

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 4. AGRICULTURE

PART 13. PRESCRIBED BURNING BOARD

CHAPTER 229. CONTINUING FIRE TRAINING

4 TAC §229.1, §229.3

The Board of Directors (Board) of the Prescribed Burning Board (PBB), a board established within the Texas Department of Agriculture (TDA), proposes amendments to §229.1, relating to individuals with authority to approve training courses and credit hours for Continuing Fire Training (CFT), and §229.3, concerning individuals with the authority to approve training activities eligible for CFT credit. The amendments are proposed to require approval of CFT courses and content by the PBB, the PBB Chairman or a Lead Burn Instructor, and to authorize additional qualified individuals to approve certain training activities for CFT credit.

The amendments to §229.1 are proposed in order to require that all CFT courses and credit hours be pre-approved by either the PBB, PBB Chairman or a Lead Burn Instructor, provided that such courses and credit hours otherwise meet all requirements set out in the PBB rules. Currently, prior approval is not required for CFT courses conducted by the Department, National Resource Conservation Service of the United States Department of Agriculture, AgriLife Extension, AgriLife Research, Texas A&M University, or a branch of the Texas A&M University System, Texas A&M Forest Service, the Texas Commission on Environmental Quality, the Texas Parks and Wildlife Department, or Texas Tech University, provided that all requirements for course content provided in §229.3 (relating to Approval of Continuing Fire Training Activity) are met. The amendments to §229.3 authorize the PBB Chairman or a Lead Burn Instructor to grant approval of CFT activities.

Stuart Strnad, Coordinator for Agriculture Commodity Boards and Producer Relations, has determined that for the first five years the proposed amended sections are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the section, as amended.

Mr. Strnad has also determined that for each year of the first five years the proposed rules are in effect the public benefit anticipated as a result of the proposed amended section will be clarification regarding PBB training requirements, certification criteria, and continuing education requirements. There will be no additional economic cost for micro-businesses, small businesses or individuals who are required to comply with the amended sections, as proposed.

Written comments on the proposal may be submitted to Stuart Strnad, Agriculture and Consumer Protection, Texas Department of Agriculture, P.O. Box 12847, Austin, Texas 78711 or by email to Stuart.Strnad@TexasAgriculture.gov. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register*.

These amendments are proposed under §153.046 of the Natural Resources Code, which provides that the PBB shall establish standards for prescribed burning, certification, recertification, and training for certified and insured prescribed burn managers, and establish minimum education, professional and insurance requirements for certified and insured prescribed burn managers and instructors.

Natural Resources Code, Chapter 153, is affected by the proposal.

§229.1. *Eligible Continuing Fire Training Activities.*

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

(c) All proposed CFT training, courses, and credit hours must be pre-approved by the Board, Board Chairman or a Lead Burn Instructor [Prior approval is not required for CFT courses conducted by the Department, NRCS, AgriLife Extension, AgriLife Research, TAMU, TFS, TCEQ, TPWD, or TTU,] provided that all requirements for course content provided in §229.3 of this title (relating to Approval of Continuing Fire Training Activity) are met.

(d) (No change.)

§229.3. *Approval for Continuing Fire Training Activity.*

(a) For a training activity to be approved as eligible for CFT credit, the activity must be submitted to the Board, Board Chairman, or Lead Burn Instructor for approval.

(b) To be approved by the board, Board Chairman, or Lead Burn Instructor a sponsor must:

(1) - (5) (No change.)

(c) (No change.)

(d) The Board, Board Chairman, or Lead Burn Instructor [or the Board chair] will respond within 10 business days of receipt of the application and approve, deny, or request additional information from the sponsor.

(e) Approval of training courses is only valid for twelve months from the date of [Board] approval.

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

Filed with the Office of the Secretary of State on June 24, 2016.

TRD-201603201

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TITLE 19. EDUCATION

PART 8. WINDHAM SCHOOL DISTRICT

CHAPTER 300. GENERAL PROVISIONS

19 TAC §300.1

The Windham School District proposes amendments to §300.1, concerning Public Presentations and Comments to the Windham School District Board of Trustees. The amendments are proposed in conjunction with a proposed rule review of §300.1 as published in other sections of the *Texas Register*. The proposed amendments are necessary to conform the rule to legislation from the 84th legislative session that prohibits the possession of firearms by anyone other than law enforcement at an open meeting.

Paul D. Brown, Chief Financial Officer for the Windham School District, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. Brown has also determined that for each year of the first five-year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rule, will be to conform the rule to current law.

Comments should be directed to Michael Mondville, General Counsel, Windham School District, P.O. Box 40, Huntsville, Texas 77342, Michael.Mondville@wsdtx.org. Written comments from the general public must be received within 30 days of the publication of this rule in the *Texas Register*.

The amendments are proposed under Texas Government Code §492.007 and §492.013, Chapter 551 and Texas Penal Code §30.06 and §30.07.

Cross Reference to Statutes: None.

§300.1. Public Presentations and Comments to the Windham School District Board of Trustees.

(a) Policy. The Windham School District (WSD) Board of Trustees (board) is committed to providing access and opportunity for public presentations and comments as provided for in this section. Persons not employed by or under contract with the WSD who wish to have items placed on the board's posted agenda, shall follow the procedures set forth in subsection (h) of this section. Public presentations and comments shall be:

(1) subject to the requirements and restrictions of subsections (b), (c), (d), (e), and (f), [and (~~g~~)] of this section;

(2) pertinent to issues under the jurisdiction of the board, as determined by the board chairman and the WSD superintendent; and

(3) pertinent to policies, procedures, standards, and rules of the WSD. Disputes that are appropriately the subject of the appeals process for contract non-renewal or employee termination, the employee grievance system, the employee disciplinary system, or comments regarding pending litigation shall be addressed through those processes.

(b) Definitions.

