.

(3) Monthly filers. Permit holders who have \$1,500 or more in state sales and use tax per quarter to report must file monthly sales and use tax returns except for permit holders who prepay the sales and use tax as provided in subsection (h) of this section.

(4) Printers. A printer who is not required to collect sales and use tax on the sale of printed materials because the transaction meets the requirements of subsection (d)(4) of this section must file a quarterly special use tax report, Form 01-157, Texas Special Use Tax Report for Printers, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form, with the comptroller on or before the last day of the month following the quarter. The report must contain the name and address of each purchaser with the sales price and date of each sale. The printer is still required to file sales and use tax returns to report and remit sales and use taxes that the printer collected from purchasers on transactions that do not meet the requirements of subsection (d)(4) of this section.

(5) Local sales and use tax. Each permit holder who is required to collect, report, and remit a city, county, special purpose district, or metropolitan transit authority/city transit department sales and use tax must report the amount subject to local sales and use tax on the state sales and use tax return described in subsection (e) of this section.

(6) State agencies. State agencies that deposit sales and use taxes directly with the comptroller's office according to Accounting Policy Statement Number 8 are not required to file a separate sales and use tax return. A fully completed deposit request voucher is deemed to be the sales and use tax return filed by these agencies. Paragraphs (1) - (3) of this subsection do not apply to these state agencies. Sales and use taxes must be deposited with the comptroller's office within the time period otherwise specified by law for deposit of state funds.

(7) Refunds on exports. Sellers who refund sales tax on exports based on customs broker certifications should refer to §3.360 of this title (relating to Customs Brokers).

(8) Direct payment permit holders. Yearly and quarterly filing requirements, as discussed in this subsection, and prepayment

discounts [procedures] and discounts for timely filing, as discussed in subsection (h) of this section, do not apply to holders of direct payment permits. See §3.288 of this title (relating to Direct Payment Procedures and Qualifications).

(9) Non-permitted purchasers. A person who does not hold a sales and use tax permit or a direct payment permit must pay sales or use tax that is due on purchases of taxable items when the sales or use tax is not collected by the seller. The sales or use tax is to be remitted on comptroller Form 01-156, Occasional Sales and Use Tax Return, its electronic equivalent, or any form promulgated by the comptroller that succeeds such form.

(A) A non-permitted purchaser who owes less than \$1000 in sales and use tax on all purchases made during a calendar year on which sales and use tax was not collected by the seller must file the return on or before the 20th of January following the year in which the purchases were made.

(B) A non-permitted purchaser who owes \$1000 or more in sales and use tax on all purchases made during a calendar year on which sales and use tax was not collected by the seller must file a return and remit sales and use taxes due on or before the 20th of the month following the month when the \$1000 threshold is reached and thereafter file monthly returns and make sales and use tax payments on all purchases on which sales and use tax is due.

(h) Discounts; prepayments; penalties and interest relating to filing sales and use tax returns.

(1) Discounts. Unless otherwise provided by this section, each permit holder may claim a discount for timely filing a sales and use tax return and paying the taxes due as reimbursement for the expense of collecting and remitting the sales and use tax. The discount is equal to 0.5% of the amount of sales and use tax due and may be claimed on the return for each reporting period and is computed on the amount timely reported and paid with that return.

(2) Prepayments. Prepayments may be made by permit holders who file monthly or quarterly sales and use tax returns. The amount of the prepayment must be a reasonable estimate of the state and local sales and use tax liability for the entire reporting period. "Reasonable estimate" means at least 90% of the total amount due or an amount equal to the actual net tax liability due and paid for the same reporting period of the immediately preceding year.

(A) A permit holder who makes a timely prepayment based upon a reasonable estimate of sales and use tax liability may retain an additional discount of 1.25% of the amount due.

(B) The monthly prepayment is due on or before the 15th day of the month for which the prepayment is made.

(C) The quarterly prepayment is due on or before the 15th day of the second month of the quarter for which the sales and use tax is due.

(D) A permit holder who makes a timely prepayment must file a sales and use tax return showing the actual liability and remit any amount due in excess of the prepayment on or before the 20th day of the month that follows the quarter or month for which a prepayment was made. If there is an additional amount due, the permit holder may retain the 0.5% reimbursement on the additional amount due, provided that both the sales and use tax return and the additional amount due are timely filed. If the prepayment exceeded the actual liability, the permit holder will be mailed an overpayment notice or refund warrant.

(E) Remittances that are less than a reasonable estimate, as described by this paragraph, are not regarded as prepayments and the 1.25% discount will not be allowed. If the permit holder owes more

than \$1,500 in a calendar quarter, the permit holder is regarded as a monthly filer. All monthly sales and use tax returns that are not filed because of the invalid prepayment are subject to late filing penalty and interest.

(3) Penalties and interest.

(A) If a person does not file a sales and use tax return together with payment on or before the due date, the person forfeits all discounts and incurs a mandatory 5.0% penalty. After the first 30 days delinquency, an additional mandatory penalty of 5.0% is assessed against the person, and after the first 60 days delinquency, interest begins to accrue at the prime rate, as published in the Wall Street Journal on the first business day of each calendar year, plus 1.0%. For taxes that are due on or before December 31, 1999, interest is assessed at the rate of 12% annually.

(B) A person who fails to timely file a sales and use tax return when due shall pay an additional penalty of \$50. The penalty is due regardless of whether the person subsequently files the sales and use tax return or whether no taxes are due for the reporting period.

(i) Reports of alcoholic beverage sales to retailers. Each brewer, manufacturer, wholesaler, winery, distributor, or package store local distributor shall electronically file a report of alcoholic beverage sales to retailers, as that term is defined in §3.9(e)(2) of this title, as provided in that section.

(j) Records required for comptroller inspection. See §3.281 of this title (relating to Records Required; Information Required) and §3.282 of this title (relating to Auditing Taxpayer Records).

(k) Resale and exemption certificates. See §3.285 of this title (relating to Resale Certificate; Sales for Resale) and §3.287 of this title (relating to Exemption Certificates).

(l) Suspension of sales and use tax permit.

(1) If a permit holder fails to comply with any provision of Tax Code, Title 2, or with the rules issued by the comptroller under those statutes, the comptroller may suspend the permit holder's sales and use tax permit or permits.

(2) Before a permit holder's sales and use tax permit is suspended, the permit holder is entitled to a hearing before the comptroller to show cause why the permit should not be suspended. The comptroller shall give the permit holder at least 20 days notice, which shall be in accordance with the requirements of §1.14 of this title (relating to Notice of Setting for Certain Cigarette, Cigar, and Tobacco Tax Cases).

(3) After a sales and use tax permit has been suspended, a new permit will not be issued to the same person until the person has posted sufficient security and satisfied the comptroller that the person will comply with both the provisions of the law and the comptroller's rules and regulations.

(m) Refusal to issue sales and use tax permit. The comptroller is required by Tax Code, §111.0046, to refuse to issue any sales and use tax permit to a person who:

(1) is not permitted or licensed as required by law for a different tax or activity administered by the comptroller; or

(2) is currently delinquent in the payment of any tax or fee collected by the comptroller.

(n) Cancellation of sales and use tax permits with no reported business activity.

(1) Permit cancellation due to abandonment. Any holder of a sales and use tax permit who reported no business activity in the previous calendar year is deemed to have abandoned the sales and use

tax permit, and the comptroller may cancel the sales and use tax permit. "No business activity" means zero total sales, zero taxable sales, and zero taxable purchases.

(2) Re-application. If a sales and use tax permit is cancelled, the person may reapply and obtain a new sales and use tax permit upon request, provided the issuance is not prohibited by subsection (m) of this section, or by Tax Code, §111.0046.

(o) Liability related to acquisition of a business or assets of a business. Tax Code, §111.020 and §111.024, provides that the comptroller may impose a tax liability on a person who acquires a business or the assets of a business. See §3.7 of this title (relating to Successor Liability and Fraudulent Transfers: Liability Incurred by Purchase or Acquisition of a Business).

(p) Criminal penalties. Tax Code, Chapter 151, imposes criminal penalties for certain prohibited activities or for failure to comply with certain provisions under the law. See §3.305 of this title (relating to Criminal Offenses and Penalties).

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 May 31, 2016.

TRD-201602734

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Comptroller of Public Accounts

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-0387



TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 11. TEXAS JUVENILE JUSTICE DEPARTMENT

CHAPTER 385. AGENCY MANAGEMENT AND OPERATIONS

The Texas Juvenile Justice Department (TJJD) proposes amendments to §§385.8153 (Research Projects), 385.9967 (Court-Ordered Child Support), and 385.9993 (Canteen Operations).

Throughout these sections, minor clarifications, grammatical corrections, and terminology updates have been made. Specific changes are listed in the following paragraphs.

SECTION-BY-SECTION SUMMARY

The amended §385.8153 will: 1) add several items to the list of items that must be included with each research proposal submitted by non-TJJD researchers; 2) clarify the meaning of "negative personal results," which is a term used when describing a prohibited type of research; 3) clarify that a copy of the final report must be submitted to TJJD *prior to releasing the report, except as approved by the executive director*; 4) add a new section that describes TJJD's process for approving research projects; 5) add a provision allowing the TJJD board to delegate to the executive director or designee authority to approve research projects; 6) add provisions that explain TJJD's responsibility to monitor research projects, evaluate the results, and recommend any ap-

propriate changes; and 7) add a section that addresses approval of pilot programs.

The amended §385.9967 will: 1) clarify that TJJD *may* (rather than *must*) notify the committing court when a court-ordered child support payment is past due; 2) remove the deadline for TJJD to make a decision to refer a delinquent account to the Child Support Division of the Attorney General's Office; 3) clarify that when TJJD receives child support for a Title IV-E certified youth, TJJD reduces the amount of its claim for reimbursement by the amount of child support received for that youth; 4) remove the requirement for TJJD to inquire into the Attorney General's system to determine if child support payments are related to an open Title IV-E case and to subsequently forward any child support received for such youth to the Attorney General's Office or Department of Family and Protective Services; and 5) remove the requirement for TJJD to notify the Attorney General's Office of certain information when a youth is certified as Title IV-E eligible.

The amended §385.9993 will: 1) remove the requirement that the Health and Human Services Commission be given the first opportunity to operate a canteen in TJJD residential facilities; 2) add an option to enter a canteen-services contract with an entity other than the local Community Resource Council; and 3) expand the scope of the rule to apply to any vending operation *accessible to youth* (rather than for the benefit of youth) and remove the exemption for vending machines.

Additionally, the amendment to §385.9993 will move several provisions out of TJJD's internal procedures and into the text of the rule, including: 1) requirements to use the Canteen Revolving Fund for any expenditures or revenues associated with operating a canteen; 2) notice that TJJD is not responsible for collecting or depositing sales taxes for canteens operated by contractors; and 3) a provision allowing TJJD employees to assist a contractor in providing canteen services only when doing so does not interfere with employees' regular job duties or the safety of youth and staff.

RULE REVIEW

Simultaneously with these proposed rulemaking actions, TJJD also publishes this notice of intent to review §§385.8153, 385.9967, and 385.9993 as required by Texas Government Code §2001.039. Comments on whether the reasons for originally adopting these rules continue to exist may be submitted to TJJD by following the instructions provided later in this notice.

FISCAL NOTE

Mike Meyer, Chief Financial Officer, has determined that for each year of the first five years the amended sections are in effect, there will be no significant fiscal impact for state or local government as a result of enforcing or administering the sections.

PUBLIC BENEFITS/COSTS

Mr. Meyer has determined that for each year of the first five years the amended sections are in effect, the public benefit anticipated as a result of administering the sections will be the availability of rules that have been updated to conform to current laws and regulations and to more accurately reflect TJJD's current organizational structure and practices.

Mr. Meyer has also determined that there will be no effect on small businesses or micro-businesses. There is no anticipated economic cost to persons who are required to comply with the

sections as proposed. No private real property rights are affected by adoption of these sections.

PUBLIC COMMENTS

Comments on the proposal and/or rule review 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 email to policy.proposals@tjjd.texas.gov.

SUBCHAPTER B. INTERACTION WITH THE PUBLIC

37 TAC §385.8153

STATUTORY AUTHORITY

Amended §385.8153 is proposed under Texas Human Resources Code §242.003, which authorizes TJJD to adopt rules appropriate to the proper accomplishment of its functions and to adopt rules for governing TJJD schools, facilities, and programs.

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

§385.8153. *Research Projects.*

(a) Purpose. This [The purpose of this] rule addresses: [is to allow for]

(1) research related to juvenile delinquency; [and to ensure]

(2) the assurance of confidentiality by establishing procedures that [which] comply with state and federal guidelines and laws and accepted professional and scientific ethics; and[-]

(3) the ability of the Texas Juvenile Justice Department (TJJD) to provide sufficient technical assistance for research projects.

(b) General Provisions. [Restrictions-]

(1) TJJD encourages [The agency will encourage] research beneficial to TJJD or the juvenile justice system.

(2) TJJD uses [The agency will use] research results to aid decision making regarding agency operations and [for] youth treatment programs.

(3) TJJD collaborates [The agency will collaborate] with other agencies whenever possible and shares [share] research information as appropriate and as allowed by law.

(4) Any patentable product, process, or idea that might result from a research project funded by TJJD is [the Texas Youth Commission shall be] the property of TJJD. [the Texas Youth Commission-]

(c) Youth Participation. Participation by TJJD [TYC] youth as research subjects is [shall be] restricted as follows:

(1) TJJD [TYC] youth may [will] not be used in experimental projects involving medical, pharmaceutical, or cosmetic research.

(2) TJJD [TYC] youth may participate in nonmedical, non-pharmaceutical, or noncosmetic research on a voluntary, noncoercive basis.

(3) TJJD [TYC] youth who choose [elect] to participate in research projects are [will] not: [be]

(A) denied basic services available to other youth; or[-] not;

(B) permitted to participate in research activities that are likely to [which may] accrue negative personal results (e.g., nega-

ative impact to treatment progress, causing emotional distress or physical harm, etc).

(d) Researchers. TJJD [TYC] staff, university faculty or students, or contracted firms or individuals may[; if approved,] conduct research if they:

(1) show that the proposed project will provide benefits to TJJD [TYC] or the juvenile justice profession;

(2) ensure confidentiality of TJJD [TYC] youth;

(3) do not place an undue burden on TJJD [TYC] staff, youth, or agency resources; [and]

(4) agree to comply with other agency rules; and [of conduct for research as specified below.]

(5) are approved under subsection (h) of this section.

(e) Oversight of Research Projects. The TJJD Research Department is responsible for ensuring research projects are proposed, reviewed, approved, and conducted in accordance with TJJD requirements. [Project Management. Procedures for research projects are managed through the research department.]

(f) Research Proposals. Project directors other than those employed by the TJJD Research Department [research department] must submit a research proposal to the Research Department, not to exceed five pages, excluding attachments [research department]. The proposal must [should] include [as much of] the following information, unless otherwise approved by the director of research [as possible]:

(1) project title;

(2) names and qualifications of all project researchers;

(3) purpose (e.g., thesis, professional paper, dissertation);

(4) executive summary;

(5) research questions and research design;

(6) research methodology including statistical methods/models if applicable;

(7) comprehensive list of data elements/fields requested and how these relate to the research questions;

(8) statement of why juvenile justice data are needed;

(9) statement of how research will benefit TJJD or the juvenile justice system;

(10) amount of TJJD staff time needed to complete the research project, provide technical assistance, or compile data;

(11) number of research subjects and time required by each study subject, if applicable;

(12) time frame of research;

(13) Institutional Review Board (IRB) approval;

(14) copy of study instruments, surveys, etc.;

(15) copy of consent forms;

(16) completed Research and Analytical Testing System (RATS) questionnaire;

(17) provisions for confidentiality of research subjects;

(18) research supervisor, if any (e.g., chairperson of thesis committee);

(19) amount and source of funding, if any; and

(20) any other information requested by the director of research.

~~[(4) research design and methodology;]~~

~~[(5) number of and time required by each TYC youth if used in research;]~~

~~[(6) provisions for confidentiality of youth names and identification numbers;]~~

~~[(7) amount of TYC staff time needed;]~~

~~[(8) benefit to TYC or juvenile profession;]~~

~~[(9) research supervisor, if any (e.g., Chairman of Thesis Committee); and]~~

~~[(10) amount and source of funding, if any.]~~

(g) Research Agreement. TJJD [TYC] and the researcher(s) must [research consultant shall] enter into a research agreement prior to the commencement of an outside research project. The agreement must [shall] contain the following:

(1) a copy of the approved research proposal; [description of the research project;]

(2) an agreement to maintain the confidentiality of TJJD [individual] youth;

(3) a clause providing that any patentable product, process, or idea that results from the performance of the research agreement, and for which TJJD [TYC] has expended appropriated funds, becomes [shall become] the property of TJJD; [the Texas Youth Commission;] and

(4) an agreement to furnish TJJD [TYC] with a copy of the final report prior to its release except as approved by the executive director.

(h) Approval of Proposals.

(1) TJJD approves up to eight research proposals each fiscal year. Additional proposals may be approved only if the director of research determines the additional project(s) would require minimal or no TJJD staff time.

(2) The TJJD research review committee reviews all research proposals. The committee includes representation from the TJJD Research Department, the affected program and operational areas, management, and other administrators.

(3) Proposals are reviewed four times per fiscal year as determined by the director of research. Formal notice of the research review committee's decision is provided to the researcher upon completion of the review process.

(4) Proposals involving on-site research are circulated to affected field administrators for their review, comment, and indication of level of support.

(5) Proposals requiring participation of TJJD youth are presented to the appropriate program directors, senior director(s), and other executive management as appropriate prior to a final decision by the research review committee.

(6) Approved non-TJJD staff proposals involving research projects using TJJD youth as participants in the study, with the exception of surveys, are presented to the TJJD Board for approval. The TJJD Board may delegate to the executive director or designee authority to approve research projects.

(i) Monitoring Projects. The TJJJ Research Department staff monitors projects and proposes adjustments when necessary.

(j) Research Results. The Research Department:

(1) reviews research results and evaluates the conclusions;

(2) distributes the final research report to appropriate staff and to other interested parties; and

(3) recommends to the appropriate program directors, senior director(s), and other executive management as appropriate any changes in programs or operations that the research results indicate.

(k) Demonstration Programs.

(1) Demonstration (pilot) programs may be implemented as a result of research conducted by TJJJ or by an outside researcher.

(2) The executive director or designee must approve all demonstration programs prior to implementation.

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 June 6, 2016.

TRD-201602858

Jill Mata

General Counsel

Texas Juvenile Justice Department

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 490-7278



SUBCHAPTER C. MISCELLANEOUS

37 TAC §385.9967, §385.9993

STATUTORY AUTHORITY

Amended §385.9967 and §385.9993 are proposed under Texas Human Resources Code §242.003, which authorizes TJJJ to adopt rules appropriate to the proper accomplishment of its functions and to adopt rules for governing TJJJ schools, facilities, and programs.

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

§385.9967. *Court-ordered [Court Ordered] Child Support.*

(a) This rule establishes [The purpose of this rule is to establish] a system for [whereby] the Texas Juvenile Justice Department (TJJJ) to comply [Youth Commission (TYC) complies] with §54.06 of the Texas Family Code[, §54.06, which specifies that the agency receives court ordered child support payments for youth committed to the agency's care and deposits these payments in the General Revenue Fund].

[(b) Upon entry into TYC, a youth's parents are informed where to send child support if they have been court ordered to do so.]

(b) [(e)] As part of TJJJ's [the] intake process, intake staff members review commitment documentation for language ordering child support payments. When this documentation exists, intake staff members ensure [that] an entry is made to the Correctional Care System [correctional care information system] detailing the payment amount and terms of rendition.

(c) [(d)] The Finance Department [finance department] maintains documentation of court-ordered [court ordered] child support payments and associated correspondence.

(d) [(e)] The Finance Department [finance department] notifies the youth's parents, or other persons responsible, [family] by letter of the address to which court-ordered child support payments are to be sent and that they must: [to:]

(1) begin payments [and provides the address to which payments are to be sent];

(2) render missed payments; and

(3) end payments when the youth is discharged or paroled to home.