(1) Public presentations are presentations made by the public to the board regarding topics posted on the board meeting agenda that has been filed with and published by the *Texas Register* and as provided for in subsection (c) of this section.

(2) Public comments are comments made by the public on non-posted board agenda topics and as provided for in subsection (d) of this section.

(c) Public presentations. Persons who desire to make public presentations to the board on posted agenda topics shall provide, on the date of the meeting, a completed registration card to onsite board office staff at least 10 minutes prior to the meeting's posted start time. Registration cards shall be made available at the entry to the room where the board's scheduled meeting is held.

(1) Pre-registration is available for public presentations through first class mail at P.O. Box 13084, Austin, Texas 78711 or email [e-mail] at tbcj@tdcj.texas.gov [tbej@tdej.state.tx.us]. Pre-registration shall be received by the board office staff no later than four calendar days prior to the posted meeting date of the presentation. In addition to the information required in subsection (c)(2) of this section, pre-registration submissions shall include appropriate contact information, such as a daytime phone number or email [e-mail] address, for the individual who is registering to speak.

(2) Registration cards and pre-registration submissions shall disclose:

(A) the name of the person who will make the presentation;

(B) a statement as to whether the person is being remunerated for the presentation and if so, by whom; and if applicable, the name of the person or entity on whose behalf the presentation will be made;

(C) a statement as to whether the presenter has registered as a lobbyist in relation to the agenda topic being addressed;

(D) a reference to the agenda topic on which the person wants to present;

(E) an indication as to whether the presenter will speak for or against the proposed agenda topic; and

(F) a statement verifying that all information that will be presented is factual, true, and correct to the best of the speaker's knowledge.

(3) The board chairman shall have discretion in setting reasonable limits on the time allocated for public presentations on posted agenda topics. If several persons have registered to address the board on the same agenda topic, it shall be within the discretion of the board chairman to request that those persons select a representative amongst themselves to express such remarks or limit their presentations to an expression of support for views previously articulated.

(4) The board chairman shall provide an opportunity for public presentations to occur prior to the board taking action on the topic denoted on the presenter's registration card. If a person who is registered to speak on a posted agenda item is not present when called

upon, that person's opportunity to speak prior to action being taken on that topic shall be forfeited.

(5) A presenter may submit documentation pertaining to the public presentation to the board office staff. Documents shall be submitted no later than three calendar days prior to the posted meeting date when the presentation is to occur. Such documentation shall then be distributed to the board. Any documentation submitted after the above-referenced date will not be distributed to the board until after the presentation. A minimum of 12 copies of any such documentation shall be submitted to the board office staff or distribution may not occur.

(d) Public comments.

(1) Twice a year, at the second and fourth regular called meetings of the board, an opportunity shall be provided for public comment on issues that are not part of the board's posted agenda but are within the board's jurisdiction. Special called meetings are not counted toward the requirement of this subsection.

(2) Persons who desire to make public comments to the board at these meetings shall provide, on the date of the meeting, a completed registration card to onsite board office staff at least 10 minutes prior to the meeting's posted start time. Registration cards shall be made available at the entry to the room where the board's scheduled meeting is held.

(3) Pre-registration is available for public comments through first class mail at P.O. Box 13084, Austin, Texas 78711 or email [e-mail] at tbcj@tdcj.texas.gov [tbcj@tdcj.state.tx.us]. Pre-registration shall be received by the board office staff no earlier than the first day of the month preceding the board meeting for which the registration is intended and no later than four calendar days prior to the posted meeting date when the comments are to occur. In addition to the information required in subsection (d)(4) of this section, pre-registration submissions shall include appropriate contact information, such as a daytime phone number or email [e-mail] address, for the individual who is registering to speak.

(4) Registration cards and pre-registration submissions shall disclose:

(A) the name of the person who will make the comments;

(B) a statement as to whether the person is being remunerated for the comments and if so, by whom; and, if applicable, the name of the person or entity on whose behalf the comments will be made;

(C) a statement as to whether the presenter has registered as a lobbyist in relation to the topic being addressed;

(D) the topic on which the person shall speak and whether the person will speak for or against the topic; and

(E) a statement verifying that all information that will be presented is factual, true, and correct to the best of the speaker's knowledge.

(5) The board chairman shall have discretion in setting reasonable limits on the time allocated for public comments. If several persons have registered to address the board on the same topic, it shall be within the discretion of the board chairman to request that those persons select a representative amongst themselves to express such comments, or limit their comments to an expression of support for views previously articulated.

(6) Public comments shall be heard just prior to the conclusion of the board meeting, with deviation from this practice within the discretion of the board chairman. If a person who is registered to

speak on a non-posted topic is not present when called upon, that person shall be called once more following all other registered speakers. If that person is not present at that time, their opportunity to speak at that meeting shall be forfeited.

(7) A presenter may submit documentation pertaining to the public comments to the board office staff. Documentation shall be submitted no later than three calendar days prior to the posted meeting date when the comments are to occur. Such documentation shall then be distributed to the board. Any documentation submitted after the above-referenced date will not be distributed to the board until after the comments. A minimum of 12 copies of any such documentation shall be submitted to the board office staff or distribution may not occur.

(e) Disability accommodations. Persons with disabilities who have special communication or accommodation needs and who plan to attend a meeting may contact the board office at 512-475-3250. Requests for accommodations shall be made at least two calendar days prior to a posted meeting. The board shall make every reasonable effort to accommodate these needs.

(f) Conduct and decorum. The board shall receive public presentations and comments as authorized by this section, subject to the following additional guidelines:

(1) Due to requirements of the *Open Meetings Act*, questions shall only occur on public presentations as defined in subsection (b) of this section as they are associated with posted agenda topics. Questions shall be reserved for board members and staff recognized by the board chairman.

(2) Presentations and comments shall remain pertinent to the issues denoted on the registration cards.

(3) A presenter who is determined by the board chairman to be disrupting a meeting shall immediately cease the disruptive activity or leave the meeting room if ordered to do so by the board chairman.

(4) A presenter may not assign a portion of his or her allotted presentation time to another speaker.

(5) Signs and placards shall not be carried or displayed in the meeting room.

~~(g) A presenter may not carry or possess a prohibited weapon, as defined in Texas Penal Code §46.05, an illegal knife, a club, or a handgun, to include a licensed concealed handgun, during any meeting of the board.~~

(g) [(H)] Requests for issues to be placed on an agenda. Persons not employed by or under contract with the WSD who wish to propose an agenda item for discussion at a board meeting shall address the request in writing to the chairman, Windham School District Board of Trustees, P.O. Box 13084, Austin, Texas 78711. Such requests shall be titled, "Proposed Agenda Topic" and shall be submitted no later than the first day of the month preceding the board meeting for which the request is intended. Such requests are subject to the requirements of the registration card in subsection (c) of this section. The decision as to whether to calendar a matter for discussion before the board, a board committee, a board liaison, or with a designated staff member shall be within the discretion of the board chairman. Public presentations on topics placed on a board agenda, at the request of an individual, shall be in accordance with subsection (c) 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 24, 2016.

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TITLE 22. EXAMINING BOARDS

**PART 1. TEXAS BOARD OF
ARCHITECTURAL EXAMINERS**

CHAPTER 1. ARCHITECTS

The Texas Board of Architectural Examiners proposes the amendment of existing rules §1.174, concerning Complaint Process; §1.177, concerning the Administrative Penalty Schedule; and §1.232, concerning Board Responsibilities.

The proposed amendments update the Board's disciplinary rules to provide greater guidance in making determinations relating to the issuance of warnings, administrative penalties, and other disciplinary actions in enforcing Occupations Code Chapter 1051 and Chapter 1 of the Board's rules, relating to regulation of the practice of architecture.

The proposed amendments to §1.174 update the Board's requirements relating to the issuance of warnings in disciplinary matters. The proposed rule clarifies that a warning is available only if the violation in question is the only violation of the Board's laws and rules, and the Respondent has not previously been subject to a Board warning or order. Furthermore, proposed subsection (j)(4) identifies the specific violations of the Board's laws and rules that may be resolved with a warning, and clarifies that the issuance of a warning is at the sole discretion of the executive director and is not an available sanction following a contested case under the Administrative Procedure Act.

The proposed amendments to §1.177 revise the Board's rule relating to the imposition of administrative penalties. First, the proposed rule would alter the Board's process for imposing a minor, moderate, or major penalty. As currently written, the rule directs the Board to identify a given violation as minor, moderate, or major based upon the analysis of three factors: seriousness of misconduct, economic harm, and sanction history. The proposed amendments would specifically identify particular violations of the Board's laws and rules as minor, moderate, or major rather than rely upon the three factor analysis. The identification of each violation as a minor, moderate, or major violation is based on an analysis of Board precedent, as well as the factors identified in Occupations Code §1051.452 as guidance for the Board in determining the appropriate amount of an administrative penalty. Second, the proposed amendments would increase the upper limits of the minor and moderate penalty ranges to \$1,000 and \$3,000, respectively. Third, the proposed rule directs the Board to consider the factors in Board Rules 1.141(c) and/or 1.165(f) in determining the specific amount of an administrative penalty within the minor, moderate, or major penalty range, or in determining the appropriate administrative penalty for a violation of the Board's laws or rules that has not been specifically defined as a minor, moderate, or major violation. Fourth, the proposed rule enables the Board to impose an increased administrative penalty if the Respondent has previously been found to have violated the Board's laws or rules, or if the Respondent has com-

mitted multiple violations of the Board's laws or rules, and to consider each sheet of architectural plans issued in violation of the Board's laws as a separate violation. Finally, the proposed rule clarifies the Board's authority to impose administrative penalties in addition to other sanctions, such as revocation, suspension, or a refusal to renew a registration.

The proposed amendments to §1.232 revise the Board's guidelines that are used to identify the range of sanctions, in addition to administrative penalties, that are appropriate for certain violations of the Board's laws and rules. These sanctions include suspension, revocation, denial of registration, denial of reapplication, and probationary initial registration. The proposed amendments eliminate a reprimand as a potential ground for discipline, which is consistent with current Board practices, given that a reprimand has not been imposed since 2004. Additionally, the proposed amendments include the addition of statutory and rule violations that were not previously included in the guidelines. The proposed amendments would implement Government Code §2001.141, which requires a final decision or order to include a ruling on each proposed finding of fact or conclusion of law submitted by a party under an agency rule. Finally, the proposed amendment clarifies the Board's authority to impose administrative penalties in addition to other sanctions, such as revocation, suspension, or a refusal to renew a registration, and to impose a more severe sanction for a Respondent who has previous disciplinary history with the Board.

Fiscal Note Guidelines

Lance Brenton, General Counsel, Texas Board of Architectural Examiners, has determined that, for the first five-year period the amended rules are in effect, the amendments will have no adverse fiscal impact upon state government, local government, or the Texas Board of Architectural Examiners.

Public Benefit/Cost Note Guidelines

Mr. Brenton, has determined that, for the first five-year period the amended rules are in effect, the expected public benefit is the promotion of consistency and predictability in Board decisions regarding the issuance of warnings in Board investigations and the imposition of administrative penalties and other sanctions in contested cases before the Board. The proposed amendments promote fair and efficient regulation by setting forth the appropriate penalties for violations of Chapter 1051 and Board rules and policies, thereby providing notice to registrants and other members of the public of the potential consequences of such actions. Additionally, the proposed amendments promote the public health and safety by providing guidance to impose disciplinary sanctions at a level sufficient to discourage violations of the law.