(e) [(f)] TJJJ may notify the [The] committing court [is notified by TYC] when any court-ordered child support [one] payment is past due.

(f) [(g)] TJJJ may refer a delinquent [Not later than the 90th day after the date the agency determines the normal agency collection procedures for an obligation to the agency have failed, the] account [may be referred] to the Child Support Division of the Office of the Attorney General as [if] determined by [a contractual legal] agreement between TJJJ [TYC] and the Office of the Attorney General.

(g) [(h)] If TJJJ receives court-ordered [If TYC receives court ordered] child support for a Title IV-E certified youth, TJJJ will reduce its Title IV-E claim for reimbursement for that youth's cost of care by the amount of child support received. [TYC will inquire into the Attorney General's system and determine if the support is for an open Title IV-E case. If the support is for an open case, the funds will be forwarded to the Office of the Attorney General. If the support is for a closed case, the funds will be forwarded to the Texas Department of Family and Protective Services.]

[(i) The Office of the Attorney General is notified of Title IV-E certification of the youth, new family contact information, discharge, or return to home.]

§385.9993. *Canteen Operations.*

(a) Purpose. This rule provides for the [The purpose of this rule is to provide Texas Youth Commission] operation of canteens in Texas Juvenile Justice Department (TJJJ) [one] residential facilities or contracting for such operations. [the operation.]

(b) Definition. [Explanation of Terms Used.] Canteen [operations]--any vending operations accessible to [for benefit of] youth [except vending machines].

(c) General Provisions.

(1) [(e)] Residential facilities [Institutions] may operate canteens on campus.

(2) [(d)] Should the residential facility [institution] choose not to operate its own canteen, the facility may contract with its Community Resource Council (council) or another entity [Health and Human Services Commission (HHSC) shall have first opportunity to establish a canteen in accordance with Texas Human Resource Code, Chapter 94. Should no canteen be established by the HHSC licensees under Chapter 94, the institution's advisory council may be awarded a contract] to provide canteen services.

(d) TJJJ-Operated Canteens.

(1) If the residential facility operates its own canteen, merchandise purchases for resale, salaries, and other expenses are paid from appropriated funds (i.e., the Canteen Revolving Fund). The canteen budget must be included in the facility operating budget and approved by the TJJJ Board.

(2) Revenues from canteen operations are deposited into the Canteen Revolving Fund. Profits after canteen expenses and sales

taxes are deposited into the Student Benefit Fund in accordance with §385.9971 of this title. The sales taxes are deposited into the State Treasury.

(3) TJJD maintains general procedures that address basic internal controls for merchandise inventory handling and cash handling.

(e) Rules for Contracting for Canteen Services.

(1) TJJD may contract with a local council or another entity for canteen services. A written contract is required and is to include the specific service to be provided and the consideration to be paid, if applicable in accordance with §385.1101 of this title.

(2) If TJJD agrees to make any expenditures related to the operation of the canteen, such payments will be made from the Canteen Revolving Fund. Any proceeds paid to TJJD for the canteen operation are deposited into the Canteen Revolving Fund.

(3) The contracted entity is responsible for collection and deposit of all sales taxes to the State Treasury.

(4) TJJD employees may assist in the provision of canteen services while on duty only when doing so does not interfere with regular job duties or the safety and security of TJJD youth and staff.

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 June 6, 2016.

TRD-201602859

Jill Mata

General Counsel

Texas Juvenile Justice Department

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 490-7278



TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 809. CHILD CARE SERVICES

The Texas Workforce Commission (Commission) proposes amendments to the following sections of Chapter 809, relating to Child Care Services:

Subchapter A. General Provisions, §809.2

Subchapter B. General Management, §§809.13, 809.15 - 809.17, 809.19, and 809.20

Subchapter C. Eligibility for Child Care Services, §§809.41 - 809.51, 809.53, and 809.54

Subchapter D. Parent Rights and Responsibilities, §§809.71 - 809.75 and 809.78

Subchapter E. Requirements to Provide Child Care, §§809.91 - 809.95

Subchapter F. Fraud Fact-Finding and Improper Payments, §§809.111 - 809.113, 809.115, and 809.117

The Commission proposes adding the following section to Chapter 809, relating to Child Care Services:

Subchapter C. Eligibility for Child Care Services, §809.52

The Commission proposes the repeal of the following sections of Chapter 809, relating to Child Care Services:

Subchapter C. Eligibility for Child Care Services, §809.55

Subchapter D. Parent Rights and Responsibilities, §809.76 and §809.77

Subchapter F. Fraud Fact-Finding and Improper Payments, §809.116

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed Chapter 809 rule change is to make amendments to the Commission's Child Care Services rules to address changes resulting from the Child Care and Development Block Grant Act (CCDBG Act) of 2014. The proposed amendments to Chapter 809 also include, where appropriate, changes in rule language based on the Notification of Proposed Rulemaking (NPRM) issued December 24, 2015, by the U.S. Health and Human Services Administration for Children and Families.

The CCDBG Act authorizes the federal Child Care and Development Fund (CCDF), which is the primary federal funding source for providing child care subsidy assistance to low-income families and for improving the quality of care for all children. The Texas Workforce Commission (Agency) is the CCDF Lead Agency in Texas. The CCDF program is administered by the 28 Local Workforce Development Boards (Boards). Additionally, the Texas Department of Family and Protective Services (DFPS) is responsible for administering the health and safety requirements of the CCDF program.

On November 19, 2014, President Obama signed the CCDBG Act of 2014, reauthorizing the CCDBG Act for the first time since 1996. The new law makes significant changes to the CCDF program, designed to promote children's healthy development and safety, improve the quality of child care, and provide support for parents who are working or in training or education.

The primary purpose of the Commission's proposed amendments to Chapter 809 is to implement the following changes to the CCDF program resulting from the CCDBG Act of 2014:

Twelve-Month Eligibility Period

The CCDBG Act of 2014 added a 12-month eligibility and re-determination period requirement for children determined eligible for subsidized child care. This change to the CCDF program is designed to provide more stable assistance to families, protection for working families, and increased opportunities for children to remain in child care services.

CCDBG Act §658E(c)(2)(N)(i) and (ii) require states to demonstrate in the CCDF State Plan that after initial eligibility each child who receives assistance will be considered to meet all eligibility requirements for such assistance and will receive such assistance for not fewer than 12 months before the state or designated local entity redetermines the eligibility of the child, regardless of changes in income--as long as income does not exceed

the federal threshold of 85 percent of the state median income (SMI)—or temporary changes in participation in work, training, or educational activities.

Therefore, a state shall not terminate assistance prior to the end of the 12-month period if the family experiences a temporary job loss or temporary change in participation in a training or educational activity.

Although the CCDBG Act requires a period of 12-month minimum eligibility and receipt of child care services prior to redetermination, §658E(c)(2)(N)(iii) allows states the option to terminate eligibility due to a permanent (nontemporary) change in work, training, or education. However, the CCDBG Act requires that prior to terminating a subsidy, the state must continue to provide child care assistance for a period of at least three months to allow parents to engage in job search, resume work, or attend an educational or training program as soon as possible.

Parent Share of Cost during the 12-Month Eligibility Period

To support continued care throughout the 12-month eligibility period, NPRM §98.21(a)(3):

--prohibits states from increasing the parent share of cost during the 12-month eligibility period, regardless of increases in the family income; and

--requires that states act upon information provided by the parent that would result in a reduction in the parent share of cost.

NPRM §98.21(b)(2) allows increases in the parent share of cost for instances in which the family has exceeded a state's initial eligibility income threshold, but still remains under the federal 85 percent of SMI.

Finally, NPRM §98.45(k)(2) requires that the parent share of cost be based on income and the size of the family and may be based on other factors as appropriate, but may not be based on the cost of care or amount of the subsidy payment.

Graduated Phaseout of Eligibility

CCDBG Act §658E(c)(2)(N)(iv) requires Lead Agencies to have a "Graduated Phaseout of Eligibility" that includes policies and procedures to continue child care assistance at the time of redetermination for children of parents who are working or attending a job training or educational program and whose income has risen above the Lead Agency's initial income eligibility threshold to qualify for assistance but remains at or below 85 percent of SMI.

Income Calculation to Consider Irregular Income Fluctuations

CCDBG Act §658E(c)(2)(N)(i)(II) requires that states take into consideration irregular fluctuations of earnings when calculating income for eligibility. NPRM §98.21(c) further clarifies this requirement by adding that the calculation of income policies ensures that temporary increases in income, "including temporary increases that result in monthly income exceeding 85 percent of SMI (calculated on a monthly basis), do not affect eligibility or family co-payments."

Priority and Eligibility for Children Experiencing Homelessness

CCDBG Act §650E(3)(B)(i) and NPRM §98.46(a)(3) and §98.51 require states to give priority for services to children experiencing homelessness. NPRM §98.2 defines a "child experiencing homelessness" as a child meeting the definition of homelessness under the McKinney-Vento Homelessness Act of 1987 (McKinney-Vento Act).

The NPRM preamble clarifies that Lead Agencies have flexibility in how they offer priority to these populations, including by prioritizing enrollment, waiving copayments, paying higher rates for access to higher-quality care, or using grants or contracts to reserve slots for priority populations.

Additionally, the CCDBG Act and the NPRM require that state procedures permit enrollment (after an initial eligibility determination) of children experiencing homelessness while required documentation is obtained.

Attendance and Provider Reimbursements

CCDBG Act §658E(c)(2)(S) and NPRM §98.45(m) require implementation of provider payment practices that:

--align with generally accepted payment practices for children who do not receive CCDF funds; and

--support the fixed costs of providing child care services by delinking provider payments from a child's occasional absences.

Consumer Education Information

CCDBG Act §658E(c)(2)(E) and NPRM §98.33 require that states collect and disseminate, through a consumer-friendly and easily accessible website, consumer education information to parents of eligible children, the general public, and, where applicable, providers regarding:

--availability of the full diversity of child care services;

--quality of providers;

--state processes for licensing, conducting background checks, and monitoring child care providers;

--other programs for which families that receive child care services may be eligible;

--research and best practices concerning children's development; and

--state policies regarding social-emotional behavioral health of children.

Additionally, NPRM §98.33(d) requires that parent consumer education information also include:

--licensing compliance information for the provider selected by the parent;

--how to submit a complaint regarding a child care provider;

--how to contact community resources that assist parents in locating quality child care; and

--how CCDF subsidies are designed to promote equal access to the full range of child care providers.

CCDBG Act §658E(c)(2)(E) also requires that Lead Agencies provide eligible parents with information on existing resources and other services in the state that conduct developmental screening and provide referrals and services, when appropriate, for children eligible for subsidized child care, including:

--the Medicaid Early and Periodic Screening, Diagnosis, and Treatment program; and

--the Early Childhood Intervention (ECI) and Preschool Program for Children with Disabilities developmental screening services.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER A. GENERAL PROVISIONS

The Commission proposes the following amendments to Subchapter A:

§809.2. Definitions

Attending a Job Training or Educational Program

Consistent with CCDBG Act §658E(c)(2)(N)(i) - (ii), the definition of "attending a job training or educational program" is amended to clarify that the requirement in the definition that the individual be making progress toward successful completion of the program as determined by the Board, is only applied at the parent's 12-month redetermination.

Consistent with the CCDBG Act, care cannot be discontinued during the 12-month eligibility period for failure to make progress toward completion of an education or training program. However, the NPRM allows additional eligibility requirements at the 12-month redetermination period. Boards must ensure that the parent is making progress toward completion of the program, as determined by the Board, when redetermining eligibility for continued care, but are prohibited from making this a condition of eligibility at the parent's initial eligibility determination. When developing policies and procedures for determining if the parent is making progress toward completion of the program, the Commission cautions against relying solely on the parent's grade point average (GPA), particularly one semester's GPA. If a Board uses the GPA, the Commission encourages Boards to establish a minimum threshold that would demonstrate if a parent has consistently failed to complete coursework during the eligibility period.

The requirement in the definition that the individual must be considered by the program to be officially enrolled in and meeting the attendance requirements of the program is retained without change because enrollment and attendance in the program should be maintained throughout the 12-month eligibility period. Discontinuing care due to a nontemporary cessation of attendance in a training or education activity during the 12-month eligibility period is addressed in §809.51(b).

As described in amended §809.73, parents are required to report items that impact a family's eligibility during the 12-month eligibility period. Boards may develop procedures for confirming continued enrollment and attendance during the 12-month eligibility period, including requesting that education institutions and training providers confirm enrollment at each semester and the resumption of training classes in order to determine that the parent has not had a nontemporary cessation of education or training activities.

The Commission notes that the requirements in §809.41 requiring Board policies for child care during education, including time limits or eligibility based on the type of education pursued by the parent, are not changed by these amendments.

A Child Experiencing Homelessness

Consistent with NPRM §98.2, §809.2 is amended to add the definition for a "child experiencing homelessness" as a child meeting the definition of homeless pursuant to the McKinney-Vento Act.

Child with Disabilities

The definition of a "child with disabilities" is amended to align with the definition under §504 of the Rehabilitation Act of 1973.

Improper Payments

The definition of "improper payments" is amended to align with the current definition of an improper payment in CCDF regulation §98.100(d). The amended §809.2(11) defines an improper payment as:

Any payment of CCDF grant funds that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements governing the administration of CCDF grant funds and includes:

- to an ineligible recipient;
- for an ineligible service;
- for any duplicate payment; and
- for services not received.

Regulated Child Care Provider

The definition of a "regulated child care provider" is amended to remove providers licensed by the Texas Department of State Health Services (DSHS) as a youth day camp as eligible providers of subsidized child care services.

CCDBG Act §658H and NPRM §98.43 require that states have in effect "requirements, policies, and procedures to require and conduct criminal background checks for child care staff members of all licensed, regulated, or registered child care providers and all providers eligible to deliver services." These requirements include a Federal Bureau of Investigation (FBI) fingerprint check. Relative providers are exempt from this requirement, which must otherwise be implemented no later than September 30, 2017.

DSHS youth day camps are currently exempt from DFPS child care licensing and monitoring requirements. DSHS conducts background checks of staff in compliance with state law for youth camps, but unlike the CCDBG Act and the NPRM, state law does not require an FBI fingerprint criminal background check for youth day camp staff. Nonetheless, certain youth day camps may be eligible for DFPS to license as child care centers. Therefore, to allow sufficient time for day camps that serve subsidized children to choose to work with DFPS to become licensed, the Commission will not implement this provision until September 30, 2017.

Working

The definition of "working" is amended to remove job search activities from the definition. Child care during periods of cessation of work, job training, or education is addressed in §809.51.

SUBCHAPTER B. GENERAL MANAGEMENT

The Commission proposes the following amendments to Subchapter B:

§809.13. Board Policies for Child Care Services

Section 809.13 is amended to remove the requirement in subsection (c) for Boards to submit policy modifications, amendments, or new policies to the Commission within two weeks of adopting the policy. This section retains the requirement that Boards submit Board policies to the Commission upon request. The additional requirement to submit changes to policies within a specific time frame is redundant. The Commission makes this change to reduce administrative burden on both Board and

Agency staff. Section 809.13 is amended to remove multiple Board policy requirements that no longer apply under the CCDBG Act.

Consistent with the CCDBG Act 12-month eligibility period requirement, §809.13 is amended to remove the requirement for Boards to have a policy on frequency of eligibility determinations, as the frequency is now established under federal law.

Section 809.13 is amended to remove the option for Boards to have a policy to include provider eligibility for nonrelative listed family homes. CCDBG Act §658E(c)(2)(K) requires annual unannounced inspections of all CCDF-subsidized providers for compliance with health, safety, and fire standards. Relative providers are exempt from this requirement. By state statute, listed family homes are not inspected by DFPS child care licensing (unless there is a report of abuse or neglect at the facility). Therefore, under the CCDBG Act, nonrelative listed family homes are not eligible to provide CCDF-subsidized services.

Section 809.13 is amended to remove the requirement that Boards establish policies for attendance standards in order to be consistent with CCDBG Act §658E(c)(2)(S), which requires that provider reimbursement policies support the fixed costs of providing child care services by delinking provider payments from a child's occasional absences. Attendance standards are established in amended §809.78, and reimbursement policies based on enrollments are established in §809.93.

Section 809.13 is amended to remove the requirement that Boards have procedures for imposing sanctions when a parent fails to comply with the provisions of the parent responsibility agreement (PRA). As explained in the changes to Subchapter D, the PRA is no longer a requirement.

Section 809.13 is amended to remove the requirement that Boards have a policy regarding the mandatory waiting period for reapplying or being placed on the waiting list. As explained in the changes to Subchapter C, the mandatory waiting period is no longer required.

§809.15. Promoting Consumer Education

Section 809.15(b) is amended to clarify that consumer education information includes consumer education information provided on the Board's website.

Section 809.15(b)(4) is amended to remove the requirement that Boards include in consumer education information for parents a description of the school readiness certification system, as the program has been discontinued.

Information on Resources for Developmental Screening

CCDBG Act §658E(c)(2)(E)(ii) requires that states provide eligible parents with information on existing resources and other services in the state that conduct developmental screening and provide referrals to services, when appropriate, for children eligible for subsidized child care regarding:

--the Medicaid Early and Periodic Screening, Diagnosis, and Treatment program; and

--Early Childhood Intervention (ECI) and Preschool Program for Children with Disabilities developmental screening services.

Information on developmental screenings must also include a description of how a family or eligible child care provider can use available resources and services to obtain developmental screenings for children receiving assistance who may be at risk

for cognitive or other developmental delays, which may include social, emotional, physical, or linguistic delays.

NPRM §98.33(c) clarifies that the developmental screening information should be made available to parents as part of the intake process and to providers through training and education.

Consistent with CCDBG Act §658E(c)(2)(E)(ii) and NPRM §98.33(c), §809.15(b) is amended to add the requirement, pursuant to CCDBG Act §658E(c)(2)(E)(ii), that Boards include:

--information on resources and services available in the local workforce development area for conducting developmental screenings and providing referrals to services when appropriate for children eligible for child care services, including the use of:

--the Early and Periodic Screening, Diagnosis, and Treatment program under 42 U.S.C. 1396 et seq.; and

--developmental screening services available under Part B and Part C of the Individuals with Disabilities Education Act (20 U.S.C. 1419, 1431 et seq.); and

--a link to the Agency's designated child care consumer education website.

The Commission clarifies that Boards are not required to make referrals or to ensure that developmental screenings are conducted. The only requirement is that Boards provide information to parents regarding available local resources and developmental screenings.

Additional information and guidance regarding the manner in which information on developmental screenings is made available will be provided by the Agency through updates to the Child Care Services Guide. Additionally, the Agency is working with statewide training partners regarding making training and education on developmental screenings available to providers.

The Commission also notes that this provision does not affect the rules, policies, and procedures currently in place regarding approval of the inclusion rate pursuant to §809.20(e).

Consumer Education

CCDBG Act §658E(c)(2)(E) and NPRM §98.33 require that states collect and disseminate consumer education information to parents of eligible children, the general public, and, where applicable, providers regarding:

--availability of the full diversity of child care services;

--quality of providers;

--state processes for licensing, conducting background checks, and monitoring child care providers;

--other programs for which families that receive child care services may be eligible;

--research and best practices concerning children's development; and

--state policies regarding social-emotional behavioral health of children.

Additional information and guidance regarding the manner in which consumer education information is made available will be provided by the Agency through updates to the Child Care Services Guide, including guidance on:

--providing licensing compliance information;

--making consumer education information available in printed form; and

--ensuring consumer education information is accessible to both individuals with disabilities and individuals with limited English proficiency.

Additionally, NPRM §98.33(d) requires that parent consumer education information also include:

--licensing compliance information of the provider selected by the parent;

--how to submit a complaint regarding a child care provider;

--how to contact community resources that assist parents in locating quality child care; and

--how CCDF subsidies are designed to promote equal access to the full range of child care providers.

All consumer education required by the final CCDF regulations is available on the Texas Child Care Solutions website at www.texaschildcaresolutions.org.

Section 809.15 is amended to require that Boards provide a link to the Commission's designated child care consumer education website as part of the consumer education information provided to parents.