The proposed amendments will have an adverse impact upon those individuals who are found to be in violation of the Board's laws and rules and subjected to an administrative penalty or other sanctions. If an administrative penalty is imposed, the amount will vary among individuals depending upon: the nature of the violation; whether multiple violations are at issue; whether the individual has previously been subject to disciplinary action; and consideration of the factors identified in §1.141(c) and/or §1.165(f). The adverse impact of any other sanction will be determined based on the proposed amendments to §1.232, and could include revocation of registration, refusal to renew registration, suspension, denial of application, denial of reapplication, and/or probationary registration.

The proposed rules will have no negative fiscal impact on small or micro-business and no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Public Comment

Comments may be submitted to Lance Brenton, General Counsel, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

SUBCHAPTER I. DISCIPLINARY ACTION

22 TAC §1.174, §1.177

Statutory Authority

The amendments are proposed under the Occupations Code §§1051.202, 1051.252, 1051.401, 1051.451, 1051.452, 1051.501, 1051.751, and 1051.752.

Section 1051.202 provides the Texas Board of Architectural Examiners with authority to promulgate rules to implement Chapters 1051, 1052, and 1053 of the Texas Occupations Code.

Section 1051.252 requires the board to adopt rules to establish a comprehensive procedure for receiving and adjudicating complaints from consumers and service recipients, including procedures regarding sanctions.

Section 1051.401 requires the Board to establish procedures by which a decision to suspend or revoke or a refusal to renew a certificate of registration is made by the board.

Section 1051.451 authorizes the Board to impose an administrative penalty on a person who engages in conduct for which the person is subject to disciplinary action under Chapters 1051, 1052, or 1053, regardless of whether the person holds a certificate of registration.

Section 1051.452 requires the Board to adopt an administrative penalty schedule for violations of Board laws and rules to ensure that the amounts of penalties imposed are appropriate to the violation.

Section 1051.501 grants the board general enforcement authority to ensure that enforcement action is taken against a person who violates Chapters 1051, 1052, or 1053.

Section 1051.751, authorizes the Board to revoke, suspend, or refuse to renew a certificate of registration; reprimand a certificate holder; or impose an administrative penalty on a person following a determination that a ground for discipline exists under §1051.752. Additionally, the Board is authorized to place a registrant on probated suspension, which could include regular reports to the Board, practice limitations, or remedial education until the person attains a degree of skill satisfactory to the board in those areas that are the basis of the probation.

Cross Reference to Statute.

The proposed amendments to these rules do not affect any other statutes.

§1.174. *Complaint Process.*

(a) A person may file a complaint by submitting the following information to the Board:

(1) the name of and contact information for the complainant unless evidence regarding a possible violation was submitted anonymously;

(2) the name of the person against whom the complaint is filed;

(3) the address, telephone number, Web site, or other contact information for the person against whom the complaint is filed, if available;

(4) the date and location of the alleged violation that is the subject of the complaint;

(5) a description of each alleged violation; and

(6) the name, address, and telephone number for any known witness who can provide information regarding the alleged violation.

(b) A complaint should be submitted on the complaint form that may be obtained by accessing the form on the Board's Web site or by contacting the Board's staff. If a completed complaint form is not submitted, the Board's staff will not be able to initiate an investigation unless the Board's staff receives information sufficient to establish probable cause to believe an actionable violation might have occurred.

(c) Once a complaint has been received, the Board's enforcement staff shall:

(1) conduct a preliminary evaluation of the complaint within thirty (30) days to determine:

(A) Jurisdiction: whether the complaint provides information sufficient to establish probable cause for the Board's staff to believe an actionable violation might have occurred;

(B) Disciplinary History: whether there has been previous enforcement activity involving the person against whom the complaint has been filed; and

(C) Priority Level: the seriousness of the complaint relative to other pending enforcement matters;

(2) provide the complainant and respondent with information which will permit review of the Board's policies and procedures from the Board's web site regarding complaint investigation and resolution. If the complainant or respondent requests a copy of the policies and procedures in written format a copy shall be mailed upon request.

(3) notify the complainant and respondent of the status of the investigation at least quarterly unless providing notice would jeopardize an investigation; and

(4) maintain a complaint file that includes at least:

(A) the name of the person who filed the complaint unless the complaint was filed anonymously;

(B) the date the complaint was received by the Board's staff;

(C) a description of the subject matter of the complaint;

(D) the name of each person contacted in relation to the complaint;

(E) a summary of the results of the review and investigation of the complaint; and

(F) an explanation for the reason the complaint was dismissed if the complaint was dismissed without action other than the investigation of the complaint.

(d) After the preliminary evaluation period, the Board's staff may contact the complainant, the respondent, and any known witness concerning the complaint.

(e) After the preliminary evaluation period, the Board's staff shall take steps to dismiss the complaint or proceed with an investigation of the allegation(s) against the respondent. A complaint may be re-

ferred to another government agency if it appears that the other agency might have jurisdiction over the issue(s) raised in the complaint.

(f) If the Board's staff proceeds with an investigation, the staff shall:

(1) investigate the complaint according to the priority level assigned to the complaint;

(2) notify the complainant and respondent that, as a result of the staff's preliminary evaluation of the complaint, the staff has determined that the Board has jurisdiction over the allegations(s) described in the complaint and has decided to proceed with an investigation of the allegation(s) against the respondent; and

(3) gather sufficient information and evidence to determine whether there is probable cause to believe that a violation of a statutory provision or rule enforced by the Board has occurred.

(g) The Board's staff may conduct an investigation regardless of whether a complaint form was received as described in subsection (a) of this section.

(h) If the information and evidence gathered during an investigation are insufficient to establish probable cause to believe that a violation has occurred, the Board's staff shall:

(1) dismiss the complaint;

(2) send notices to the complainant and respondent regarding the dismissal;

(3) if warranted, include in the respondent's notice a recommendation or warning regarding the respondent's future conduct; and

(4) if a complaint is determined to be unfounded, state in the respondent's notice that no violation was found.

(i) If the information and evidence gathered during an investigation are sufficient to establish probable cause to believe that a violation has occurred, the Board's staff shall:

(1) seek to resolve the matter pursuant to §§ 1.165, 1.166 or 1.173 of this subchapter; or

(2) issue a warning in accordance with subsection (j). ~~[to the respondent if the violation is the respondent's first violation and:]~~

~~[(A) the respondent has not received a written warning or advisory notice from the Board;]~~

~~[(B) the respondent provided a satisfactory remedy which has eliminated any harm or threat to the health or safety of the public; and]~~

~~[(C) the guidelines for determining an appropriate penalty for the violation recommend an administrative penalty or a reprimand as an appropriate sanction for the violation.]~~

(j) A warning may be issued by the Executive Director only as follows:

(1) the violation is the Respondent's only violation of the Board's laws and rules;

(2) the Respondent has not previously been subject to a Board warning or order;

(3) the Respondent has provided a satisfactory remedy which has eliminated any harm or threat to the health or safety of the public; and

(4) The Respondent has committed one of the following violations:

(A) failure to provide or timely provide plans and specifications to TDLR under the requirements of Govt. Code Chap. 469 (Elimination of Architectural Barriers);

(B) Unauthorized use of term "architect" or "architecture";

(C) Failure to respond to a Board inquiry;

(D) Failure to provide a statement of jurisdiction;

(E) Use of a non-compliant seal by registrant;

(F) Failure to register or annually renew the registration of a business; or

(G) Creation of misleading impression by an architect advertising for services.

(k) The decision to issue a warning is at the sole discretion of the Executive Director and not available as a result of a contested case proceeding conducted pursuant to the Government Code Chapter 2001.

(l) [(j)] Before a proposed settlement agreement may be approved by the Board,[:]

~~[(1) the complainant, if known, must be notified of the terms of the agreement and the date, time, and location of the meeting during which the Board will consider the agreement; and]~~

~~[(2) the terms of the agreement must be reviewed by legal counsel for the Board to ensure that all legal requirements have been satisfied.~~

(m) [(k)] If a complaint is dismissed, the complainant may submit to the Executive Director a written request for reconsideration. The written request must explain why the complaint should not have been dismissed. The Executive Director may, but is not required to, respond to the request for reconsideration.

§1.177. Administrative Penalty Schedule.

If the Board determines that an administrative penalty is the appropriate sanction for a violation of any of the statutory provisions or rules enforced by the Board, the following guidelines shall be applied to guide the Board's assessment of an appropriate administrative penalty:

(1) In determining whether a minor, moderate, or major penalty is imposed under subsection (2) of this rule, the following classifications shall apply:
Figure: 22 TAC §1.177(1)

~~[(1) The Board shall consider the following factors to determine whether the violation is minor, moderate, or major:]~~

~~[(A) Seriousness of misconduct and efforts to correct the ground for sanction:]~~

~~[(i) Minor--the respondent has demonstrated that he/she was unaware that his/her conduct was prohibited and unaware that the conduct was reasonably likely to cause the harm that resulted from the conduct or the respondent has demonstrated that there were significant extenuating circumstances or intervening causes for the violation; and the respondent has demonstrated that he/she provided a satisfactory remedy that alleviated or eliminated any harm or threat to the health or safety of the public.]~~

~~[(ii) Moderate--the violation shows that the respondent knowingly disregarded a standard or practice normally followed by a reasonably prudent person under the same or similar circumstances. A violation of a Board order shall constitute, at a minimum, a moderate violation.]~~

~~[(iii) Major—the conduct demonstrates gross negligence or recklessness or resulted in a threat to the health or safety of the public and the respondent, after being notified of the alleged violation intentionally refused or failed to take prompt and remedial action.]~~

~~[(B) Economic harm:]~~

~~[(i) Minor—there was no apparent economic damage to property or monetary loss to the project owner or other involved persons and entities.]~~

~~[(ii) Moderate—economic damage to property or monetary harm to other persons or entities did not exceed \$1,000, or damage exceeding \$1,000 was reasonably unforeseeable.]~~

~~[(iii) Major—economic damage to property or economic injury to other persons or entities exceeded \$1,000.]~~

~~[(C) Sanction history:]~~

~~[(i) Minor—the respondent has not previously received a written warning, advisory notice or been subject to other enforcement proceedings from the Board.]~~

~~[(ii) Moderate—the respondent was previously subject to an order of the Board or other enforcement proceedings which resulted in a finding of a violation of the laws or rules over which the TBAE has jurisdiction.]~~

~~[(iii) Major—the respondent has received at least two prior written notices or has been subject to two disciplinary actions for violation of the rules and laws over which the TBAE has jurisdiction.]~~

(2) After determining whether the violation is minor, moderate, or major, the Board shall impose an administrative penalty as follows:

(A) Minor violations--[if the violation is minor in every category described in paragraph (1) of this section,] an administrative penalty of not more than \$1,000 [~~\$500~~] shall be imposed.

(B) Moderate violations--[if the violation is moderate in any category described in paragraph (1) of this section,] an administrative penalty of not more than \$3,000 [~~\$2,000~~] shall be imposed.

(C) Major violations--[if the violation is major in any category described in paragraph (1) of this section or if the Board determines that the facts of the case indicate a higher penalty is necessary in order to deter similar misconduct in the future,] an administrative penalty of not more than \$5,000 shall be imposed.

(3) In determining the specific amount of an administrative penalty within the minor, moderate, or major range, the Board shall consider the factors outlined in Board Rules 1.141(c) and/or 1.165(f).