§809.16. Quality Improvement Activities

Section 809.16 is amended to remove outdated CCDF regulatory citations. The current CCDF regulations are being amended by the U.S. Department of Health and Human Services and the NPRM language has changed citations for quality improvement activities and the use of CCDF for construction. Further, the list of allowable quality activities in the CCDF regulations has been expanded to include quality activities listed in the CCDBG Act. Section 809.16 removes the specific citations list of quality activities, and replaces it with the general reference for CCDF in 45 C.F.R., Part 98.

§809.17. Leveraging Local Resources

Section 809.17 is amended with language moved, without changes, from Subchapter C §809.42(c) related to public entities certifying expenditures for direct child care, as the language is more relevant to the local match process described in §809.17 than to eligibility for child care services described in §809.42(c).

§809.19. Assessing the Parent Share of Cost

Parent Share of Cost Incentives to Consider Selection of a TRS-Certified Provider

NPRM §98.30(h) includes provisions designed to provide parents with incentives that encourage the selection of high-quality child care without violating parental choice provisions. The NPRM provides states with flexibility in determining what types of incentives to use to encourage parents to choose high-quality providers, including the option to lower the parent share of cost for parents who choose a high-quality provider.

Consistent with NPRM §98.30(h) and to encourage parents to select a TRS-certified provider as well as encourage greater provider participation in the TRS program, the Commission amends §809.19(a)(1) to allow Boards to consider the parent selection of a TRS-certified provider in the parent share of cost assessment.

Parent Share of Cost during the 12-Month Eligibility Period

To support continued care throughout the 12-month eligibility period, NPRM §98.21(a)(3):

--prohibits states from increasing the parent share of cost during the 12-month eligibility period, regardless of increases in the family income; and

--requires that states act upon information provided by the parent that would result in a reduction in the parent share of cost.

Consistent with the NPRM, §809.19(a) is amended to add the requirement that the parent share of cost is assessed only at the following times:

--Initial eligibility determination;

--12-month eligibility redetermination;

--The addition of a child in care that would result in an additional amount of parent share of cost; and

--Parent's report of change in income, family size, or number of children in care that would result in a reduced parent share of cost assessment.

Basing the Parent Share of Cost on the Cost of Care or Subsidy Amount

NPRM §98.45(k)(2) requires that the parent share of cost be based on income and the size of the family and may be based on other factors as appropriate, but may not be based on the cost of care or amount of the subsidy payment.

Section 809.19 is amended to remove the provision that the assessed parent share of cost must not exceed the Board's maximum reimbursement rate or the provider's published rate, whichever is lower. This provision is contrary to the requirement in the NPRM that the assessed parent share of cost must not be based on the cost of care or the amount of the subsidy payment.

The parent share of cost must only be based on the following factors:

--the family's size and income, and

--may also consider the number of children in care and parent selection of a TRS-certified provider as described in §809.19(a)(1)(B).

The Commission retains the rule language in §809.19(d) that allows Boards to review the assessed parent share of cost for possible reduction if there are extenuating circumstances that jeopardize a family's self-sufficiency. However, this reduction shall not be based on the Board's maximum reimbursement rate or the provider's published rate.

The Commission notes that the current rules at §809.19(d) allow Boards to review the assessed parent share of cost for possible reductions if there are extenuating circumstances that jeopardize a family's self-sufficiency. Extenuating circumstances include unexpected temporary costs such as medical expenses and work-related expenses that are not reimbursed by the employer. The Commission is aware that some Boards may allow a limited number of these reductions during the eligibility period. Such policies are still allowed, but Boards must ensure that the parent share of cost is reduced any time the parent reports a change in income, family size, or number of children in care that would result in a reduced parent share of cost.

The Commission further notes that amended §809.73 requires that parents report such changes within 14 calendar days of the change. Changes in the parent share of cost should be made at

the beginning of the month following the reported change. If the parent does not report the change within that time period, the Board is not required to make the change retroactive from the actual date of the reduction.

The Commission is also aware that some Boards reduce the parent share of cost for a limited period of time during the initial eligibility period in order to assist the parent, particularly newly employed parents, with the parent share of cost. This remains an allowable practice under §809.19(d) regarding a reduction of the assessed parent share of cost. After this initial reduction, the parent share of cost may be regularly assessed based on the family size and income and number of children in care, as required by §809.19(a)(1)(B).

Exemptions for Parents of Children Experiencing Homelessness

CCDBG Act §650E(3)(B)(i) and NPRM §98.46(a)(3) and §98.51 require that states give priority for services to children experiencing homelessness. The NPRM preamble clarifies that Lead Agencies have flexibility as to how they offer priority to these populations, including by prioritizing enrollment, waiving copayments, paying higher rates for access to higher-quality care, or using grants or contracts to reserve slots for priority populations.

Section 809.19(a)(2) is amended to require that parents of a child experiencing homelessness be exempt from the parent share of cost.

The Commission emphasizes that pursuant to §809.19(e), the Board or its child care contractor shall not waive the assessed parent share of cost unless the parent is covered by an exemption specified in §809.19(a)(2).

§809.20. Maximum Provider Reimbursement Rates

Section 809.20(b) is amended to remove the requirement that Boards establish enhanced reimbursement rates for preschool-age children at providers that obtain school readiness certification, as the school readiness certification system has been discontinued.

Section 809.20(c) is amended to remove the September 1, 2015, effective date for the TRS tiered reimbursement rates as these requirements are currently in effect.

Section 809.20(d) is amended to clarify in rule language the current requirement and practice that there must be a 2 percentage point difference between the TRS star levels.

SUBCHAPTER C. ELIGIBILITY FOR CHILD CARE SERVICES

The Commission proposes the following amendments to Subchapter C:

§809.41. A Child's General Eligibility for Child Care Services

CCDBG Act §658E(c)(2)(N)(i) requires that each child who receives CCDF assistance be considered to meet all eligibility requirements and receive assistance for not less than 12 months before eligibility redetermination. NPRM §98.20 clarifies that general eligibility requirements are applicable "at the time of eligibility determination or redetermination."

Consistent with CCDBG Act §658E(c)(2)(N)(i) and NPRM §98.20, §809.41 is amended to add language clarifying that a child's general eligibility requirements--i.e., child's age, citizenship status, and residency, and the family's income, work status, and attendance in a job training or educational activity--are applied at the time of eligibility determination or redetermination. Changes to the child's age or residency, the family's income,

participation in work, job training, or education activities that occur during the 12-month eligibility period and affect the child's continued care and eligibility are covered in §809.42.

The CCDBG Act revised the definition of eligibility at §658P(4)(B) so that, in addition to being at or below 85 percent of SMI for a family of the same size, the "family assets do not exceed \$1,000,000 (as certified by a member of such family)." This requirement is included in NPRM §98.20(a)(2)(ii).

Section 809.41(a)(3)(A) is amended to include this requirement and clarify that a family member must certify that the family assets do not exceed the \$1,000,000 threshold. This certification will be based on the parent's self-attestation and will be included in the application for services. Boards are not required to verify this certification; however, if it is discovered that the family may exceed the \$1,000,000 asset threshold, the parent may be subject to fraud fact-finding procedures, as described in Subchapter F. Additional guidance will be provided in the Child Care Services Guide.

As mentioned previously, CCDBG Act §650E(3)(B)(i) and NPRM §98.46(a)(3) and §98.51 require states to give priority for services to children experiencing homelessness. The NPRM preamble clarifies that Lead Agencies have flexibility as to how they offer priority to these populations.

Consistent with this requirement, §809.41(a)(2)(A) is amended to include language that families meeting the definition of experiencing homelessness in §809.2 are considered as having income that does not exceed 85 percent of the state median income. Therefore, Boards are not required to conduct income eligibility determinations for families with a child experiencing homelessness.

Section 809.41 is amended to remove subsection (d) related to job search limitations. Continued child care for job search is described in §809.51.

CCDBG Act §658E(c)(2)(N)(iv) requires Lead Agencies to have a "Graduated Phaseout of Eligibility" that includes policies and procedures to continue child care assistance at the time of redetermination for children of parents who are working or attending a job training or educational program and whose income has risen above the Lead Agency's initial income eligibility threshold to qualify for assistance but remains at or below 85 percent of SMI.

NPRM §98.21(b) provides two options for states to use for the CCDBG Act's graduated phaseout requirement. The phaseout can be accomplished either by:

--establishing a second tier of eligibility at 85 percent of SMI if the parents, at the time of redetermination, are working or attending a job training or educational program, even if their income exceeds the initial income limit; or

--using the approach specified above, but only for a limited period of not less than an additional 12 months.

Section 809.41 is amended to add language requiring that Boards that establish initial family income eligibility at a level less than 85 percent of the SMI must ensure that the family remains income-eligible for care after passing the Board's initial income eligibility limit. As a result, for Boards with an initial eligibility limit lower than 85 percent of the SMI, the family's income eligibility for continued care will be 85 percent of the SMI at the following times:

--at the 12-month redetermination;

--once a parent resumes activities during the three-month period described in §809.51; and

--any time a parent reports a change in income that may exceed 85 percent of the SMI.

This language is consistent with NPRM §98.21(b)(1)(i), which provides the option to require that the family remain income-eligible for care after passing the initial income eligibility limit, including at the family's scheduled 12-month eligibility redetermination, as long as the family income does not exceed 85 percent of SMI.

In determining if the family exceeds 85 percent of the SMI, the Board will use income calculation methodology and guidance that take into consideration fluctuations of income pursuant to §809.44(a).

The Commission notes that Boards are not required to establish initial family income eligibility at a level less than 85 percent of the SMI. The graduated phaseout requirements only apply to Boards that have established income eligibility thresholds pursuant to §809.41(a) that are less than 85 percent of the SMI.

§809.42. Eligibility Verification, Determination, and Redetermination

Section 809.42 is amended to include rule provisions related to eligibility verification, determination, and redetermination consistent with the CCDBG Act.

Section 809.42(a) is amended to emphasize that a Board shall ensure that all eligibility requirements for child care are verified prior to authorizing care. Due to the requirement in CCDBG Act §658E(c)(2)(N)(i) that each child who receives CCDF assistance will be considered to meet all eligibility requirements and will receive assistance for not less than 12 months before the eligibility is redetermined, it is critical that eligibility is properly and accurately verified prior to authorizing care.

Consistent with CCDBG Act §658E(c)(2)(N)(i) and NPRM §98.21, amended §809.42(b) requires that Boards ensure that eligibility for child care services shall be redetermined no sooner than 12 months following the initial determination or most recent redetermination.

§809.43. Priority for Child Care Services

Consistent with CCDBG Act §650E(3)(B)(i) and NPRM §98.46(a)(3) and §98.51, which require states to give priority for services to children experiencing homelessness, the Commission amends §809.43 to add children experiencing homelessness as a second priority group served, subject to the availability of funds. This priority group will follow the three priority groups in state statute--children in protective services, children of a qualified veteran or spouse, and children of foster youth.

§809.44. Calculating Family Income

CCDBG Act §658E(c)(2)(N)(i)(II) and NPRM §98.21(c) require that states take into consideration irregular fluctuations of earnings when calculating income for eligibility. The NPRM further clarifies this requirement by adding that the calculation of income policies ensures that temporary increases in income, "including temporary increases that result in monthly income exceeding 85 percent of SMI (calculated on a monthly basis), do not affect eligibility or family co-payments."

Section 809.44(a) is amended to reflect these new requirements. The rule language requires that Boards ensure family income is

calculated in accordance with Commission guidelines. Consistent with the CCDBG Act, rule language also requires that Commission guidelines:

--take into account irregular fluctuations in earnings; and

--ensure that temporary increases in income, including temporary increases that result in monthly income exceeding 85 percent SMI, do not affect eligibility or parent share of cost.

A standard and uniform methodology applied consistently across all 28 local workforce development areas (workforce areas) is important to ensure that the state is meeting the requirements of the CCDBG Act regarding fluctuations of income. This is also important, as child care is also required to continue if a parent moves to another workforce area.

The Commission will be developing guidelines based on the current methodology and income sources used by the Workforce Innovation and Opportunity Act of 2014 (WIOA) adult program. WIOA annualizes family income using the most recent six months of income sources. By taking into consideration six months of income, this methodology meets the requirement to take into account irregular fluctuations in earnings and will ensure that temporary increases in monthly income do not affect eligibility or parent share of cost. Additionally, aligning the child care income calculation sources and methodology with sources and methodology used by WIOA will provide consistency among the Commission's two major programs in which income is calculated for eligibility purposes.

The guidelines will identify any differences between the two programs that are specific to the relevant program, while retaining the overall goal of aligning the income calculation methodology as closely as possible, given any federal guidance specific to the programs. The guidance will include, but not be limited to, the following:

--Income documentation requirements at initial eligibility that may differ from requirements at redetermination;

--Documentation requirements for gaps in income;

--Calculation of bonuses received during the 12-month eligibility period;

--The methodology and documentation used to determine family income for changes reported during the 12-month eligibility period; and

--The methodology and documentation used to determine family income for parents who resume work, training, or education during the three-month period of nontemporary cessation of activities.

Section 809.44(b) is amended to provide an updated itemized list of income sources that are specifically excluded from determining family income. This list includes income sources that are specifically excluded by various federal laws or regulations in determining eligibility for public assistance programs including CCDF, as well as income sources that are excluded by the WIOA adult program.

The specific exclusions are:

--Medicare, Medicaid, Supplemental Nutrition Assistance Program (SNAP) benefits, school meals, and housing assistance;

--Monthly monetary allowances provided to or for children of Vietnam veterans born with certain birth defects;

--Needs-based educational scholarships, grants, and loans, including financial assistance under Title IV of the Higher Education Act--Pell Grants, Federal Supplemental Educational Opportunity grants, Federal Work Study Program, PLUS, Stafford loans, and Perkins loans;

--Individual Development Account (IDA) withdrawals for the purchase of a home, medical expenses, or educational expenses;

--Onetime cash payments, including tax refunds, Earned Income Tax Credit (EITC) and Advanced EITC, onetime insurance payments, gifts, and lump sum inheritances;

--VISTA and AmeriCorps living allowances and stipends;

--Noncash or in-kind benefits such as employer-paid fringe benefits, food, or housing received in lieu of wages;

--Foster care payments and adoption assistance;

--Special military pay or allowances, including subsistence allowances, housing allowances, family separation allowances, or special allowances for duty subject to hostile fire or imminent danger;

--Income from a child in the household between 14 and 19 years of age who is attending school;

--Early withdrawals from qualified retirement accounts specified as hardship withdrawals as classified by the Internal Revenue Service (IRS);

--Unemployment compensation;

--Child support payments;

--Cash assistance payments, including Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Refugee Cash Assistance, general assistance, emergency assistance, and general relief;

--Onetime income received in lieu of TANF cash assistance;

--Income earned by a veteran while on active military duty and certain other veterans' benefits, such as compensation for service-connected death, vocational rehabilitation, and education assistance;

--Regular payments from Social Security, such as Old-Age and Survivors Insurance Trust Fund;

--Lump sum payments received as assets in the sale of a house, in which the assets are to be reinvested in the purchases of a new home (consistent with IRS guidance);

--Payments received as the result of an automobile accident insurance settlement that are being applied to the repair or replacement of an automobile; and

--Any income sources specifically excluded by federal law or regulation.

The Commission understands that the new income calculation methodology and income exemptions may equate to lower parent share of cost assessments, thereby increasing the cost of care and reducing the number of children the Board may be able to serve. The Agency will continue to analyze Board costs, including parent share of cost, as part of the Agency's performance target methodology.

New §809.44(c) states that income that is not listed in §809.44(b) as excluded from income is included as income.

§809.45. Choices Child Care

Section 809.45(b) is amended to clarify that for a parent receiving Choices Child Care who ceases participation in the Choices program during the 12-month eligibility period, Boards must ensure that:

--child care continues for the three-month period pursuant to §809.51; and

--the provisions of §809.51 shall apply if the parent resumes participation in Choices or begins participation in work or attendance in a job training or education program during the three-month period.

§809.46. Temporary Assistance for Needy Families Applicant Child Care

Section 809.46 is amended to remove provisions that:

--duplicate the 12-month eligibility period specified in §809.42; or

--would end care prior to the end of the 12-month eligibility period.

§809.47. Supplemental Nutrition Assistance Program Employment and Training Child Care

Section 809.47 is amended to remove language stating that SNAP Employment and Training (SNAP E&T) care continues as long as the case remains open.

Section 809.47(b) is added to clarify that for a parent receiving SNAP E&T Child Care who ceases participation in the E&T program during the 12-month eligibility period, Boards must ensure that:

--child care continues for the three-month period pursuant to §809.51; and

--the provisions of §809.51 shall apply if the parent resumes participation in the E&T program or begins participation in work or attendance in a job training or education program during the three-month period.

§809.48. Transitional Child Care

Section 809.48 is amended to remove provisions that would end care prior to the end of the 12-month eligibility period.

§809.49. Child Care for Children Receiving or Needing Protective Services

Section 809.49 is amended to clarify that child care discontinued by DFPS prior to the end of the 12-month eligibility period shall be subject to the Continuity of Care provisions in §809.54.

Section 809.49 is also amended to clarify that the requirements of §809.91(f)(1) do not apply to foster parents whose care is authorized by DFPS. The language clarifies that requests made by DFPS for specific eligible providers are enforced for children in protective services, including children of foster parents when the foster parent is the owner, director, assistant director, or other individual with an ownership interest in the provider.

A technical change to §809.49(a)(2) is made to clarify that DFPS may authorize care for a child under the age of 19.

§809.50. At-Risk Child Care

Section 809.50 is amended to clarify that eligibility requirements for At-Risk child care are applied at initial determination and at the 12-month eligibility redetermination, pursuant to §809.41 and §809.42.

§809.51. Child Care during Interruptions in Work, Education, or Job Training

Section 809.51 is amended to include CCDBG Act and NPRM requirements regarding the provision of child care during interruptions in work, education, or job training. The section contains the rules related to both temporary interruptions and permanent cessation of activities during the 12-month eligibility period.

Section 809.51(a) is amended to include the CCDBG Act requirement that if a child met all of the applicable eligibility requirements for any child care service in Subchapter C on the date of the most recent eligibility determination or redetermination, the child shall be considered to be eligible and will receive services during the 12-month eligibility period, regardless of any:

--change in family income, if that family income does not exceed 85 percent of SMI for a family of the same size; or

--temporary change in the ongoing status of the child's parent as working or attending a job training or education program.

Consistent with language in the NPRM, a temporary change shall include, at a minimum, any:

--time-limited absence from work for an employed parent for periods of family leave (including parental leave) or sick leave;

--interruption in work for a seasonal worker who is not working between regular industry work seasons;

--student holiday or break for a parent participating in training or education;

--reduction in work, training or education hours, as long as the parent is still working or attending a training, or education program;

--other cessation of work or attendance in a training or education program that does not exceed three months;

--change in age, including turning 13 years old during the eligibility period; and

--change in residency within the state.

Section 809.51(b) is amended to require that during the period of time between eligibility redeterminations, a Board shall discontinue child care services due to a parent's loss of work or cessation of attendance at a job training or educational program that does not constitute a temporary change in accordance with subsection (b)(2) of this section. However, Boards must ensure that care continues at the same level for a period of not less than three months after such loss of work or cessation of attendance at a job training or educational program.

Section 809.42(c) is amended to state that if a parent resumes work or attendance at a job training or education program at any level and at any time during the three months, Boards shall ensure that:

--care will continue to the end of the 12-month eligibility period at the same or greater level, depending upon any increase in the activity hours of the parent; and

--the parent share of cost will not be increased during the remainder of the 12-month eligibility period, including for parents who are exempt from the parent share of cost pursuant to §809.19.

This is consistent with NPRM §98.21(a)(3), which prohibits states from increasing the parent share of cost during the 12-month eligibility period, regardless of increases in the family income.

The rule language also clarifies that the Board child care contractor shall verify only:

--that the family income does not exceed 85 percent SMI; and

--the resumption of work or attendance at a job training or education program.

School Holidays and Breaks

The Commission clarifies that student holidays such as spring break and breaks between semesters that are less than three months are considered temporary changes, and eligibility shall continue during those breaks. Breaks between semesters that last longer than three months are considered nontemporary, and care ends if the parent does not resume attendance at an education or job training program, or does not participate in work within three months of the end of the semester.