(4) If a violation of the Board's laws or rules is not specifically defined in paragraph (1) as a minor, moderate, or major violation, the Board shall consider the factors outlined in Board Rules 1.141(c) and/or 1.165(f) in determining an appropriate administrative penalty.

(5) Previous Disciplinary History - If the respondent was previously found to have violated the Board's laws or rules in a warning or Order of the Board, then any subsequent disciplinary action may be considered at the next higher level of severity.

(6) Multiple Violations

(A) The administrative penalty ranges discussed in paragraph (2) are to be applied to each individual violation of the Board's laws and rules. If a respondent has violated multiple laws and/or rules, or has committed multiple violations of a single law

or rule, the Respondent shall be subject to a separate administrative penalty for each violation.

(B) Each sheet of architectural plans and specifications created or issued in violation of the Board's laws and rules shall be considered a separate violation for purposes of calculating the total administrative penalty under paragraph (6)(A).

(C) In the case of a continuing violation, each day a violation continues or occurs shall be considered a separate violation for purposes of calculating the total administrative penalty under paragraph (6)(A).

(7) The administrative penalties set out in this section may be considered in addition to any other disciplinary actions, such as revocation, suspension, or refusal to renew a registration.

(8) If the facts of a case are unique or unusual, the Board may suspend the guidelines described in this section.

~~[(D) Because of the threat to human health, safety and well-being which necessarily arises out of a Nonregistrant preparing and issuing architectural plans and specifications the Board possesses a compelling interest in ensuring that architectural plans and specifications are prepared and issued only by a registered architect or by a person who is working under the active and documented Supervision and Control of a registered Architect when required by law. If the evidence establishes that Architectural plans and specifications for a project that is not exempt from the Architects' Practice Act were prepared by a person who is not registered to engage in the Practice of Architecture and was not working under the active and documented Supervision and Control of an Architect the violation shall be presumed to be a major violation and each sheet of architectural plans or separate section of the specifications shall be considered a separate violation for purposes of calculating and imposing administrative penalties.]~~

~~[(E) Because of the threat to human health, safety and welfare which necessarily arises from Nonregistrants engaging in the Practice of Architecture the Board has a compelling interest in ensuring that only those persons who are registered to engage in the Practice of Architecture or whose work is conducted under the active and documented Supervision and Control of a registered architect engage in the Practice of Architecture. If the evidence establishes that an Architect has sealed architectural plans and separately numbered section of the specifications without having exercised active and documented Supervision and Control of the Nonregistrants's activities the Board shall presume such conduct by the sealing architect to be a major violation and each sheet of architectural plans or separate section of the specifications shall be considered a separate violation for purposes of calculating and imposing administrative penalties.]~~

~~[(F) The agency is responsible for protecting the public's health, safety and welfare by interpreting and enforcing the Architects' Practice Act. In fulfilling this statutory duty the Board depends upon, and expects, that Registrants and Applicants will provide complete, truthful and accurate information to the Board upon request. This prompt and accurate provision of information is essential to protecting the public's health, safety and welfare.]~~

~~(9) [(G)] An Architect, Candidate, or Applicant who fails, without good cause, to provide information to the Board under provision of §1.171 of this subchapter (relating to Responding to Request for Information) is presumed to be interfering with and preventing the Board from fulfilling its responsibilities. A [For these reasons a] violation of §1.171 of this subchapter shall be considered a minor [moderate] violation if a complete response is not received within 30 days after receipt of the Board's written inquiry. An additional 15 day [Any further] delay constitutes a moderate [major] violation, and each[. Each] 15 day~~

delay thereafter shall be considered a separate major violation of these rules.

~~{(3) In order to determine the appropriate amount in a penalty range described in paragraph (2) of this section, the Board shall consider the factors described in paragraph (1) of this section.}~~

~~{(4) If the facts of a case are unique or unusual, the Board may suspend the guidelines described in 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 27, 2016.

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Lance R. Brenton

General Counsel

Texas Board of Architectural Examiners

Earliest possible date of adoption: August 7, 2016

For further information, please call: (406) 461-4705



SUBCHAPTER L. HEARINGS--CONTESTED CASES

22 TAC §1.232

Statutory Authority

The amendments are proposed under the Occupations Code §§1051.202, 1051.252, 1051.401, 1051.451, 1051.452, 1051.501, 1051.751, and 1051.752.

Section 1051.202 provides the Texas Board of Architectural Examiners with authority to promulgate rules to implement Chapters 1051, 1052, and 1053 of the Texas Occupations Code.

Section 1051.252 requires the board to adopt rules to establish a comprehensive procedure for receiving and adjudicating complaints from consumers and service recipients, including procedures regarding sanctions.

Section 1051.401 requires the Board to establish procedures by which a decision to suspend or revoke or a refusal to renew a certificate of registration is made by the board.

Section 1051.451 authorizes the Board to impose an administrative penalty on a person who engages in conduct for which the person is subject to disciplinary action under Chapters 1051, 1052, or 1053, regardless of whether the person holds a certificate of registration.

Section 1051.452 requires the Board to adopt an administrative penalty schedule for violations of Board laws and rules to ensure that the amounts of penalties imposed are appropriate to the violation.

Section 1051.501 grants the board general enforcement authority to ensure that enforcement action is taken against a person who violates Chapters 1051, 1052, or 1053.

Section 1051.751, authorizes the Board to revoke, suspend, or refuse to renew a certificate of registration; reprimand a certificate holder; or impose an administrative penalty on a person following a determination that a ground for discipline exists under §1051.752. Additionally, the Board is authorized to place a registrant on probated suspension, which could include regular reports to the Board, practice limitations, or remedial education

until the person attains a degree of skill satisfactory to the board in those areas that are the basis of the probation.

Cross Reference to Statute.

The proposed amendments to these rules do not affect any other statutes.

§1.232. Board Responsibilities.

(a) The Board shall investigate Contested Case matters and attempt to resolve Contested Cases informally as provided in Subchapter I of this chapter (relating to Disciplinary Action). However, if a Contested Case is not settled informally pursuant to Subchapter I of this chapter, it shall be referred to SOAH for a formal hearing to determine whether there has been a violation of any of the statutory provisions or rules enforced by the Board.

(b) A formal hearing shall be conducted in accordance with the Rules of Procedure of SOAH.

(c) After a formal hearing of a Contested Case, the SOAH administrative law judge who conducted the formal hearing shall prepare a proposal for decision and submit it to the Board so that the Board may render a final decision with regard to the Contested Case. The proposal for decision shall include findings of fact and conclusions of law.

(d) If a party submits proposed findings of fact or conclusions of law, the proposal for decision shall include a ruling on each proposed finding or conclusion. [Any party of record in a Contested Case who is adversely affected by the proposal for decision may file exceptions and briefs within 20 days after the date of service of the proposal for decision. Replies to exceptions and briefs may be filed within 15 days after the date for the filing of exceptions and briefs. Exceptions, briefs, and replies shall be filed with the Board and copies shall be served on the administrative law judge and on all other parties in the same manner as for serving other documents in a Contested Case.]

(e) Any party of record in a Contested Case may request an oral hearing before the Board. A request for an oral hearing shall be filed with the Board and copies shall be served on the administrative law judge and on all other parties in the same manner as for serving other documents in a Contested Case. The Board, in its sole discretion, shall determine whether to grant or deny a request for an oral hearing. If a request for an oral hearing is granted, each party of record shall be allotted 30 minutes to make an oral presentation to the Board. The oral presentation shall be confined to matters contained within the administrative record.

(f) Upon the expiration of the time provided for the filing of exceptions and briefs or, if exceptions and briefs are filed, upon the 10th day following the time provided for the filing of replies to exceptions and briefs, the Board may render a decision to finally resolve a Contested Case. The Board may change a finding of fact or conclusion of law made by an administrative law judge or may vacate or modify an order issued by an administrative law judge only if the Board determines:

(1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

(g) If the Board makes a change to a finding of fact or conclusion of law or vacates or modifies an order pursuant to subsection (f)

of this section, the Board must state in writing the specific reason and the legal basis for the change.

(h) The Board shall issue a written order regarding the Board's decision to finally resolve a Contested Case that is not settled informally. The written order shall include findings of fact and conclusions of law that are based on the official record of the Contested Case. The written order may adopt by reference the findings of fact and conclusions of law made by an administrative law judge and included in the proposal for decision submitted to the Board.

(i) Motions for rehearing and appeals may be filed and judicial review of final decisions of the Board may be sought pursuant to the Administrative Procedure Act. The party who appeals a final decision in a Contested Case shall be responsible for the cost of the preparation of the original or a certified copy of the record of the agency proceeding that is required to be sent to the reviewing court.

(j) The Board and the administrative law judge who presides over the formal hearing in a Contested Case shall refer to the following guidelines to determine the appropriate penalty for a violation of any of the statutory provisions or rules enforced by the Board:
Figure: 22 TAC §1.232(j)

(k) The penalty for a violation of any of the statutory provisions or rules enforced by the Board may vary from the penalty recommended in subsection (j) of this section if justified by the circumstances of the matter or the disciplinary history of the respondent. If the Respondent has previously been subject to disciplinary action before the Board, more severe discipline may be imposed.

(l) For any violation where revocation is recommended as an appropriate penalty for the violation, refusing to renew the respondent's certificate of registration also shall be an appropriate penalty for the violation.

(m) If the Board or the administrative law judge determines that an administrative penalty is the appropriate sanction for a violation, the guidelines described in §1.177 of this chapter (relating to Administrative Penalty Schedule) shall be applied to determine the amount of the administrative penalty.

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

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Lance R. Brenton

General Counsel

Texas Board of Architectural Examiners

Earliest possible date of adoption: August 7, 2016

For further information, please call: (406) 461-4705



CHAPTER 3. LANDSCAPE ARCHITECTS

The Texas Board of Architectural Examiners proposes the amendment of existing rules §3.174, concerning the Complaint Process; §3.177, concerning the Administrative Penalty Schedule; and §3.232, concerning Board Responsibilities.

The proposed amendments update the Board's disciplinary rules to provide greater guidance in making determinations relating to the issuance of warnings, administrative penalties, and other disciplinary action in enforcing Occupations Code Chapters 1051

and 1052 and Chapter 3 of the Board's rules, relating to regulation of the practice of landscape architecture.

The proposed amendments to §3.174 update the Board's requirements relating to the issuance of warnings in disciplinary matters. The proposed rule clarifies that a warning is available only if the violation in question is the only violation of the Board's laws and rules, and the Respondent has not previously been subject to a Board warning or order. Furthermore, proposed subsection (j)(4) identifies the specific violations of the Board's laws and rules that may be resolved with a warning, and clarifies that the issuance of a warning is at the sole discretion of the executive director and is not an available sanction following a contested case under the Administrative Procedure Act.

The proposed amendments to §3.177 revise the Board's rule relating to the imposition of administrative penalties. First, the proposed rule would alter the Board's process for imposing a minor, moderate, or major penalty. As currently written, the rule directs the Board to identify a given violation as minor, moderate, or major based upon the analysis of three factors: seriousness of misconduct, economic harm, and sanction history. The proposed amendments would specifically identify particular violations of the Board's laws and rules as minor, moderate, or major rather than rely upon the three factor analysis. The identification of each violation as a minor, moderate, or major violation is based on an analysis of Board precedent, as well as the factors identified in Occupations Code §1051.452 as guidance for the Board in determining the appropriate amount of an administrative penalty. Second, the proposed amendments would increase the upper limits of the minor and moderate penalty ranges to \$1,000 and \$3,000, respectively. Third, the proposed rule directs the Board to consider the factors in Board Rules 3.141(c) and/or 3.165(f) in determining the specific amount of an administrative penalty within the minor, moderate, or major penalty range, or in determining the appropriate administrative penalty for a violation of the Board's laws or rules that has not been specifically defined as a minor, moderate, or major violation. Fourth, the proposed rule enables the Board to impose an increased administrative penalty if the Respondent has previously been found to have violated the Board's laws or rules, or if the Respondent has committed multiple violations of the Board's laws or rules, and to consider each sheet of architectural plans issued in violation of the Board's laws or rules as a separate violation. Finally, the proposed rule clarifies the Board's authority to impose administrative penalties in addition to other sanctions, such as revocation, suspension, or a refusal to renew a registration.