Reductions in Work, Training, or Education for Dual-Parent Families

The Commission clarifies that in a dual-parent family, if both parents have a nontemporary loss of job (or end of training/education activities), then the family would be subject to the three-month job search period prior to termination. However, if one parent experiences a nontemporary change, then this would be considered a reduction in the dual-parent 50-hour participation requirements. Under the CCDBG Act, a reduction in work is not considered a permanent loss of job and is not subject to discontinuation of the child's care. Care would continue through the 12-month period without requiring care to end if one parent does not resume activities within three months. The child is still residing with at least one parent who is working and is still eligible under the CCDBG Act.

Continued Care for Children over the Age of 13

The Commission notes that the DFPS Child Care Licensing allows children under the age of 14 (and under the age of 19 for children with disabilities) to receive care at a regulated facility. However, the Commission is aware that some child care facilities do not serve children over the age of 13. In such a case, the Board must ensure that eligibility continues at a different provider selected by the parent until the end of the child's eligibility period, unless the parent voluntarily withdraws from child care services.

Continued Care for Children and Families Relocating to Another Workforce Area

Under the CCDBG Act, a change in the child's residence is not grounds for ending care in the state, regardless of the enrollment status of the workforce area to which the parent moved. The Commission understands that a Board at full enrollment would be required to enroll and fund children even if the Board enrollment of new children is closed at the time. The movement of children both into and out of workforce areas is anticipated to be balanced throughout the year. However, the Agency will track this movement and the fiscal impact on Boards to determine if funding amounts should be adjusted accordingly.

Additional policies, procedures, and documenting requirements regarding continuation of care for children and families who relocate to another workforce area will be provided as updates to the Child Care Services Guide.

The Commission clarifies that the Board that determined eligibility at the beginning of the 12-month period is responsible for any subsequent finding of improper eligibility determinations. However, the Board in the workforce area in which the family relo-

cates is responsible for verifying that the move did not result in a nontemporary loss of work, training, or education, and the family is not over 85 percent of the SMI.

The Commission clarifies that if the move to a different workforce area does not result in a change of provider (i.e., the child remains at the originating workforce area provider), then care would continue at that provider under the originating Board's agreement, rates, and funding through the remainder of the authorization for care and the end of the 12-month eligibility period. However, if the move to a different workforce area results in or is accompanied by a change in provider, then the receiving Board will establish and fund the authorization.

The Commission also clarifies that if a parent is participating in the three-month period of continued care and relocates to a different workforce area without resuming activities, then the parent would not receive a new three-month period, but is entitled to continue the three-month period that began in the previous workforce area.

Other Cessation of Work, Training, or Education Activities

The Commission recognizes that there are situations, such as parent incarcerations or other circumstances, that may not be clearly defined in the rules. The Commission will work with Boards to provide guidance on these situations. As a general rule, if the separation from activities is of a length that would allow the parent to continue participation within three months, then care would continue through the remainder of the 12-month eligibility period. If, however, the separation is expected to last over three months, then care would be discontinued three months after the cessation of work, training, or education.

Number of Three-Month Periods in a 12-Month Eligibility Period

The CCDBG Act requires that care continue for at least 12 months following the initial eligibility determination. Neither the CCDBG Act nor the NPRM allows states to put limits on the number of three-month periods of continued care that a parent may have during the 12-month eligibility period. Parents will be allowed a three-month period of continued care for each nontemporary cessation of activities within the 12-month eligibility period.

Parent Share of Cost during the Three-Month Period of Continued Care

As required in §809.19(a)(1)(C), the parent share of cost is reassessed if a parent reports a change in income that would result in a reduced parent share of cost. Accordingly, the parent share of cost should be reassessed during the three-month period due to the resulting reduction of family income. As mentioned in the discussion on calculating family income in §809.44, the Commission will provide guidance on the methodology used to calculate income during this period in order to take into consideration fluctuation in income. During this period, Boards may also reduce the parent share of cost based on the Board policies for reductions due to extenuating circumstances pursuant to §809.19(d).

Increases in the Level of Care following the Three-Month Period of Continued Care

Section 809.51(c) requires care to continue to the end of the 12-month eligibility period at the same or greater level, depending on any increase in the activity hours of the parent. The Commission expects that the parent should provide documentation to verify that such an increase is warranted.

Implementation of the 12-Month Eligibility Period

The Commission clarifies that eligibility determinations under the new rules will go into effect at the family's first scheduled redetermination (under the Board's previous determination period) following October 1, 2016.

§809.52. Child Care for Children Experiencing Homelessness

New §809.52 is added to include initial eligibility for children experiencing homelessness. CCDBG Act §658E(c)(3) requires that state procedures permit enrollment (after an initial eligibility determination) of children experiencing homelessness while required documentation is obtained.

Consistent with this requirement, §809.52(a) requires that for a child experiencing homelessness, a Board shall ensure that the child is initially enrolled for a period not to exceed three months.

Section 809.52(b)(1) states that if, during the three-month enrollment period, the parent of a child experiencing homelessness is unable to provide documentation verifying that the child meets the age and citizenship status requirements under §809.41(a)(1) - (2), then care shall be discontinued following the three-month enrollment period. Consistent with NPRM §98.51, payments of child care services for this three-month period are not considered improper payments.

Section 809.52(b)(2) states that if, during the three-month enrollment period, a parent provides documentation verifying eligibility under §809.41(a) (regarding the child's age and citizenship status, and the parent's participation in work, job training, or education activities) then care shall continue through the end of the 12-month initial eligibility period (inclusive of the three-month initial enrollment period).

For parents of children experiencing homelessness, parent self-attestation of the eligibility requirements under §809.41(a)(1) - (2) will be allowed for the first three months for all eligibility requirements, as long as the family meets the definition of homelessness. This can be verified through another entity such as a school district or housing authority, or by the Board contractor.

The Agency will work with Boards to provide guidance on determining initial and continuing eligibility for homeless families.

The Commission clarifies that parents of children experiencing homelessness must have appeal rights pursuant to §809.74.

§809.53. Child Care for Children Served by Special Projects

Section 809.53 is amended to clarify that the provisions related to child care for children serviced by special projects are only for special projects funded through non-CCDF sources.

§809.54. Continuity of Care

Section 809.54 is amended to clarify that for enrolled children, including children whose eligibility for Transitional child care has expired, care continues through the end of the applicable eligibility periods described in §809.42.

Rule language also clarifies that enrolled children of military parents in military deployment remain eligible for continued care, including parents in military deployment at the end of the 12-month eligibility redetermination period.

Section 809.54 also removes the temporary placement of a child if space is available due to another child's absence due to custody arrangements, as temporary placements are contrary to the CCDBG Act's 12-month eligibility requirements.

§809.55. Mandatory Waiting Period for Reapplication

Section 809.55, regarding a mandatory waiting period for reapplication if care is terminated for certain reasons, is repealed because the listed termination reasons for ending care are no longer applicable.

SUBCHAPTER D. PARENT RIGHTS AND RESPONSIBILITIES

The Commission proposes the following amendments to Subchapter D:

§809.71. Parent Rights

Section 809.71 is amended to clarify that the 20-day eligibility notification following receipt of eligibility documentation from the parent is applicable for both the initial eligibility determinations and the 12-month eligibility redetermination.

Section 809.71(9) is amended to remove the exceptions to the 15-day notification of termination for instances in which care is to end immediately due to a parent no longer participating in Choices or SNAP E&T or due to a child being absent five consecutive days, as these are no longer eligible reasons to terminate care during the 12-month eligibility period.

Regarding the 15-day termination notice, the Commission clarifies that for parents with a nontemporary cessation of activities, at a minimum, notification must be provided at least 15 days prior to the end of the three-month period of continued care. However, Boards should also clearly notify or provide clear instructions to parents at the beginning of the three-month period that care will end if the parent does not resume participation at any level within three months.

Section 809.71 is amended to remove the 30-day notification due to terminations to make room for a priority group member, as this is no longer an eligible reason to terminate care during the 12-month period.

Section 809.71 is also amended to remove the requirement that parents be informed of the Board's attendance policies. Notification of the attendance standards are located in amended §809.78.

§809.72. Parent Eligibility Documentation Requirements

Section 809.72(a) is amended to clarify that child care cannot be determined or redetermined and care cannot be authorized until parents provide to the Board's child care contractor all the information necessary to determine eligibility.

Section 809.72(b) is amended to clarify that a parent's failure to submit documentation shall result in initial denial of child care service or the termination of services at the 12-month redetermination period.

As mentioned in §809.42(a), due to the requirement in CCDBG Act §658E(c)(2)(N)(i) that each child who receives CCDF-funded child care will be considered to meet all eligibility requirements and will receive assistance for not less than 12 months before the eligibility is redetermined, it is critical that all eligibility documentation submitted is properly and accurately verified prior to authorizing care. As described in §809.42(c), an exception to this requirement exists for a child experiencing homelessness.

§809.73. Parent Reporting Requirements

CCDBG Act §658E(c)(2)(N)(ii) and NPRM §98.21(e)(2) state that any requirement for parents to provide notification of changes in circumstances shall not constitute an undue burden on families. Any such requirements shall:

--limit notification requirements to changes that impact a family's eligibility (e.g., only if income exceeds 85 percent of SMI, or there is a nontemporary change in the status of the child's parent as working or attending a job training or educational program) or changes that impact the Lead Agency's ability to contact the family or pay providers;

--not require an office visit to fulfill notification requirements; and

--offer a range of notification options (e.g., phone, e-mail, online forms, extended submission hours) to accommodate the needs of working parents.

Further NPRM language states that Lead Agencies must allow families the option to voluntarily report changes on an ongoing basis:

--Lead Agencies are required to act on the information provided by the family if it would reduce the family's copayment or increase the family's subsidy.

--Lead Agencies are prohibited from acting on information that would reduce the family's subsidy unless the information provided indicates that the family's income exceeds 85 percent of SMI for a family of the same size, taking into account irregular income fluctuations, or, at the option of the Lead Agency, if the family has experienced a nontemporary change in work, training, or educational status.

Section 809.73 related to parent reporting requirements is amended consistent with this guidance.

Section 809.73(a) is amended to require Boards to ensure that during the 12-month eligibility period, parents are only required to report items that impact a family's eligibility or that enable the Board or Board contractor to contact the family or pay the provider.

This is further clarified in §809.73(b), which is amended to state that parents shall report to the child care contractor, within 14 days of the occurrence, the following:

--Changes in family income or family size that would cause the family to exceed 85 percent of SMI for a family of the same size;

--Changes in work or attendance at a job training or educational program not considered to be temporary changes, as described in §809.42; and

--Any change in family residence, primary phone number, or e-mail (if available).

The amendment extends the number of days to report from the current 10 calendar days to 15 calendar days. This will allow additional time for parents to report changes while also allowing sufficient time for Boards to make any requested changes in the parent share of cost or for other authorization changes to become effective, as well as sufficient time to adjust the parent's eligibility (if the reported change caused the family to exceed 85 percent SMI or constitutes a nontemporary change in activity status).

Because the CCDBG Act limits termination of eligibility for care to the parent's permanent cessation of work, training, or education activities, or the family exceeding 85 percent of SMI (taking into consideration fluctuations of income), §809.73 is also amended to remove the provision that care may be terminated and costs may be recovered due to a parent failure to report a change in §809.73(b). However, the provision that failure to report a change may result in fact-finding for suspected fraud as described in Subchapter F is retained.

Section 809.73 is also amended to require Boards to allow parents to report, and require the child care contractor to take appropriate action, regarding changes in:

--income and family size, which may result in a reduction in the parent share of cost pursuant to §809.19; and

--work, job training, or education program participation that may result in an increase in the level of child care services.

The CCDBG Act requires that reporting requirements during the 12-month period do not constitute an undue burden on working parents, and the NPRM clarifies that the reporting requirements must only be on information that affects eligibility or the ability to contact the parent and pay the provider. Therefore, the Commission emphasizes that Boards must not require parents to report any changes during the 12-month period other than those specified in amended §809.73(a) - (b).

The Agency will work with Boards to provide technical assistance on establishing clear and family-friendly information for parents on when they are required to report income and family changes.

Additionally, the Agency will work with Boards to provide reports and tools, including tools associated with wage records and a child's attendance tracking, to assist Boards in identifying parents and families that:

--may have changes in income or family size that may have resulted in the family income exceeding 85 percent of the SMI; or

--may have experienced a nontemporary change in work, training, or education activities.

Implementation of the Reporting Requirements

The Commission clarifies that parents with children enrolled prior to the effective date of the rule amendments may be notified of the new parent reporting requirements at the parent's next scheduled redetermination. However, the standards for assessing any reported changes to the parent's eligibility as well as changes in the consequences for failure to report will be effective on the effective date of the amended rules. Therefore, the Board must ensure that if a parent fails to report a change that was required under the former rules, care shall not be terminated and recoupment is not required for this failure to report, subject to the requirements in Subchapter F regarding recoupments.

§809.74. Parent Appeal Rights

Section 809.74 is amended to clarify that parents may appeal the amount of any recoupment determined pursuant Subchapter F of this chapter.

§809.75. Child Care during Appeal

Section 809.75 is amended to remove the provisions for not continuing care during a parent appeal as the reasons for terminating care provided in this section no longer apply.

§809.76. Parent Responsibility Agreement

As stated previously, CCDBG Act §658E(c)(2)(N) states that each child who receives assistance will be considered to meet all eligibility requirements for such assistance and will receive such assistance for not less than 12 months before the state redetermines eligibility.

NPRM §98.20(b)(4) clarifies that the state may establish additional eligibility conditions, regarding the child's age, citizenship, residing in a family with an income that does not exceed 85 percent SMI, and residing with parents who are working or in

job training or education, as long as the additional requirements do not impact eligibility other than at the time of eligibility determination or redetermination. Additionally, CCDBG Act §658E(c)(2)(N)(ii) and NPRM §98.21(d) require that Lead Agency eligibility redetermination requirements do not unduly disrupt parent work, training, or education activities.

The PRA in §809.76 requires that the parent shall:

--pursue child support by:

--cooperating with the Office of the Attorney General (OAG), if necessary, to establish paternity and to enforce child support on an ongoing basis by either:

--providing documentation that the parent has an open case with OAG and is cooperating with OAG; or

--opening a child support case with OAG and providing documentation that the parent is cooperating with OAG; or

--providing documentation that the parent has an arrangement with the absent parent for child support and is receiving child support on an ongoing basis;

--not use, sell, or possess marijuana or other controlled substances; and

--ensure that each family member younger than 18 years of age attend school regularly (unless exempt under state law).

Current §809.76(c) requires that the parent demonstrate compliance with these provisions within three months of initial eligibility. If the parent does not demonstrate compliance within three months, child care is required to end. Some Boards require parents to demonstrate compliance with the PRA at the time of initial eligibility.

Boards have reported that parents meet PRA requirements by opening an OAG case at initial determination, closing the case immediately following initial determination, and then reopening the case immediately prior to redetermination. This increases OAG's workload and requires Boards and Board contractors to track parent compliance with the PRA--without meeting the PRA's intent.

Therefore, §809.76 regarding the PRA is repealed, as the requirements of the provisions of the PRA:

--cannot be applied or enforced during the 12-month eligibility period;

--cause delays in determining eligibility; and

--cause errors in calculating income due to inconsistent receipt of child support.

§809.77. Exemptions from the Parent Responsibility Agreement

Section 809.77 related to exemptions from the PRA is repealed.

§809.78. Attendance Standards and Reporting Requirements

CCDBG Act §658E(c)(2)(S) and NPRM §98.45(m) require implementation of provider payment practices that:

--align with generally accepted payment practices for children who do not receive CCDF funds; and

--support the fixed costs of providing child care services by delinking provider payments from a child's occasional absences.

NPRM §98.45(m)(2) included four options that states may consider to meet the statutory requirement to support the fixed costs

of providing child care by delinking payments from a child's occasional absence. The options include:

- paying providers based on a child's enrollment, rather than attendance;
- providing full payment to providers as long as a child attends for at least 85 percent of the authorized time;
- providing full payment to providers as long as a child is absent for five or fewer days in a four-week period; and
- requiring states that do not choose one of these three approaches to describe their approach in the State Plan, including how the approach is not weaker than one of the three listed above.

Currently, Chapter 809 requires Boards to establish a policy on attendance standards and procedures regarding reimbursement to providers for absence days. Chapter 809 requires Boards to terminate services if a child exceeds the Board-allowed number of paid absences during a year. If care is terminated due to excessive absences, then the parent must wait 30 days before reapplying for services.

Neither the CCDBG Act nor the NPRM grants states the authority to terminate care due to a child not meeting the state's attendance standards.

As described in §809.93, consistent with the requirements in the CCDBG Act and the NPRM, the Commission amends §809.93 to state that providers shall be reimbursed based on the child's enrollment, rather than daily attendance.

However, in order to ensure that authorizations for reimbursement based on enrollments do not result in underutilization of services, and to prevent the potential for waste, fraud, or abuse of public child care funds, the Commission establishes statewide attendance standards designed to encourage parents to fully use child care services.

Section 809.78(a)(1) is amended to require that parents shall be notified that the eligible child shall attend on a regular basis consistent with the child's authorization for enrollment. Failure to meet attendance standards may:

- result in suspension of care; and
- be grounds for determining that a change in the parent's participation in work, a job training, or an education program has occurred and care may be terminated pursuant to the requirements in §809.51(b).

Section 809.78(a)(2) establishes allowable attendance standards as fewer than:

- five consecutive absences during the month;
- ten total absences during the month; or
- forty-one absences in a 12-month period.

Section 809.78(a)(3) states that child care providers may end a child's enrollment with the provider if the child does not meet the provider's established attendance policy. As will be discussed in Subchapter E, regarding provider reimbursement based on enrollment, a child's eligibility cannot end based on the number of absences. However, parents must be notified that a provider is allowed to discontinue enrollment of the child at the provider facility if the child does not meet attendance standards established by the provider.

Section 809.78(a) is also amended to remove the provisions that child care services may be terminated for absences or misuse of attendance automation policies. However, the rules retain the provisions that parents be notified that misuse of the automated attendance procedures is grounds for a potential fraud determination.

The Commission acknowledges that the rule amendments related to enrollments and absences will require substantial modifications to existing Board policies and procedures as well as changes to the Agency's information and attendance automation systems. The Agency will work with Boards regarding these changes and to develop necessary reports to assist Boards, parents, and providers in tracking attendance.

SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

The Commission proposes the following amendments to Subchapter E:

§809.91. Minimum Requirements for Providers

CCDBG Act §658E(c)(2)(K) requires annual unannounced inspections of all CCDF providers for compliance with health, safety, and fire standards. Relative providers are exempt from this requirement. By state statute, listed family homes are not inspected by DFPS child care licensing (unless there is a report of abuse or neglect at the facility). Therefore, under the CCDBG Act, nonrelative listed family homes are not eligible to provide CCDF services. Therefore, §809.91(b) is amended to remove requirements for Boards choosing to allow nonrelative listed homes as eligible child care providers as these providers are no longer eligible to care for CCDF-subsidized children.

Section 809.91(f) is amended to clarify that foster parents who are also directors, assistant directors, or have an ownership in the child care center, may receive reimbursement if authorized by DFPS.

§809.92. Provider Responsibilities and Reporting Requirements

Section 809.92(b) is amended to remove the specific attendance reporting requirements for providers to:

- document and maintain a list of each child's attendance and submit the list upon request;
- inform the Board when an enrolled child is absent; and
- inform the Board that a child has not attended the first three days of scheduled care.

The implementation of the child care attendance automation system eliminates the need for providers to report this attendance to the Board. However, the Commission notes that removing the requirement from Chapter 809 that providers document and maintain a list of each child's attendance does not remove the DFPS child care licensing requirement for providers to maintain a daily sign-in sheet for all children enrolled at the facility.

§809.93. Provider Reimbursement

As explained in §809.78 regarding a child's attendance standards, CCDBG Act §658E(c)(2)(S) and NPRM §98.45(m) require implementation of provider payment practices that:

- align with generally accepted payment practices for children who do not receive CCDF funds; and
- support the fixed costs of providing child care services by delinking provider payments from a child's occasional absences.

NPRM §98.45(m)(2) included four options that states may consider to meet the statutory requirement to support the fixed costs of providing child care by delinking payments from a child's occasional absence. The options include:

--paying providers based on a child's enrollment, rather than attendance;

--providing full payment to providers as long as a child attends for at least 85 percent of the authorized time;

--providing full payment to providers as long as a child is absent for five or fewer days in a four-week period; and

--requiring states that do not choose one of these three approaches to describe their approach in the State Plan, including how the approach is not weaker than one of the three listed above.

Currently, Chapter 809 requires Boards to establish a policy on attendance standards and procedures regarding reimbursement to providers for absence days. Chapter 809 requires Boards to terminate services if a child exceeds the Board-allowed number of paid absences during a year. If care is terminated due to excessive absences, then the parent must wait 30 days before reapplying for services.

Neither the CCDBG Act nor the NPRM grants states the authority to terminate care due to a child not meeting the state's attendance standards.

To ensure statewide consistency for families and statewide compliance to the requirements in CCDBG Act §658E(c)(2)(S) and NPRM §98.45(m), §809.93 is amended to implement a statewide policy that reimburses regulated providers based on the child's enrollment, rather than daily attendance.

The rules retain the requirement that relative child care providers are not reimbursed for days on which the child is absent. The Commission retains this provision based on the contention that unregulated relative providers do not have the same fixed costs as regulated providers do in order to meet regulatory standards.

§809.94. Providers Placed on Corrective or Adverse Action by the Texas Department of Family and Protective Services

Section 809.94(c) is amended to remove language stating that a parent receiving notification of a provider's corrective action may choose to continue care with the provider if the parent signs the notification acknowledging that the parent is aware of the provider status. The effect of this language is to end the child's care unless the parent signs the notification and acknowledges that the parent chooses to continue care at the facility. Under the CCDBG Act, care cannot end during the 12-month period for a parent's failure to return the acknowledgement to continue care at the facility.

Therefore, §809.94(c) is amended to state that the parent may transfer the child to another provider without being subject to the Board's transfer policies if the parent requests the transfer within 14 business days of receiving the notification.

§809.95. Provider Automated Attendance Agreement

Section 809.95 is amended to clarify that provider misuse of attendance reporting and violation of the requirements in this section are grounds for fraud determination pursuant to Subchapter F of this chapter.

SUBCHAPTER F. FRAUD FACT-FINDING AND IMPROPER PAYMENTS

The Commission proposes the following amendments to Subchapter F:

§809.111. General Fraud Fact-Finding Procedures

Under *Program Integrity* on page 80488, the NPRM preamble provided the following clarification regarding the Administration for Children and Families' (ACF) intent regarding fraud and recoupments:

ACF would like to clarify that there is no Federal requirement for Lead Agencies to recoup CCDF overpayments, except in instances of fraud. We also strongly discourage such policies as they may impose a financial burden on low-income families that is counter to CCDF's long-term goal of promoting family economic stability. The Act affirmatively states an eligible child "will be considered to meet all eligibility requirements" for a minimum of 12 months regardless of increases in income (as long as income remains at or below 85 percent of SMI) or temporary changes in parental employment or participation in education and training. Therefore, there are very limited circumstances in which a child would not be considered eligible after an initial eligibility determination.

When implementing their CCDF programs, Lead Agencies must balance ensuring compliance with eligibility requirements with other considerations, including administrative feasibility, program integrity, promoting continuity of care for children, and aligning child care with Head Start, Early Head Start, and other early childhood programs. These proposed changes are intended to remove any uncertainty regarding applicability of Federal eligibility requirements for CCDF and the threat of potential penalties or disallowances that otherwise may inhibit Lead Agencies ability to balance these priorities in a way that best meets the needs of children.

Existing regulations at §98.60 indicate that Lead Agencies shall recover child care payments that are the result of fraud from the responsible party. While ACF does not define the term fraud and leaves flexibility to Lead Agencies, fraud in this context typically involves knowing and willful misrepresentation of information to receive a benefit. We urge Lead Agencies to carefully consider what constitutes fraud, particularly in the case of individual families.

In accordance with this guidance, §809.111 is amended to provide a definition of fraud in relation to child care services. The amended rule states that a person commits fraud if, to obtain or increase a benefit or other payment, either for the person or another person, the person:

--makes a false statement or representation, knowing it to be false; or

--knowingly fails to disclose a material fact.

This definition is consistent with the definition of fraudulently obtaining benefits under Texas Labor Code §214.001.

§809.112. Suspected Fraud

Section 809.112 is amended to clarify specific parental actions that may be grounds for suspected fraud and cause the Board to conduct fact-finding or the Commission to initiate a fraud investigation. These actions include:

--not reporting or falsely reporting at initial eligibility or at eligibility redetermination:

--household composition, or income sources or amounts that would have resulted in ineligibility or a higher parent share of cost; or

--work, training, or education hours that would have resulted in ineligibility; or

--not reporting during the 12-month eligibility period:

--changes in income or household composition that would cause the family income to exceed 85 percent SMI (taking into consideration fluctuations of income); or

--a permanent loss of job or cessation of training or education that exceeds 90 days; and

--improper or inaccurate reporting of attendance.

§809.113. Action to Prevent or Correct Suspected Fraud

Section 809.113 is amended to remove the provision that a child care contractor may take certain actions if a provider or parent has committed fraud. Although a Board's child care contractor is expected to take these actions, the language implied that the contractor determines which action to take without the involvement of the Board or the Commission.

Amended language in §809.113 clarifies that actions taken against a provider or parent shall be consistent with and pursuant to Commission policy.

Further, §809.113 is amended to include the following options:

--A provider may be prohibited from future eligibility to provide Commission-funded child care services; and

--A parent's eligibility may be terminated during the 12-month eligibility period if eligibility was determined using fraudulent information provided by the parent.

§809.115. Corrective Adverse Actions

Section 809.115 is amended to remove §809.115(b)(4) to remove termination of child care services as a possible corrective action for parents' noncompliance with this chapter.

§809.116. Recovery of Improper Payments

Section 809.116 is repealed and combined with §809.117.

§809.117. Recovery of Improper Payments to a Provider or Parent

Section 809.117 is amended to clarify the circumstances in which parents are required to repay improper payments. The language clarifies that a parent shall repay improper payments only in the following circumstances:

--Instances involving fraud;

--Instances in which the parent has received child care services awaiting an appeal and the determination is affirmed by the hearing officer; or

--Instances in which the parent fails to pay the parent share of cost and the Board's policy is to pay the provider for the parent's failure to pay the parent share of cost.

Section 809.117 is amended to prohibit a parent subject to the repayment provisions above from future child care eligibility until the repayment amount is recovered, provided that the prohibition does not result in a Choices or SNAP E&T participant becoming ineligible for child care.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no additional estimated costs to the state and to local governments expected as a result of enforcing or administering the rules.

There are no estimated cost reductions to the state and to local governments as a result of enforcing or administering the rules.

There are no estimated losses or increases in revenue to the state or to local governments as a result of enforcing or administering the rules.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules.

There are no anticipated economic costs to persons required to comply with the rules.

There is no anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rules.

While we are not concluding any net increase or decrease to the cost of the child care program administered by TWC and Boards as a result of these proposed rules, it is pertinent to take note that there will likely be an impact to the child care program, possibly to somewhat reduce child care operational and administrative costs, somewhat increase the cost of some individual units of child care, and possibly to increase waiting lists for subsidized child care. While these individual impacts cannot easily be quantified at this time, we note that they are necessary due to the enactment of federal statutory revisions and the impending effective date of federal regulations, and not created by these proposed rules.

Economic Impact Statement and Regulatory Flexibility Analysis

The Agency has determined that the proposed rules will not have an adverse economic impact on small businesses as these proposed rules place no requirements on small businesses, including child care providers.

Doyle Fuchs, Director of Labor Market and Career Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

Reagan Miller, Director, Workforce Development Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed rules will be to ensure compliance with the CCDBG Act, and to provide efficient and effective subsidized child care services that promote both child development and parent workforce participation.

The Agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, the Commission sought the involvement of Texas' 28 Boards. Agency executive management discussed the policy concept with the Board executive directors during the March 29, 2016, Executive Director Council meeting and Agency staff presented the policy concept to Board staff during the March 29, 2016, workforce forum. During the rulemaking process,

the Commission considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce Policy and Service Delivery, attn: Workforce Editing, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. Comments must be received or postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §809.2

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rule affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Attending a job training or educational program--An individual is [considered to be] attending a job training or educational program if the individual:

- (A) is considered by the program to be officially enrolled;
- (B) meets all attendance requirements established by the program; and
- (C) is making progress toward successful completion of the program as determined by the Board upon eligibility redetermination as described in §809.42(b).

(2) Child--An individual who meets the general eligibility requirements contained in this chapter for receiving child care services.

(3) Child care contractor--The entity or entities under contract with the Board to manage child care services. This includes contractors involved in determining eligibility for child care services, contractors involved in the billing and reimbursement process related to child care subsidies, as well as contractors involved in the funding of quality improvement activities as described in §809.16.

(4) Child care services--Child care subsidies and quality improvement activities funded by the Commission.

(5) Child care subsidies--Commission-funded child care reimbursements to an eligible child care provider for the direct care of an eligible child.

(6) Child experiencing homelessness--A child who is homeless as defined in the McKinney-Vento Act (42 U.S.C. 11434(a)), Subtitle VII-B, §725.

(7) [(6)] Child with disabilities--A child who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Major life activities include, [is mentally or physically incapable of performing routine activities of daily living within the child's typical chronological range of development. A child is con-

sidered mentally or physically incapable of performing routine activities of daily living if the child requires assistance in performing tasks (major life activity) that are within the typical chronological range of development, including] but are not limited to, caring for oneself; performing manual tasks; walking; hearing; seeing, speaking, breathing; learning; and working.

(8) [(7)] Educational program--A program that leads to:

- (A) a high school diploma;
- (B) a General Educational Development (GED) credential; or
- (C) a postsecondary degree from an institution of higher education.

(9) [(8)] Family--The unit composed of a child eligible to receive child care services, the parents of that child, and household dependents.

(10) [(9)] Household dependent--An individual living in the household who is one of the following:

- (A) An adult considered as a dependent of the parent for income tax purposes;
- (B) A child of a teen parent; or
- (C) A child or other minor living in the household who is the responsibility of the parent.

(11) [(10)] Improper payments--Any payment of CCDF grant funds that should not have been made or that was made in an incorrect amount (including overpayments and underpayments) under statutory, contractual, administrative, or other legally applicable requirements governing the administration of CCDF grant funds and includes payments: [Payments to a provider or Board's child care contractor for goods or services that are not in compliance with federal or state requirements or applicable contracts:]

- (A) to an ineligible recipient;
- (B) for an ineligible service;
- (C) for any duplicate payment; and
- (D) for services not received.

(12) [(11)] Job training program--A program that provides training or instruction leading to:

- (A) basic literacy;
- (B) English proficiency;
- (C) an occupational or professional certification or license; or
- (D) the acquisition of technical skills, knowledge, and abilities specific to an occupation.

(13) [(12)] Listed family home--A family home, other than the eligible child's own residence, that is listed, but not licensed or registered with, the Texas Department of Family and Protective Services (DFPS) pursuant to Texas Human Resources Code §42.052(c).

(14) [(13)] Military deployment--The temporary duty assignment away from the permanent military installation or place of residence for reserve components of the single military parent or the dual military parents. This includes deployed parents in the regular military, military reserves, or National Guard.

(15) [(14)] Parent--An individual who is responsible for the care and supervision of a child and is identified as the child's natural

parent, adoptive parent, stepparent, legal guardian, or person standing in loco parentis (as determined in accordance with Commission policies and procedures). Unless otherwise indicated, the term applies to a single parent or both parents.

(16) ~~[(15)]~~ Protective services--Services provided when:

(A) a child is at risk of abuse or neglect in the immediate or short-term future and the child's family cannot or will not protect the child without DFPS Child Protective Services (CPS) intervention;

(B) a child is in the managing conservatorship of DFPS and residing with a relative or a foster parent; or

(C) a child has been provided with protective services by DFPS within the prior six months and requires services to ensure the stability of the family.

(17) ~~[(16)]~~ Provider--A provider is defined as:

(A) a regulated child care provider as defined in §809.2(18) ~~[(§809.2(17))]~~;

(B) a relative child care provider as defined in §809.2(19) ~~[(§809.2(18))]~~; or

(C) a listed family home as defined in §809.2(13) ~~[(§809.2(12))]~~, subject to the requirements in §809.91(b).

(18) ~~[(17)]~~ Regulated child care provider--A provider caring for an eligible child in a location other than the eligible child's own residence that is:

(A) licensed by DFPS;

(B) registered with DFPS; or

~~[(C) licensed by the Texas Department of State Health Services as a youth day camp; or]~~

~~[(C) [(D)] operated and monitored by the United States military services.~~

(19) ~~[(18)]~~ Relative child care provider--An individual who is at least 18 years of age, and is, by marriage, blood relationship, or court decree, one of the following:

(A) The child's grandparent;

(B) The child's great-grandparent;

(C) The child's aunt;

(D) The child's uncle; or

(E) The child's sibling (if the sibling does not reside in the same household as the eligible child).

(20) ~~[(19)]~~ Residing with--Unless otherwise stipulated in this chapter, a child is considered to be residing with the parent when the child is living with and physically present with the parent during the time period for which child care services are being requested or received.

(21) ~~[(20)]~~ Teen parent--A teen parent (teen) is an individual 18 years of age or younger, or 19 years of age and attending high school or the equivalent, who has a child.

(22) ~~[(21)]~~ Texas Rising Star program--A voluntary, quality-based rating system of child care providers participating in Commission-subsidized child care.

(23) ~~[(22)]~~ Texas Rising Star Provider--A provider certified as meeting the TRS program standards. TRS providers are certified as one of the following:

(A) 2-Star Program Provider;

(B) 3-Star Program Provider; or

(C) 4-Star Program Provider.

(24) ~~[(23)]~~ Working--Working is defined as:

(A) activities for which one receives monetary compensation such as a salary, wages, tips, and commissions; or

~~[(B) job search activities (subject to the requirements in §809.41(d)); or]~~

~~[(C)]~~ participation in Choices or Supplemental Nutrition Assistance Program Employment and Training (SNAP E&T) activities.

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 June 3, 2016.

TRD-201602824

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Earliest possible date of adoption: July 17, 2016

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SUBCHAPTER B. GENERAL MANAGEMENT

40 TAC §§809.13, 809.15 - 809.17, 809.19, 809.20

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.13. Board Policies for Child Care Services.

(a) A Board shall develop, adopt, and modify its policies for the design and management of the delivery of child care services in a public process in accordance with Chapter 802 of this title.

(b) A Board shall maintain written copies of the policies that are required by federal and state law, or as requested by the Commission, and make such policies available to the Commission and the public upon request.

~~[(c) A Board shall also submit any modifications, amendments, or new policies to the Commission no later than two weeks after adoption of the policy by the Board.]~~

(c) ~~[(d)]~~ At a minimum, a Board shall develop policies related to:

(1) how the Board determines that the parent is making progress toward successful completion of a job training or educational program as described in §809.2(1);

(2) maintenance of a waiting list as described in §809.18(b);

(3) assessment of a parent share of cost as described in §809.19, including the reimbursement of providers when a parent fails to pay the parent share of cost;

(4) maximum reimbursement rates as provided in §809.20, including policies related to reimbursement of providers that offer transportation;

(5) family income limits as described in Subchapter C of this chapter (relating to Eligibility for Child Care Services);

(6) provision of child care services to a child with disabilities under ~~up to~~ the age of 19 as described in §809.41(a)(1)(B);

(7) minimum activity requirements for parents as described in §809.48 and §809.50;

(8) time limits for the provision of child care while the parent is attending an educational program as described in §809.41(b);

~~[(9) frequency of eligibility redetermination as described in §809.42(b)(2);]~~

~~[(9) [(40)] Board priority groups as described in §809.43(a);]~~

~~[(10) [(41)] transfer of a child from one provider to another as described in §809.71(3);]~~

~~[(12) provider eligibility for listed family homes as provided in §809.91(b), if the Board chooses to include listed family homes as eligible providers;]~~

~~[(13) attendance standards and procedures as provided in §809.92(b)(4), including provisions consistent with §809.54(f) (relating to Continuity of Care for custody and visitation arrangements);]~~

~~[(11) [(44)] providers charging the difference between their published rate and the Board's reimbursement rate as provided in §809.92(d);]~~

~~[(12) [(45)] procedures for fraud fact-finding as provided in §809.111; and]~~

~~[(16) procedures for imposing sanctions when a parent fails to comply with the provisions of the parent responsibility agreement (PRA) as described in §809.76(e);]~~

~~[(17) mandatory waiting period for reapplying or being placed on the waiting list for child care services as described in §809.55; and]~~

~~[(13) [(48)] policies and procedures to ensure that appropriate corrective actions are taken against a provider or parent for violations of the automated attendance requirements specified in §809.115(d) - (e).]~~

§809.15. Promoting Consumer Education.

(a) A Board shall promote informed child care choices by providing consumer education information to:

- (1) parents who are eligible for child care services;
- (2) parents who are placed on a Board's waiting list;
- (3) parents who are no longer eligible for child care services; and
- (4) applicants who are not eligible for child care services.

(b) The consumer education information, including consumer education information provided through a Board's website, shall contain, at a minimum:

(1) information about the Texas Information and Referral Network/2-1-1 Texas (2-1-1 Texas) information and referral system;

(2) the website and telephone number of DFPS, so parents may obtain health and safety requirements including information on:

(A) the prevention and control of infectious diseases (including immunizations);

(B) building and physical premises safety;

(C) minimum health and safety training appropriate to the provider setting; and

(D) the regulatory compliance history of child care providers;

(3) a description of the full range of eligible child care providers set forth in §809.91; and

(4) a description of programs available in the workforce area relating to school readiness and quality rating systems, including:

(A) Texas Rising Star (TRS) Provider criteria, pursuant to Texas Government Code §2308.315; and

~~[(B) the school readiness certification system, pursuant to Texas Education Code §29.161; and]~~

~~[(B) [(C)] integrated school readiness models, pursuant to Texas Education Code §29.160; and]~~

(5) a list of child care providers that meet quality indicators, pursuant to Texas Government Code §2308.3171;[-]

(6) information on existing resources and services available in the workforce area for conducting developmental screenings and providing referrals to services when appropriate for children eligible for child care services, including the use of:

(A) the Early and Periodic Screening, Diagnosis, and Treatment program under 42 U.S.C. 1396 et seq.; and

(B) developmental screening services available under Part B and Part C of the Individuals with Disabilities Education Act (20 U.S.C. 1419, 1431 et seq.; and

(7) a link to the Agency's designated child care consumer education website.

(c) A Board shall cooperate with the Texas Health and Human Services Commission (HHSC) to provide 2-1-1 Texas with information, as determined by HHSC, for inclusion in the statewide information and referral network.

§809.16. Quality Improvement Activities.

(a) Child care funds allocated by the Commission pursuant to its allocation rules (generally, Chapter 800, General Administration, Subchapter B, Allocation and Funding, and specifically §800.58, Child Care), including local public transferred funds and local private donated funds, as provided in §809.17, to the extent they are used for nondirect care quality improvement activities, may be expended on any quality improvement activity described in 45 CFR Part 98. ~~[[§98.51. These activities may include, but are not limited to:]]~~

~~[(1) activities designed to provide comprehensive consumer education to parents and the public;]~~

~~[(2) activities that increase parental choice; and]~~

~~[(3) activities designed to improve the quality and availability of child care.]]~~

(b) Boards must ensure compliance with 45 CFR Part 98 ~~[[§98.54(b)]]~~ regarding construction expenditures, as follows:

(1) State and local agencies and nonsectarian agencies or organizations.

(A) Funds shall not be expended for the purchase or improvement of land, or for the purchase, construction, or permanent improvement of any building or facility.

(B) Funds may be expended for minor remodeling, and for upgrading child care facilities to ensure that providers meet state and local child care standards, including applicable health and safety requirements.

(2) Sectarian agencies or organizations.

(A) The prohibitions in paragraph (1) of this subsection apply.

(B) Funds may be expended for minor remodeling only if necessary to bring the facility into compliance with the health and safety requirements established pursuant to 45 CFR Part 98 [§98.41].

(c) Expenditures certified by a public entity, as provided in §809.17(b)(3), may include expenditures for any quality improvement activity described in 45 CFR Part 98 [§98.51].

§809.17. *Leveraging Local Resources.*

(a) Leveraging Local Funds.

(1) The Commission encourages Boards to secure local public and private funds for the purpose of matching federal funds in order to maximize resources for child care needs in the community.

(2) A Board is encouraged to secure additional local funds in excess of the amount required to match federal funds allocated to the Board in order to maximize its potential to receive additional federal funds should they become available.

(3) A Board's performance in securing and leveraging local funds for match may make the Board eligible for incentive awards.

(b) The Commission accepts the following as local match:

(1) Funds from a private entity that:

(A) are donated without restrictions that require their use for:

(i) a specific individual, organization, facility, or institution; or

(ii) an activity not included in the CCDF State Plan or allowed under this chapter;

(B) do not revert back to the donor's facility or use;

(C) are not used to match other federal funds; and

(D) are certified by both the donor and the Commission as meeting the requirements of subparagraphs (A) - (C) of this paragraph.

(2) Funds from a public entity that:

(A) are transferred without restrictions that would require their use for an activity not included in the CCDF State Plan or allowed under this chapter;

(B) are not used to match other federal funds; and

(C) are not federal funds, unless authorized by federal law to be used to match other federal funds.

(3) Expenditures by a public entity certifying that the expenditures:

(A) are for an activity included in the CCDF State Plan or allowed under this chapter;

(B) are not used to match other federal funds; and

(C) are not federal funds, unless authorized by federal law to be used to match other federal funds.

(c) A Board shall ensure that a public entity certifying expenditures for direct child care as described in §809.17(b)(3), determines and verifies that the expenditures are for child care provided to an eligible child. At a minimum, the public entity shall verify that the child:

(1) is under 13 years of age, or at the option of the Board, is a child with disabilities under 19 years of age; and

(2) resides with:

(A) a family whose income does not exceed 85 percent of the state median income for a family of the same size; and

(B) a parent who requires child care in order to work or attend a job training or educational program.

(d) [(e)] A Board shall submit private donations, public transfers, and public certifications to the Commission for acceptance, with sufficient information to determine that the funds meet the requirements of subsection (b) of this section.

(e) [(d)] Completing Private Donations, Public Transfers, and Public Certifications.

(1) A Board shall ensure that:

(A) private donations of cash and public transfers of funds are paid to the Commission; and

(B) public certifications are submitted to the Commission.

(2) Private donations and public transfers are considered complete when the funds have been received by the Commission.

(3) Public certifications are considered complete to the extent that a signed written instrument is delivered to the Commission that reflects that the public entity has expended a specific amount of funds on eligible activities described in subsection (b)(3) of this section.

(f) [(e)] A Board shall monitor the funds secured for match and the expenditure of any resulting funds to ensure that expenditures of federal matching funds available through the Commission do not exceed an amount that corresponds to the private donations, public transfers, and public certifications that are completed by the end of the program year.

§809.19. *Assessing the Parent Share of Cost.*

(a) For child care funds allocated by the Commission pursuant to its allocation rules (generally, Chapter 800, General Administration, Subchapter B, Allocation and Funding, and specifically, §800.58, Child Care), including local public transferred funds and local private donated funds, as provided in §809.17, the following shall apply.

(1) A Board shall set a parent share of cost policy that assesses the parent share of cost in a manner that results in the parent share of cost:

(A) being assessed to all parents, except in instances when an exemption under paragraph (2) of this subsection applies;

(B) being an amount determined by a sliding fee scale based on the family's size and gross monthly income, and also may consider the:

(i) number of children in care; and

(ii) parent selection of a TRS-certified provider;

(C) being assessed only at the following times:

(i) Initial eligibility determination;

(ii) 12-month eligibility redetermination;
(iii) upon the addition of a child in care that would result in an additional amount for the child; and
(iv) upon a parent's report of a change in income, family size, or number of children in care that would result in a reduced parent share of cost assessment.

~~[(C) not exceeding the Board's maximum reimbursement rate of the provider's published rate, whichever is lower.]~~

(2) Parents who are one or more of the following are exempt from paying the parent share of cost:

- (A) Parents who are participating in Choices;
- (B) Parents who are participating in SNAP E&T services;

(C) Parents of a child experiencing homelessness as defined in §809.2; or

(D) [(C)] Parents who have children who are receiving protective services child care pursuant to §809.49 and §809.54(c)(1), unless DFPS assesses the parent share of cost.

(3) Teen parents who are not covered under exemptions listed in paragraph (2) of this subsection shall be assessed a parent share of cost. The teen parent's share of cost is based solely on the teen parent's income and size of the teen's family as defined in §809.2 [~~§809.2(8)~~].

(b) For child care services funded from sources other than those specified in subsection (a) of this section, a Board shall set a parent share of cost policy based on a sliding fee scale. The sliding fee scale may be the same as or different from the provisions contained in subsection (a) of this section.

(c) A Board shall establish a policy regarding reimbursement of providers when parents fail to pay the parent share of cost.

(d) The Board or its child care contractor may review the assessed parent share of cost for possible reduction if there are extenuating circumstances that jeopardize a family's self-sufficiency. The Board or its child care contractor may reduce the assessed parent share of cost if warranted by these circumstances.

(e) If the parent is not covered by an exemption as specified in subsection (a)(2) of this section, then the Board or its child care contractor shall not waive the assessed parent share of cost under any circumstances.

(f) If the parent share of cost, based on family income and family size, is calculated to be zero, then the Board or its child care contractor shall not charge the parent a minimum share of cost amount.

§809.20. Maximum Provider Reimbursement Rates.

(a) Based on local factors, including a market rate survey provided by the Commission, a Board shall establish maximum reimbursement rates for child care subsidies to ensure that the rates provide equal access to child care in the local market and in a manner consistent with state and federal statutes and regulations governing child care. At a minimum, Boards shall establish reimbursement rates for full-day and part-day units of service, as described in §809.93(e), for the following:

(1) Provider types:

- (A) Licensed child care centers, including before- or after-school programs and school-age programs, as defined by DFPS;
- (B) Licensed child care homes as defined by DFPS;

and (C) Registered child care homes as defined by DFPS;

(D) Relative child care providers as defined in §809.2.

(2) Age groups in each provider type:

- (A) Infants age 0 to 17 months;
- (B) Toddlers age 18 to 35 months;
- (C) Preschool age children from 36 to 71 months; and
- (D) School age children 72 months and over.

(b) A Board shall establish enhanced reimbursement rates:

(1) for all age groups at TRS provider facilities; and

~~[(2) only for preschool-age children at child care providers that obtain school readiness certification pursuant to Texas Education Code §29.161; and]~~

(2) [(3)] only for preschool-age children at child care providers that participate in integrated school readiness models pursuant to Texas Education Code §29.160.

(c) The minimum enhanced reimbursement rates established under subsection (b) of this section shall be greater than the maximum rate established for providers not meeting the requirements of subsection (b) of this section for the same category of care up to, but not to exceed, the provider's published rate. The [Effective September 1, 2015, the] maximum rate must be at least:

(1) 5 percent greater for a:

(A) 2-Star Program Provider; or

(B) child care provider meeting the requirements of subsection (b)(2) [subsections (b)(2) or (b)(3)] of this section;

(2) 7 percent greater for a 3-Star Program Provider; and

(3) 9 percent greater for a 4-Star Program Provider.

(d) Boards may establish a higher enhanced reimbursement rate than those specified in subsection (c) of this section for TRS providers, as long as there is a minimum 2 percentage point [~~percent~~] difference between each star level.

(e) A Board or its child care contractor shall ensure that providers that are reimbursed for additional staff or equipment needed to assist in the care of a child with disabilities are paid a rate up to 190 percent of the provider's reimbursement rate for a child of that same age. The higher rate shall take into consideration the estimated cost of the additional staff or equipment needed by a child with disabilities. The Board shall ensure that a professional, who is familiar with assessing the needs of children with disabilities, certifies the need for the higher reimbursement rate described in this subsection.

(f) The Board shall determine whether to reimburse providers that offer transportation as long as the combined total of the provider's published rate, plus the transportation rate, is subject to the maximum reimbursement rate established in subsection (a) of this section.

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 June 3, 2016.
TRD-201602825

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SUBCHAPTER C. ELIGIBILITY FOR CHILD CARE SERVICES

40 TAC §§809.41 - 809.54

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.41. A Child's General Eligibility for Child Care Services.

(a) Except for a child receiving or needing protective services as described in §809.49, for a child to be eligible to receive child care services, at the time of eligibility determination or redetermination, a Board shall ensure that the child:

(1) meets one of the following age requirements:

(A) be under 13 years of age; or

(B) at the option of the Board, be a child with disabilities under 19 years of age;

(2) is a U.S. citizen or legal immigrant as determined under applicable federal laws, regulations, and guidelines; and

(3) resides with:

(A) a family within the Board's workforce area;

(i) whose income does not exceed the income limit established by the Board, which income limit must not exceed 85[%] percent of the state median income (SMI) for a family of the same size; and

(ii) whose assets do not exceed \$1,000,000 as certified by a family member; or

(iii) that meets the definition of experiencing homelessness as defined in §809.2.

(B) parents who require child care in order to work or attend a job training or educational program; or

(C) a person standing in loco parentis for the child while the child's parent is on military deployment and the deployed military parent's income does not exceed the limits set forth in subparagraph (A) of this paragraph.

(b) Notwithstanding the requirements set forth in subsection (c) of this section, a Board shall establish policies, including time limits, for the provision of child care services while the parent is attending an educational program.

(c) Time limits pursuant to subsection (b) of this section shall ensure the provision of child care services for four years, if the eligible child's parent is enrolled in an associate's degree program that will

prepare the parent for a job in a high-growth, high-demand occupation as determined by the Board.

~~[(d) Unless otherwise subject to job search limitations as stipulated in this title, the following shall apply:]~~

~~[(1) For child care funds allocated by the Commission pursuant to its allocation rules (generally, Chapter 800, General Administration, Subchapter B, Allocation and Funding, and specifically, §800.58 Child Care), an enrolled child may be eligible for child care services for four weeks within a federal fiscal year in order for the child's parent to search for work because of interruptions in the parent's employment.]~~

~~[(2) For child care services funded by the Commission from sources other than those specified in paragraph (1) of this subsection, child care services during job search activities are limited to four weeks within a federal fiscal year.]~~

~~[(e) A Board may establish a policy to allow parents attending a program that leads to a postsecondary degree from an institution of higher education to be exempt from residing with the child as defined in §809.2.~~

~~(e) Boards that establish initial family income eligibility at a level less than 85 percent SMI must ensure that the family remains income-eligible for care after passing the Board's initial income eligibility limit.~~

§809.42. Eligibility Verification, Determination, and Redetermination [Verification].

(a) A Board shall ensure that its child care contractor verifies all eligibility requirements for child care services prior to authorizing child care.

(b) A Board shall ensure that eligibility [Eligibility] for child care services shall be redetermined no sooner than 12 months following the initial determination or most recent redetermination.[:]

~~[(1) any time there is a change in family income or other information that could affect eligibility to receive child care services; and]~~

~~[(2) on an established frequency at the Board's discretion.]~~

~~[(e) A Board shall ensure that a public entity certifying expenditures for direct child care as described in §809.17(b)(3) determines and verifies that the expenditures are for child care provided to an eligible child. At a minimum, the public entity shall verify that the child:]~~

~~[(1) is under 13 years of age; or at the option of the Board, is a child with disabilities under 19 years of age; and]~~

~~[(2) resides with:]~~

~~[(A) a family whose income does not exceed 85% of the state median income for a family of the same size; and]~~

~~[(B) a parent who requires child care in order to work or attend a job training or educational program.]~~

§809.43. Priority for Child Care Services.

(a) A Board shall ensure that child care services are prioritized among the following three priority groups:

(1) The first priority group is assured child care services and includes children of parents eligible for the following:

(A) Choices child care as referenced in §809.45;

(B) Temporary Assistance for Needy Families (TANF) Applicant child care as referenced in §809.46;

(C) SNAP E&T child care as referenced in §809.47; and

(D) Transitional child care as referenced in §809.48.

(2) The second priority group is served subject to the availability of funds and includes, in the order of priority:

(A) children who need to receive protective services child care as referenced in §809.49;

(B) children of a qualified veteran or qualified spouse as defined in §801.23 of this title;

(C) children of a foster youth as defined in §801.23 of this title;

(D) children experiencing homelessness as defined in §809.2 and described in §809.52;

(E) ~~[(D)]~~ children of parents on military deployment as defined in §809.2 whose parents are unable to enroll in military-funded child care assistance programs;

(F) ~~[(E)]~~ children of teen parents as defined in §809.2; and

(G) ~~[(F)]~~ children with disabilities as defined in §809.2.

(3) The third priority group includes any other priority adopted by the Board.

(b) A Board shall not establish a priority group under subsection (a)(3) of this section based on the parent's choice of an individual provider or provider type.

§809.44. *Calculating Family Income.*

(a) For the purposes of determining family income and assessing the parent share of cost, Boards shall ensure that family income is calculated in accordance with Commission guidelines that:

(1) take into account irregular fluctuations in earnings; and

(2) ensure that temporary increases in income, including temporary increases that result in monthly income exceeding 85 percent SMI do not affect eligibility or parent share of cost.

~~[(a) Unless otherwise required by federal or state law, the family income for purposes of determining eligibility and the parent share of cost means the monthly total of the following items for each member of the family (as defined in §809.2(8)):]~~

~~[(1) Total gross earnings. These earnings include wages, salaries, commissions, tips, piece-rate payments, and cash bonuses earned.]~~

~~[(2) Net income from self-employment. Net income includes gross receipts minus business-related expenses from a person's own business, professional enterprise, or partnership, which result in the person's net income. Net income also includes gross receipts minus operating expenses from the operation of a farm.]~~

~~[(3) Pensions, annuities, life insurance, and retirement income, and early withdrawals from a 401(k) plan not rolled over within 60 days of withdrawal. This includes Social Security pensions, veteran's pensions and survivor's benefits and any cash benefit paid to retirees or their survivors by a former employer, or by a union, either directly or through an insurance company. This also includes payments from annuities and life insurance.]~~

~~[(4) Taxable capital gains, dividends, and interest. These earnings include capital gains from the sale of property and earnings from dividends from stock holdings, and interest on savings or bonds.]~~

~~[(5) Rental income. This includes net income from rental of a house, homestead, store, or other property, or rental income from boarders or lodgers.]~~

~~[(6) Public assistance payments. These payments include TANF as authorized under Chapters 31 or 34 of the Texas Human Resources Code, refugee assistance, Social Security Disability Insurance, Supplemental Security Income, and general assistance (such as cash payments from a county or city).]~~

~~[(7) Income from estate and trust funds. These payments include income from estates, trust funds, inheritances, or royalties.]~~

~~[(8) Unemployment compensation. This includes unemployment payments from governmental unemployment insurance agencies or private companies and strike benefits while a person is unemployed or on strike.]~~

~~[(9) Workers' compensation income, death benefit payments and other disability payments. These payments include compensation received periodically from private or public sources for on-the-job injuries.]~~

~~[(10) Spousal maintenance or alimony. This includes any payment made to a spouse or former spouse under a separation or divorce agreement.]~~

~~[(11) Child support. These payments include court-ordered child support, any maintenance or allowance used for current living costs provided by parents to a minor child who is a student, or any informal child support cash payments made by an absent parent for the maintenance of a minor.]~~

~~[(12) Court settlements or judgments. This includes awards for exemplary or punitive damages, noneconomic damages, and compensation for lost wages or profits, if the court settlement or judgment clearly allocates damages among these categories.]~~

~~[(13) Lottery payments of \$600 or greater.]~~

(b) In accordance with Commission income calculation guidelines, Boards shall ensure that the following income sources are excluded from the family income: [Income to the family that is not included in subsection (a) of this section is excluded in determining the total family income. Specifically, family income does not include:]

(1) Medicare, Medicaid, SNAP benefits, school meals, and housing assistance;

(2) Monthly monetary allowances provided to or for children of Vietnam veterans born with certain birth defects;

(3) Needs-based educational [Educational] scholarships, grants, and loans; including financial assistance under Title IV of the Higher Education Act--Pell Grants, Federal Supplemental Educational Opportunity grants, Federal Work Study Program, PLUS, Stafford loans, and Perkins loans;

(4) Earned Income Tax Credit (EITC) and the Advanced EITC;

(4) ~~[(5)]~~ Individual Development Account (IDA) withdrawals for the purchase of a home, medical expenses, or educational expenses;

(5) ~~[(6)]~~ Onetime cash payments, including tax [Tax] refunds, Earned Income Tax Credit (EITC) and Advanced EITC, onetime insurance payments, gifts, and lump sum inheritances;

(6) ~~[(7)]~~ VISTA and AmeriCorps living allowances and stipends;

(7) [(8)] Noncash or in-kind benefits such as employer-paid fringe benefits, food, or housing received in lieu of wages;

(8) [(9)] Foster care payments and adoption assistance;

(9) [(10)] Special military pay or allowances, including [which include] subsistence allowances, housing allowances, family separation allowances, or special allowances for duty subject to hostile fire or imminent danger;

(10) [(11)] Income from a child in the household between 14 and 19 years of age who is attending school;

(11) [(12)] Early [401(k)] withdrawals from qualified retirement accounts specified as hardship withdrawals as classified by the Internal Revenue Service (IRS); [and]

(12) Unemployment compensation;

(13) Child support payments;

(14) Cash assistance payments, including Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), Refugee Cash Assistance, general assistance, emergency assistance, and general relief;

(15) Onetime income received in lieu of TANF cash assistance;

(16) Income earned by a veteran while on active military duty and certain other veterans' benefits, such as compensation for service-connected death, vocational rehabilitation, and education assistance;

(17) Regular payments from Social Security, such as Old-Age and Survivors Insurance Trust Fund;

(18) Lump sum payments received as assets in the sale of a house, in which the assets are to be reinvested in the purchases of a new home (consistent with IRS guidance);

(19) Payments received as the result of an automobile accident insurance settlement that are being applied to the repair or replacement of an automobile; and

(20) [(13)] Any income sources specifically excluded by federal law or regulation.

(c) Income that is not listed in subsection (b) of this section as excluded from income is included as income.

§809.45. Choices Child Care.

(a) A parent is eligible for Choices child care if the parent is participating in the Choices program as stipulated in Chapter 811 of this title.

(b) For a parent receiving Choices Child Care who ceases participation in the Choices program during the 12-month eligibility period, Boards must ensure that:

(1) child care continues for the three-month period pursuant to §809.51; and

(2) the provisions of §809.51 shall apply if the parent resumes participation in Choices or begins participation in work or attendance in a job training or education program during the three-month period.

[(b) A parent who has been approved for Choices, but is waiting to enter an approved initial component of the program, may be eligible for up to two weeks of child care services if:]

[(1) child care services will prevent loss of the Choices placement; and]

[(2) child care is available to meet the needs of the child and parent.]

§809.46. Temporary Assistance for Needy Families Applicant Child Care.

(a) A parent is eligible for TANF Applicant child care if the parent:

(1) receives a referral from the Health and Human Services Commission (HHSC) to attend a Workforce Orientation for Applicants (WOA);

(2) locates employment or has increased earnings prior to TANF certification; and

(3) needs child care to accept or retain employment.

(b) To receive TANF Applicant child care, the parent shall be working and not have voluntarily terminated paid employment of at least 25 hours a week within 30 days prior to receiving the referral from HHSC to attend a WOA, unless the voluntary termination was for good cause connected with the parent's work.

[(c) Subject to the continued employment of the parent, TANF Applicant child care shall be provided for up to 12 months or until the family reaches the Board's income limit for eligibility under any provision contained in §809.50, whichever occurs first.]

[(d) Parents who are employed fewer than 25 hours a week at the time they apply for temporary cash assistance are limited to 90 days of TANF Applicant child care. Applicant child care may be extended to a total of 12 months, inclusive of the 90 days, if before the end of the 90-day period, the applicant increases the hours of employment to a minimum of 25 hours a week.]

[(e) A parent whose time limit for TANF Applicant child care has expired may continue to be eligible for child care services provided the parent and child are otherwise eligible under any provision contained in §809.50.]

§809.47. Supplemental Nutrition Assistance Program Employment and Training Child Care.

(a) A parent is eligible to receive SNAP E&T child care services if the parent is participating in SNAP E&T services, in accordance with the provisions of 7 CFR Part 273[; as long as the ease remains open].

(b) For a parent receiving SNAP E&T child care services who ceases participation in the E&T program during the 12-month eligibility period, Boards must ensure that:

(1) child care continues for the three-month period pursuant to §809.51; and

(2) the provisions of §809.51 shall apply if the parent resumes participation in the E&T program or begins participation in work or attendance in a job training or education program during the three-month period.

§809.48. Transitional Child Care.

(a) A parent is eligible for Transitional child care services if the parent:

(1) has been denied TANF and was employed at the time of TANF denial; or

(2) has been denied TANF within 30 days because of expiration of TANF time limits; and

(3) requires child care to work or attend a job training or educational program for a combination of at least an average of 25

hours per week for a single-parent family or 50 hours per week for a two-parent family, or a higher number of hours per week as established by a Board.

(b) Boards may establish an income eligibility limit for Transitional child care that is higher than the eligibility limit for At-Risk child care, pursuant to §809.50, provided that the higher income limit does not exceed 85[%] percent of the state median income for a family of the same size.

(c) For former TANF recipients who are employed when TANF is denied, Transitional child care shall be available for:

(1) a period of up to 12 months from the effective date of the TANF denial; or

(2) a period of up to 18 months from the effective date of the TANF denial in the case of a former TANF recipient who was eligible for child caretaker exemptions pursuant to Texas Human Resources Code §31.012(c) and voluntarily participates in the Choices program.

~~[(d) Former TANF recipients who are not employed when TANF expires, including recipients who are engaged in a Choices activity except as provided under subsection (e) of this section, shall receive up to four weeks of Transitional child care in order to allow these individuals to search for work as needed.]~~

~~[(e) Former TANF recipients who are not employed when TANF is denied, are engaged in a Choices activity, are meeting the requirements of Chapter 811 of this title, and are denied TANF because of receipt of child support shall be eligible to receive Transitional child care services until the date on which the individual completes the activity, as defined by the Board.]~~

~~(d) [(f)] A Board may allow a reduction to the requirement in subsection (a)(3) of this section if a parent's documented medical disability or need to care for a physically or mentally disabled family member prevents the parent from participating in work, education, or job training activities for the required hours per week.~~

~~(e) [(g)] For purposes of meeting the education requirements stipulated in subsection (a)(3) of this section, the following shall apply:~~

~~(1) each credit hour of postsecondary education counts as three hours of education activity per week; and~~

~~(2) each credit hour of a condensed postsecondary education course counts as six education activity hours per week.~~

§809.49. Child Care for Children Receiving or Needing Protective Services.

(a) A Board shall ensure that determinations of eligibility for children needing protective services are performed by DFPS.

(1) Child care will continue as long as authorized and funded by DFPS.

(2) DFPS may authorize child care for a child under court supervision under the [up to] age of 19.

(3) Child care discontinued by DFPS prior to the end of the 12-month eligibility period shall be subject to the Continuity of Care provisions in §809.54.

(b) A Board shall ensure that requests made by DFPS for specific eligible providers are enforced for children in protective services, including children of foster parents when the foster parent is the owner, director, assistant director or other individual with an ownership interest in the provider.

§809.50. At-Risk Child Care.

(a) A parent is eligible for child care services under this section if at initial eligibility determination and at eligibility redetermination as described in §809.42:

(1) the family income does not exceed the income limit established by the Board pursuant to §809.41(a)(2)(A); and

(2) child care is required for the parent to work or attend a job training or educational program for a combination of at least an average of 25 hours per week for a single-parent family or 50 hours per week for a two-parent family, or a higher number of hours per week as established by the Board.

(b) A Board may allow a reduction to the work, education, or job training activity requirements in subsection (a)(2) of this section if a parent's documented medical disability or need to care for a physically or mentally disabled family member prevents the parent from participating in these activities for the required hours per week.

(c) For purposes of meeting the education requirements stipulated in subsection (a)(2) of this section, the following shall apply:

(1) each credit hour of postsecondary education counts as three hours of education activity per week;

(2) each credit hour of a condensed postsecondary education course counts as six education activity hours per week; and

(3) teen parents attending high school or the equivalent shall be considered as meeting the education requirements in subsection (a)(2) of this section.

(d) When calculating income eligibility for a child with disabilities, a Board shall deduct the cost of the child's ongoing medical expenses from the family income.

(e) Boards may establish a higher income eligibility limit for teen parents than the eligibility limit established pursuant to §809.41(a)(2)(A) provided that the higher income limit does not exceed 85[%] percent of the state median income for a family of the same size.

(f) A teen parent's family income is based solely on the teen parent's income and size of the teen's family as defined in §809.2[~~(8)~~].

(g) Boards may establish a higher income eligibility limit for families with a child who is enrolled in Head Start, Early Head Start, or public pre-K provided that the higher income limit does not exceed 85[%] percent of the state median income for a family of the same size.

§809.51. Child Care during [Temporary] Interruptions in Work, Education, or Job Training.

(a) Except for a child experiencing homelessness, as described in §809.52, if the child met all of the applicable eligibility requirements for child care services in this subchapter on the date of the most recent eligibility determination or redetermination, the child shall be considered to be eligible and will receive services during the 12-month eligibility period described in §809.42, regardless of any:

(1) change in family income, if that family income does not exceed 85 percent SMI for a family of the same size; or

(2) temporary change in the ongoing status of the child's parent as working or attending a job training or education program. A temporary change shall include, at a minimum, any:

(A) time-limited absence from work for an employed parent for periods of family leave (including parental leave) or sick leave;

(B) interruption in work for a seasonal worker who is not working between regular industry work seasons;

(C) student holiday or break for a parent participating in training or education;

(D) reduction in work, training, or education hours, as long as the parent is still working or attending a training or education program;

(E) other cessation of work or attendance in a training or education program that does not exceed three months;

(F) change in age, including turning 13 years old during the eligibility period; and

(G) change in residency within the state.

(b) During the period of time between eligibility redeterminations, a Board shall discontinue child care services due to a parent's loss of work or cessation of attendance at a job training or educational program that does not constitute a temporary change in accordance with subsection (a)(2) of this section. However, Boards must ensure that care continues at the same level for a period of not less than three months after such loss of work or cessation of attendance at a job training or educational program.

(c) If a parent resumes work or attendance at a job training or education program at any level and at any time during the period described in subsection (b), then the Board shall ensure that:

(1) care will continue to the end of the 12-month eligibility period at the same or greater level, depending upon any increase in the activity hours of the parent;

(2) the parent share of cost will not be increased during the remainder of the 12-month eligibility period, including for parents who are exempt from the parent share of cost pursuant to §809.19; and

(3) the Board's child care contractor verifies only:

(A) that the family income does not exceed 85 percent of the SMI; and

(B) the resumption of work or attendance at a job training or education program.

[(a) If a parent has a temporary cessation of work, education, or job training activities and is unable to meet the requirements described in §809.50(a)(2), child care may be suspended for no more than 90 calendar days from the documented effective date of the cessation of these activities.]

[(b) If a parent has a documented temporary medical incapacity and is unable to meet the work, education, or job training requirements described in §809.50(a)(2), the following shall apply:]

[(1) Child care may be allowed to continue for no more than 60 calendar days from the documented effective date of the temporary medical incapacity; and]

[(2) Child care may be suspended for no more than 30 calendar days after the end of the 60-day calendar period following the documented temporary medical incapacity, as described in subsection (b)(1) of this section.]

[(c) Upon the parent's return to work, education, or job training activities, a Board is not required to resume child care at the same provider used prior to the documented temporary cessation of these activities or medical incapacity.]

[(d) Prior to any suspension of child care as described in this section, a parent must provide:]

[(1) documentation from the employer or training provider stating that the parent will be returning to work or job training activ-

ities following the temporary cessation of these activities or medical incapacity; or]

[(2) written notification to the child care contractor of the parent's intent to enroll in an educational institution following the temporary cessation of educational activities.]

§809.52. Child Care for Children Experiencing Homelessness.

(a) For a child experiencing homelessness, as defined in §809.2, a Board shall ensure that the child is initially enrolled for a period of three months.

(b) If, during the three-month initial enrollment period, the parent of a child experiencing homelessness:

(1) is unable to provide documentation verifying that the child is eligible under §809.41(a)(1) - (2) (regarding age and citizenship status), then care shall be discontinued following the three-month enrollment period; or

(2) provides documentation verifying eligibility under §809.41(a), then care shall continue through the end of the 12-month initial eligibility period (inclusive of the three-month initial enrollment period).

§809.53. Child Care for Children Served by Special Projects.

(a) Special projects developed in federal and state statutes or regulations and funded using non-CCDF sources may add groups of children eligible to receive child care.

(b) The eligibility criteria as stated in the statutes, [or] regulations, or funding sources shall control for the special project, unless otherwise indicated by the Commission.

(c) The time limit for receiving child care for children served by special projects may be:

(1) specifically prescribed by federal or state statutes or regulations according to the particular project;

(2) otherwise set by the Commission depending on the purpose and goals of the special project; and

(3) limited to the availability of funds.

§809.54. Continuity of Care.

(a) Enrolled children, including children whose eligibility for Transitional child care has expired, shall receive child care through the end of the applicable eligibility periods described in §809.42 [as long as the family remains eligible for any available source of Commission-funded child care except as otherwise provided under subsection (b) of this section].

(b) Except as provided by §809.75(b) relating to child care during appeal, nothing in this chapter shall be interpreted in a manner as to result in a child being removed from care; except when removal from care is required for child care to be provided to a child of parents eligible for the first priority group as provided in §809.43].

(c) In closed DFPS CPS cases (DFPS cases) where child care is no longer funded by DFPS, child care shall continue through the end of the applicable eligibility periods described in §809.42 using funds allocated to the Board by the Commission. [the following shall apply:]

[(1) Former DFPS Children Needing Protective Services Child Care. Regardless of whether the family meets the income eligibility requirements of the Board or is working or attending a job training or educational program, if DFPS determines on a case-by-case basis that the child continues to need protective services and child care is integral to that need, then the Board shall continue the child care by using other funds, including funds received through the Commission, for child care services for up to six months after DFPS case is closed.]

~~[(2) Former DFPS Children Not Needing Protective Services Child Care. If the family meets the income eligibility requirements of the Board and if DFPS does not state on a case-by-case basis that the child continues to need protective services or child care is not integral to that need, then the Board may provide care subject to the availability of funds. To receive care under this paragraph, the parents must be working or attending a job training or an educational program.]~~

~~(d) A Board shall ensure that no enrolled children of military parents in military deployment have a disruption of child care services or eligibility during [because of the] military deployment, including parents in military deployment at the end of the 12-month eligibility redetermination period.~~

~~(e) A Board shall ensure that a child who is required by a court-ordered custody or visitation arrangement to leave a provider's care is permitted to continue receiving child care by the same provider, or another provider if agreed to by the parent in advance of the leave, upon return from the court-ordered custody or visitation arrangement.~~

~~[(f) A Board may encourage parents of other children to temporarily utilize the space the child under court-ordered custody or visitation arrangement has vacated until the child returns so he or she can return to the same provider.]~~

~~[(g) A Board shall ensure that parents who choose to accept temporary child care to fill a position opened because of court-ordered custody or visitation shall not lose their place on the waiting list.]~~

~~[(h) A Board shall ensure that parents who choose not to accept temporary child care to fill a position opened because of court-ordered custody or visitation shall not lose their place on the waiting list.]~~

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 June 3, 2016.

TRD-201602826

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Deputy Director, Workforce Development Division Programs

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Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-0829



40 TAC §809.55

The repeal is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed repeal affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.55. *Mandatory Waiting Period for Reapplication.*

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 June 3, 2016.

TRD-201602827

Patricia Gonzalez

Deputy Director, Workforce Development Division Programs

Texas Workforce Commission

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-0829



SUBCHAPTER D. PARENT RIGHTS AND RESPONSIBILITIES

40 TAC §§809.71 - 809.75

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.71. *Parent Rights.*

A Board shall ensure that the Board's child care contractor informs the parent in writing that the parent has the right to:

(1) choose the type of child care provider that best suits their needs and to be informed of all child care options available to them as included in the consumer education information described in §809.15;

(2) visit available child care providers before making their choice of a child care option;

(3) receive assistance in choosing initial or additional child care referrals including information about the Board's policies regarding transferring children from one provider to another;

(4) be informed of the Commission rules and Board policies related to providers charging parents the difference between the Board's reimbursement and the provider's published rate as described in §809.92(c) - (d);

(5) be represented when applying for child care services;

(6) be notified of their eligibility to receive child care services within 20 calendar days from the day the Board's child care contractor receives all necessary documentation required to initially determine or redetermine eligibility for child care;

(7) receive child care services regardless of race, color, national origin, age, sex, disability, political beliefs, or religion;

(8) have the Board and the Board's child care contractor treat information used to determine eligibility for child care services as confidential;

(9) receive written notification~~], except as provided by paragraph (10) of this section;~~ at least 15 days before ~~[the denial, delay, reduction, or] termination of child care services; [unless:]~~

~~[(A) the services are authorized to cease immediately because either the parent is no longer participating in the Choices or SNAP E&T program or services are authorized to end immediately for children in protective services child care; or]~~

~~[(B) the services are authorized to cease immediately as required by Board policy because the child has been absent for five consecutive authorized days of care and the parent has failed to contact~~

the child care provider or the child care contractor by the end of the fifth authorized day;]

[(10) receive 30-day written notification from the Board's child care contractor if child care is to be terminated in order to make room for a priority group described in §809.43(a)(1), as follows:]

[(A) Written notification of denial, delay, reduction, or termination shall include information regarding other child care options for which the recipient may be eligible.]

[(B) If the notice on or before the 30th day before denial, delay, reduction, or termination in child care would interfere with the ability of the Board to comply with its duties regarding the number of children served or would require the expenditure of funds in excess of the amount allocated to the Board, notice may be provided on the earliest date on which it is practicable for the Board to provide notice;]

(10) [(11)] reject an offer of child care services or voluntarily withdraw their child from child care, unless the child is in protective services;

(11) [(12)] be informed of the possible consequences of rejecting or ending the child care that is offered;

(12) [(13)] be informed of the eligibility documentation and reporting requirements described in §809.72 and §809.73;

(13) [(14)] be informed of the parent appeal rights described in §809.74; and

[(15) be informed of the Board's attendance policy as required in §809.13(d)(13) and the consequences for five consecutive absences without contact as described in paragraph (9)(B) of this section; and]

(14) [(16)] be informed of required background and criminal history checks for relative child care providers through the listing process with DFPS, as described in §809.91(e), before the parent or guardian selects the relative child care provider.

§809.72. Parent Eligibility Documentation Requirements.

(a) Except for a child experiencing homelessness pursuant to §809.52 at initial eligibility, before a child can be initially determined or redetermined eligible for child care services and care authorized, parents [Parents] shall provide the Board's child care contractor with all information necessary to determine eligibility according to the Board's administrative policies and procedures.

(b) A parent's failure to submit eligibility documentation shall [may] result in initial denial [or termination] of child care services or termination of services at the 12-month eligibility redetermination period.

§809.73. Parent Reporting Requirements.

(a) Boards shall ensure that during the 12-month eligibility period, parents are only required to report items that impact a family's eligibility or that enable the Board or Board contractor to contact the family or pay the provider.

(b) [(a)] Pursuant to subsection (a) of this section, parents [Parents] shall report to the child care contractor, within 14 calendar [40] days of the occurrence, the following:

(1) Changes in family income or family size that would cause the family to exceed 85 percent of SMI for a family of the same size;

[(2) Changes in family size;]

(2) [(3)] Changes in work or attendance at [in] a job training or educational program not considered to be temporary changes, as described in §809.42; and

(3) Any change in family residence, primary phone number, or e-mail (if available).

[(4) The receipt or the awarding of any child care funds from other public or private entities; or]

[(5) Any other changes that may affect the child's eligibility or parent share of cost for child care.]

(c) [(b)] Failure to report changes described in subsection (a) of this section may result in fact-finding for suspected fraud as described in Subchapter F of this chapter.[:]

[(1) termination of child care;]

[(2) recovery of payments by the Board, the Board's child care contractor, or the Commission; or]

[(3) fact-finding for suspected fraud as described in Subchapter F of this chapter.]

(d) A Board shall allow parents to report and the child care contractor shall take appropriate action regarding changes in:

(1) income and family size, which may result in a reduction in the parent share of cost pursuant to §809.19; and

(2) work, job training, or education program participation that may result in an increase in the level of child care services.

[(e) The receipt of child care services for which the parent is no longer eligible constitutes grounds on which to suspect fraud.]

§809.74. Parent Appeal Rights.

(a) Unless otherwise stated in this section, a parent may request a hearing pursuant to Chapter 823 of this title.[:]

(1) if the parent's eligibility or child's enrollment is denied, delayed, reduced, suspended, or terminated by the Board's child care contractor, Choices caseworker, or SNAP E&T caseworker; or[:]

(2) regarding the amount of recoupment determined pursuant to Subchapter F of this chapter.

(b) A parent may have an individual represent him or her during this process.

(c) A parent of a child in protective services may not appeal pursuant to Chapter 823 of this title, but shall follow the procedures established by DFPS.

§809.75. Child Care during Appeal.

(a) For a child currently enrolled in child care, a Board shall ensure that child care services continue during the appeal process until a decision is reached, if the parent requests a hearing.

[(b) A Board shall ensure that child care does not continue during the appeal process if the parent's eligibility or child's enrollment is denied, delayed, reduced, suspended, or terminated because of:]

[(1) excessive absences;]

[(2) voluntary withdrawal from child care;]

[(3) change in federal or state laws or regulations that affect the parent's eligibility;]

[(4) lack of funding because of increases in the number of enrolled children in state and Board priority groups;]

[(5) a sanctions finding against the parent participating in the Choices program;]

~~[(6) voluntary withdrawal of a parent from the Choices program;]~~

~~[(7) nonpayment of parent share of cost;]~~

~~[(8) a parent's failure to report, within 10 days of occurrence, any change in the family's circumstances that would have rendered the family ineligible for subsidized child care;]~~

~~[(9) a suspension of child care services pursuant to §809.51 (related to Child Care during Temporary Interruptions in Work, Education, or Training); or]~~

~~[(10) five consecutive absences and the parent has failed to contact the child care provider or the child care contractor by the end of the fifth authorized day;]~~

(b) ~~[(e)]~~ The cost of providing services during the appeal process is subject to recovery from the parent by the Board, if the appeal decision is rendered against the parent.

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 June 3, 2016.

TRD-201602828

Patricia Gonzalez

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Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-0829



40 TAC §809.76, §809.77

The repeals are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed repeals affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.76. *Parent Responsibility Agreement.*

§809.77. *Exemptions from the Parent Responsibility Agreement.*

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 June 3, 2016.

TRD-201602829

Patricia Gonzalez

Deputy Director, Workforce Development Division Programs

Texas Workforce Commission

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-0829



40 TAC §809.78

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority

to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rule affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.78. *[Parent] Attendance Standards and Reporting Requirements.*

(a) A Board shall ensure that parents are notified of the following:

(1) Parents shall ensure that the eligible child attends on a regular basis consistent with the child's authorization for enrollment. Failure to meet attendance standards described in paragraph (2) of this subsection may:

(A) result in suspension of care; or

(B) be grounds for determining that a change in the parent's participation in work, job training, or an education program has occurred and care may be terminated pursuant to the requirements in §809.51(b).

(2) Meeting attendance standards for child care services consists of fewer than:

(A) five consecutive absences during the month;

(B) ten total absences during the month; or

(C) forty-one total absences over a 12-month period.

(3) Child care providers may end a child's enrollment with the provider if the child does not meet the provider's established policy regarding attendance.

(4) ~~[(4)]~~ Parents shall use the attendance card to report daily attendance and absences.

~~[(2) Child care services may be terminated and parents may be held responsible for paying the provider for attendance and absences that are not reimbursed by the Board.]~~

(5) ~~[(3)]~~ Parents shall not designate anyone under age 16 as a secondary cardholder, unless the individual is a child's parent.

(6) ~~[(4)]~~ Parents shall not designate the owner, assistant director, or director of the child care facility as a secondary cardholder.

(7) ~~[(5)]~~ Parents shall:

(A) ensure the attendance card is not misused by secondary cardholders;

(B) inform secondary cardholders of the responsibilities for using the attendance card;

(C) ensure that secondary cardholders comply with these responsibilities; and

(D) ensure the protection of attendance cards issued to them or secondary cardholders.

(8) ~~[(6)]~~ The [Child care services may be terminated if the] parent or secondary cardholders giving [give] the attendance card or the personal identification number (PIN) to another person, including the child care provider, is grounds for a potential fraud determination pursuant to Subchapter F of this chapter.

(9) ~~[(7)]~~ Parents shall report to the child care contractor instances in which a parent's attempt to record attendance in the child

care automated attendance system is denied or rejected and cannot be corrected at the provider site. Failure to report such instances may result in an absence counted toward the attendance standards described in paragraph (2) of this subsection [Board's maximum number of allowable absences or the parent being liable for the reimbursement to the provider].

~~[(8) Five consecutive absences on authorized days of care, with no contact from the parent with the child care provider or child care contractor, may result in termination of child care services. Additionally, the 15-day notice of termination is not required in this circumstance, and child care shall not continue during any appeal.]~~

(b) Boards shall ensure that parents sign a written acknowledgment indicating their understanding of the [parent] attendance standards and reporting requirements [and responsibilities,] at each of the following stages:

(1) initial eligibility determination; and

(2) each eligibility redetermination, [conducted at a frequency determined by the Board,] as required in §809.42(b) [§809.42(b)(2)].

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 June 3, 2016.

TRD-201602830

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Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-0829



SUBCHAPTER E. REQUIREMENTS TO PROVIDE CHILD CARE

40 TAC §§809.91 - 809.95

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.91. Minimum Requirements for Providers.

(a) A Board shall ensure that child care subsidies are paid only to:

(1) regulated child care providers as described in §809.2 [§809.2(17)];

(2) relative child care providers as described in §809.2 [§809.2(18)], subject to the requirements in subsection (e) of this section;

(3) at the Board's option, listed family homes as defined in §809.2 [§809.2(12)], subject to the requirements in subsection (b)(2) of this section; or

(4) at the Board's option, child care providers licensed in a neighboring state, subject to the following requirements:

(A) Boards shall ensure that the Board's child care contractor reviews the licensing status of the out-of-state provider every month, at a minimum, to confirm the provider is meeting the minimum licensing standards of the state;

(B) Boards shall ensure that the out-of-state provider meets the requirements of the neighboring state to serve CCDF-subsidized children; and

(C) The provider shall agree to comply with the requirements of this chapter and all Board policies and Board child care contractor procedures.

(b) [For providers listed with DFPS, the following applies:]

[(4)] A Board shall not prohibit a relative child care provider who is listed with DFPS and who meets the minimum requirements of this section from being an eligible relative child care provider.

[(2) If a Board chooses to include listed family homes, as defined in §809.2(12), that provide care for children unrelated to the provider, a Board shall ensure that there are in effect, under local law, requirements applicable to the listed family homes designated to protect the health and safety of children. Pursuant to 45 CFR §98.41, the requirements shall include:]

[(A) The prevention and control of infectious diseases (including immunizations);]

[(B) building and physical premises safety; and]

[(C) minimum health and safety training appropriate to the child care setting.]

(c) Except as provided by the criteria for TRS Provider certification, a Board or the Board's child care contractor shall not place requirements on regulated providers that:

(1) exceed the state licensing requirements stipulated in Texas Human Resources Code, Chapter 42; or

(2) have the effect of monitoring the provider for compliance with state licensing requirements stipulated in Texas Human Resources Code, Chapter 42.

(d) When a Board or the Board's child care contractor, in the course of fulfilling its responsibilities, gains knowledge of any possible violation regarding regulatory standards, the Board or its child care contractor shall report the information to the appropriate regulatory agency.

(e) For relative child care providers to be eligible for reimbursement for Commission-funded child care services, the following applies:

(1) Relative child care providers shall list with DFPS; however, pursuant to 45 CFR §98.41(e), relative child care providers listed with DFPS shall be exempt from the health and safety requirements of 45 CFR §98.41(a) and subsection (b)(2) of this section.

(2) A Board shall allow relative child care providers to care for a child in the child's home (in-home child care) only for the following:

(A) A child with disabilities as defined in §809.2 [§809.2(6)], and his or her siblings;

(B) A child under 18 months of age, and his or her siblings;

(C) A child of a teen parent; and

(D) When the parent's work schedule requires evening, overnight, or weekend child care in which taking the child outside of the child's home would be disruptive to the child.

(3) A Board may allow relative in-home child care for circumstances in which the Board's child care contractor determines and documents that other child care provider arrangements are not available in the community.

(f) Boards shall ensure that subsidies are not paid for a child at the following child care providers:

(1) Except for foster parents authorized by DFPS pursuant to §809.49, licensed [Licensed] child care centers, including before- or after-school programs and school-age programs, in which the parent or his or her spouse, including the child's parent or stepparent, is the director or assistant director, or has an ownership interest; or

(2) Licensed, registered, or listed child care homes where the parent also works during the hours his or her child is in care.

§809.92. Provider Responsibilities and Reporting Requirements.

(a) A Board shall ensure that providers are given written notice of and agree to their responsibilities, reporting requirements, and requirements for reimbursement under this subchapter prior to enrolling a child.

(b) Providers shall:

(1) be responsible for collecting the parent share of cost as assessed under §809.19 before child care services are delivered;

(2) be responsible for collecting other child care funds received by the parent as described in §809.21(2);

(3) report to the Board or the Board's child care contractor instances in which the parent fails to pay the parent share of cost; and

(4) follow attendance reporting and tracking procedures required by the Commission under §809.95, the Board, or, if applicable, the Board's child care contractor. ~~[At a minimum, the provider shall:]~~

~~[(A) document and maintain a record of each child's attendance and submit attendance records to the Board's child care contractor upon request;]~~

~~[(B) inform the Board's child care contractor when an enrolled child is absent; and]~~

~~[(C) inform the Board's child care contractor that the child has not attended the first three days of scheduled care. The provider has until the close of the third day of scheduled attendance to contact the Board's child care contractor regarding the child's absence.]~~

(c) Providers shall not charge the difference between the provider's published rate and the amount of the Board's reimbursement rate as determined under §809.21 to parents:

(1) who are exempt from the parent share of cost assessment under §809.19(a)(2); or

(2) whose parent share of cost is calculated to be zero pursuant to §809.19(f).

(d) A Board may develop a policy that prohibits providers from charging the difference between the provider's published rate and the amount of the Board's reimbursement rate (including the assessed parent share of cost) to all parents eligible for child care services.

(e) Providers shall not deny a child care referral based on the parent's income status, receipt of public assistance, or the child's protective service status.

(f) Providers shall not charge fees to a parent receiving child care subsidies that are not charged to a parent who is not receiving subsidies.

§809.93. Provider Reimbursement.

(a) A Board shall ensure that reimbursement for child care is paid only to the provider.

(b) A Board or its child care contractor shall reimburse a regulated provider based on a child's monthly enrollment authorization.

~~(c) [(b)]~~ A Board shall ensure that a relative child care provider is not reimbursed for days on which the child is absent.

~~(d) [(e)]~~ A relative child care provider shall not be reimbursed for more children than permitted by the DFPS minimum regulatory standards for Registered Child Care Homes. A Board may permit more children to be cared for by a relative child care provider on a case-by-case basis as determined by the Board.

~~(e) [(d)]~~ A Board shall not reimburse providers that are debarred from other state or federal programs unless and until the debarment is removed.

~~(f) [(e)]~~ Unless otherwise determined by the Board and approved by the Commission for automated reporting purposes, reimbursement for child care is based on the unit of service delivered, as follows:

(1) A full-day unit of service is 6 to 12 hours of care provided within a 24-hour period; and

(2) A part-day unit of service is fewer than 6 hours of care provided within a 24-hour period.

~~(g) [(f)]~~ A Board or its child care contractor shall ensure that providers are not paid for holding spaces open ~~[except as consistent with attendance policies as established by the Board].~~

~~(h) [(g)]~~ A Board or the Board's child care contractor shall not pay providers:

(1) less, when a child enrolled full time occasionally attends for a part day; or

(2) more, when a child enrolled part time occasionally attends for a full day.

~~(i) [(h)]~~ The Board or its child care contractor shall not reimburse a provider retroactively for new Board maximum reimbursement rates or new provider published rates.

~~(j) [(i)]~~ A Board or its child care contractor shall ensure that the parent's travel time to and from the child care facility and the parent's work, school, or job training site is included in determining whether to authorize reimbursement for full-day or part-day care under subsection (f) [subsection (e)] of this section.

§809.94. Providers Placed on Corrective or Adverse Action by the Texas Department of Family and Protective Services.

(a) For a provider placed on evaluation corrective action (evaluation status) by DFPS, Boards shall ensure that:

(1) parents with children enrolled in Commission-funded child care are notified in writing of the provider's evaluation status no later than five business days after receiving notification from the Agency of DFPS' decision to place the provider on evaluation status; and

(2) parents choosing to enroll children in Commission-funded child care with the provider are notified in writing of the provider's evaluation status prior to enrolling the children with the provider.

(b) For a provider placed on probation corrective action (probationary status) by DFPS, Boards shall ensure that:

(1) parents with children in Commission-funded child care are notified in writing of the provider's probationary status no later than five business days after receiving notification from the Agency of DFPS' decision to place the provider on probationary status; and

(2) no new referrals are made to the provider while on probationary status.

(c) A parent receiving notification of a provider's evaluation or probationary status with DFPS pursuant to subsections (a) and (b) of this section may transfer the child to another eligible provider without being subject to the Board transfer policies described in §809.71(3) [choose to continue the enrollment of a child with the provider] if the parent requests the transfer within 14 [signs and returns to the Board's child care contractor within 10] business days of receiving such notification [a written acknowledgment that the parent is aware of the provider's status with DFPS, but chooses to enroll the child with the provider].

(d) For a provider placed on evaluation or probationary status by DFPS, Boards shall ensure that the provider is not reimbursed at the Boards' enhanced reimbursement rates described in §809.20 while on evaluation or probationary status.

(e) For a provider against whom DFPS is taking adverse action, Boards shall ensure that:

(1) parents with children enrolled in Commission-funded child care are notified no later than two business days after receiving notification from the Agency that DFPS intends to take adverse action against the provider;

(2) children enrolled in Commission-funded child care with the provider are transferred to another eligible provider no later than five business days after receiving notification from the Agency that DFPS intends to take adverse action against the provider; and

(3) no new referrals for Commission-funded child care are made to the provider while DFPS is taking adverse action.

(f) For adverse actions in which DFPS has determined that the provider poses an immediate risk to the health or safety of children and cannot operate pending appeal of the adverse action, but for which there is a valid court order that overturns DFPS' determination and allows the provider to operate pending administrative review or appeal, Boards shall take action consistent with subsection (e) of this section.

§809.95. Provider Automated Attendance Agreement.

Boards shall notify providers of the following:

(1) Employees of child care providers shall not:

(A) possess, have on the premises, or otherwise have access to the attendance card of a parent or secondary cardholder;

(B) accept or use the attendance card or PIN of a parent or secondary cardholder; or

(C) perform the attendance or absence reporting function on behalf of the parent;

(2) The owner, director, or assistant director of a child care provider shall not be designated as the secondary cardholder by a parent with a child enrolled with the provider;

(3) Providers shall report misuse of attendance cards and PINs to the Board or the Board's child care contractor; and

(4) Providers shall report to the child care contractor authorized days that do not match the referral in the Agency's automated attendance system within five days of receiving the authorization. Failure to report the discrepancy may result in withholding payment to the provider.

(5) Misuse of attendance reporting and violation of the requirements in this section are grounds for a potential fraud determination pursuant to Subchapter F of this chapter.

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 June 3, 2016.

TRD-201602831

Patricia Gonzalez

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Texas Workforce Commission

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-0829



SUBCHAPTER F. FRAUD FACT-FINDING AND IMPROPER PAYMENTS

40 TAC §§809.111 - 809.113, 809.115

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rules affect Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.111. General Fraud Fact-Finding Procedures.

(a) This subchapter establishes authority for a Board to develop procedures for the prevention of fraud by a parent, provider, or any other person in a position to commit fraud consistent with fraud prevention provisions in the Agency-Board Agreement.

(b) In this subchapter, a person commits fraud if, to obtain or increase a benefit or other payment, either for the person or another person, the person:

(1) makes a false statement or representation, knowing it to be false; or

(2) knowingly fails to disclose a material fact.

(c) [(b)] A Board shall ensure that procedures for researching and fact-finding for possible fraud are developed and implemented to deter and detect suspected fraud for child care services in the workforce area.

(d) [(e)] These procedures shall include provisions that suspected fraud is reported to the Commission in accordance with Commission policies and procedures.

(e) [(d)] Upon review of suspected fraud reports, the Commission may either accept the case for investigation and action at the state

level, or return the case to the Board or its child care contractor for action including, but not limited to, the following:

(1) further fact-finding; or

(2) other corrective action as provided in this chapter or as may be appropriate.

(d) [(e)] The Board shall ensure that a final fact-finding report is submitted to the Commission after a case is returned to the Board or its child care contractor and all feasible avenues of fact-finding and corrective actions have been exhausted.

§809.112. Suspected Fraud.

(a) A parent, provider, or any other person in a position to commit fraud may be suspected of fraud if the person presents or causes to be presented to the Board or its child care contractor one or more of the following items:

(1) A request for reimbursement in excess of the amount charged by the provider for the child care; or

(2) A claim for child care services if evidence indicates that the person may have:

(A) known, or should have known, that child care services were not provided as claimed;

(B) known, or should have known, that information provided is false or fraudulent;

(C) received child care services during a period in which the parent or child was not eligible for services;

(D) known, or should have known, that child care subsidies were provided to a person not eligible to be a provider; or

(E) otherwise indicated that the person knew or should have known that the actions were in violation of this chapter or state or federal statute or regulations relating to child care services.

(b) The following parental actions may be grounds for suspected fraud and cause for Boards to conduct fraud fact-finding or the Commission to initiate a fraud investigation:

(1) Not reporting or falsely reporting at initial eligibility or at eligibility redetermination:

(A) household composition, or income sources or amounts that would have resulted in ineligibility or a higher parent share of cost; or

(B) work, training, or education hours that would have resulted in ineligibility; or

(2) Not reporting during the 12-month eligibility period:

(A) changes in income or household composition that would cause the family income to exceed 85 percent of SMI (taking into consideration fluctuations of income); or

(B) a permanent loss of job or cessation of training or education that exceeds 90 days; and

(C) improper or inaccurate reporting of attendance.

§809.113. Action to Prevent or Correct Suspected Fraud.

(a) The Commission or Board[, Board, or Boards child care contractor] may take the following actions pursuant to Commission policy if the Commission or Board finds that a provider has committed fraud:

(1) Temporary withholding of payments to the provider for child care services delivered;

(2) Nonpayment of child care services delivered;

(3) Recoupment of funds from the provider;

(4) Stop authorizing care at the provider's facility or location;

(5) Prohibiting future eligibility to provide Commission-funded child care services; or

(6) [(5)] Any other action consistent with the intent of the governing statutes or regulations to investigate, prevent, or stop suspected fraud.

(b) The Commission or Board[, Board, or Boards child care contractor] may take the following actions pursuant to Commission policy if the Commission or Board finds that a parent has committed fraud:

(1) recouping funds from the parent;

(2) prohibiting future child care eligibility, provided that the prohibition does not result in a Choices or SNAP E&T participant becoming ineligible for child care;

(3) limiting the enrollment of the parent's child to a regulated child care provider;

(4) terminating care during the 12-month eligibility period if eligibility was determined using fraudulent information provided by the parent; or

(5) [(4)] any other action consistent with the intent of the governing statutes or regulations to investigate, prevent, or stop suspected fraud.

§809.115. Corrective Adverse Actions.

(a) When determining appropriate corrective actions, the Board or Board's child care contractor shall consider:

(1) the scope of the violation;

(2) the severity of the violation; and

(3) the compliance history of the person or entity.

(b) Corrective actions for providers may include, but are not limited to, the following:

(1) Closing intake;

(2) Moving children to another provider selected by the parent;

(3) Withholding provider payments or reimbursement of costs incurred; and

[(4) Termination of child care services; and]

(4) [(5)] Recoupment of funds.

(c) When a provider violates a provision of Subchapter E of this chapter, a written Service Improvement Agreement may be negotiated between the provider and the Board or the Board's child care contractor. At the least, the Service Improvement Agreement shall include the following:

(1) The basis for the Service Improvement Agreement;

(2) The steps required to reach compliance including, if applicable, technical assistance;

(3) The time limits for implementing the improvements; and

(4) The consequences of noncompliance with the Service Improvement Agreement.

(d) The Board shall develop policies and procedures to ensure that the Board or the Board's child care contractor take corrective action consistent with subsections (a) - (c) of this section against a provider when a provider:

(1) possesses, or has on the premises, attendance cards without the parent being present at the provider site;

(2) accepts or uses an attendance card or PIN of a parent or secondary cardholder; or

(3) performs the attendance reporting function on behalf of a parent.

(e) The Board shall develop policies and procedures to require the Board's child care contractor to take corrective action consistent with subsections (a) - (c) of this section against a parent when a parent or parent's secondary cardholder gives his or her:

(1) card to a provider; or

(2) PIN to a provider.

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 June 3, 2016.

TRD-201602832

Patricia Gonzalez

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Texas Workforce Commission

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-0829



40 TAC §809.116

The repeal is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed repeal affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.116. *Recovery of Improper Payments.*

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 June 3, 2016.

TRD-201602833

Patricia Gonzalez

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Texas Workforce Commission

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-0829



40 TAC §809.117

The rule is proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Commission with the authority

to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities, and Texas Human Resources Code §44.002, regarding Administrative Rules.

The proposed rule affects Texas Labor Code, Title 4, particularly Chapters 301 and 302, as well as Texas Government Code, Chapter 2308.

§809.117. *Recovery of Improper Payments to a Provider or Parent.*

(a) A Board shall attempt recovery of all improper payments as defined in §809.2.

(b) Recovery of improper payments shall be managed in accordance with Commission policies and procedures.

(c) [(a)] The provider shall repay improper payments for child care services received in the following circumstances:

(1) Instances involving fraud;

(2) Instances in which the provider did not meet the provider eligibility requirements in this chapter;

(3) Instances in which the provider was paid for the child care services from another source;

(4) Instances in which the provider did not deliver the child care services;

(5) Instances in which referred children have been moved from one facility to another without authorization from the child care contractor; and

(6) Other instances when repayment is deemed an appropriate action.

(d) [(b)] A parent shall repay improper payments for child care only in the following circumstances:

(1) Instances involving fraud as defined in this subchapter [chapter];

(2) Instances in which the parent has received child care services while awaiting an appeal and the determination is affirmed by the hearing officer; or

(3) Instances in which the parent fails to pay the parent share of cost and the Board's policy is to pay the provider for the parent's failure to pay the parent share of cost. [Other instances in which repayment is deemed an appropriate corrective action.]

(e) A Board shall ensure that a parent subject to the repayment provisions in subsection (d) of this section shall prohibit future child care eligibility until the prepayment amount is recovered, provided that the prohibition does not result in a Choices or SNAP E&T participant becoming ineligible for child 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.

Filed with the Office of the Secretary of State on June 3, 2016.

TRD-201602834

Patricia Gonzalez

Deputy Director, Workforce Development Division Programs

Texas Workforce Commission

Earliest possible date of adoption: July 17, 2016

For further information, please call: (512) 475-0829