The proposed amendments to §3.232 revise the Board's guidelines that are used to identify the range of sanctions, in addition to administrative penalties, that are appropriate for certain violations of the Board's laws and rules. These sanctions include suspension, revocation, denial of registration, denial of reapplication, and probationary initial registration. The proposed amendments eliminate a reprimand as a potential ground for discipline, which is consistent with current Board practices, given that a reprimand has not been imposed since 2004. Additionally, the proposed amendments include the addition of statutory and rule violations that were not previously included in the guidelines. The proposed amendments would implement Government Code §2001.141, which requires a final decision or order to include a ruling on each proposed finding of fact or conclusion of law submitted by a party under an agency rule. Finally, the proposed amendment clarifies the Board's authority to impose administrative penalties in addition to other sanctions, such as revocation, suspension, or a refusal to renew a registration, and to impose

a more severe sanction for a Respondent who has previous disciplinary history with the Board.

Fiscal Note Guidelines

Lance Brenton, General Counsel, Texas Board of Architectural Examiners, has determined that, for the first five-year period the amended rules are in effect, the amendments will have no adverse fiscal impact upon state government, local government, or the Texas Board of Architectural Examiners.

Public Benefit/Cost Note Guidelines

Mr. Brenton, has determined that, for the first five-year period the amended rules are in effect, the expected public benefit is the promotion of consistency and predictability in Board decisions regarding the issuance of warnings in Board investigations and the imposition of administrative penalties and other sanctions in contested cases before the Board. The proposed amendments promote fair and efficient regulation by setting forth the appropriate penalties for violations of Occupations Code Chapter 1052 and Board rules and policies, thereby providing notice to registrants and other members of the public of the potential consequences of such actions. Additionally, the proposed amendments promote the public health and safety by providing guidance to impose disciplinary sanctions at a sufficient level to discourage violations of the law.

The proposed amendments will have an adverse impact upon those individuals who are found to be in violation of the Board's laws and rules and subjected to an administrative penalty or other sanctions. If an administrative penalty is imposed, the amount will vary among individuals depending upon: the nature of the violation; whether multiple violations are at issue; whether the individual has previously been subject to disciplinary action; and consideration of the factors identified in §3.141(c) and/or §3.165(f). The adverse impact of any other sanction will be determined based on the proposed amendments to §3.232, and could include revocation of registration, refusal to renew registration, suspension, denial of application, denial of reapplication, and/or probationary registration.

The proposed rules will have no negative fiscal impact on small or micro-business and no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Public Comment

Comments may be submitted to Lance Brenton, General Counsel, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

SUBCHAPTER I. DISCIPLINARY ACTION

22 TAC §3.174, §3.177

Statutory Authority

The amendments are proposed under the Occupations Code §§1051.202, 1051.252, 1051.401, 1051.451, 1051.452, 1051.501, 1052.251, and 1052.252.

Section 1051.202 provides the Texas Board of Architectural Examiners with authority to promulgate rules to implement Chapters 1051, 1052, and 1053 of the Texas Occupations Code.

Section 1051.252 requires the board to adopt rules to establish a comprehensive procedure for receiving and adjudicating complaints from consumers and service recipients, including procedures regarding sanctions.

Section 1051.401 requires the Board to establish procedures by which a decision to suspend or revoke or a refusal to renew a certificate of registration is made by the board.

Section 1051.451 authorizes the Board to impose an administrative penalty on a person who engages in conduct for which the person is subject to disciplinary action under Chapters 1051, 1052, or 1053, regardless of whether the person holds a certificate of registration.

Section 1051.452 requires the Board to adopt an administrative penalty schedule for violations of Board laws and rules to ensure that the amounts of penalties imposed are appropriate to the violation.

Section 1051.501 grants the board general enforcement authority to ensure that enforcement action is taken against a person who violates Chapters 1051, 1052, or 1053.

Section 1052.251, authorizes the Board to revoke, suspend, or refuse to renew a certificate of registration; reprimand a certificate holder; or impose an administrative penalty on a person following a determination that a ground for discipline exists under §1052.252. Additionally, the Board is authorized to place a registrant on probated suspension, which could include regular reports to the Board, practice limitations, or remedial education until the person attains a degree of skill satisfactory to the board in those areas that are the basis of the probation.

Cross Reference to Statute.

The proposed amendments to these rules do not affect any other statutes.

§3.174. *Complaint Process.*

(a) A person may file a complaint by submitting the following information to the Board:

- (1) the name of and contact information for the complainant unless evidence regarding a possible violation was submitted anonymously;
- (2) the name of the person against whom the complaint is filed;
- (3) the address, telephone number, Web site, or other contact information for the person against whom the complaint is filed, if available;
- (4) the date and location of the alleged violation that is the subject of the complaint;
- (5) a description of each alleged violation; and
- (6) the name, address, and telephone number for any known witness who can provide information regarding the alleged violation.

(b) A complaint should be submitted on the complaint form that may be obtained by accessing the form on the Board's Web site or by contacting the Board's staff. If a completed complaint form is not submitted, the Board's staff will not be able to initiate an investigation unless the Board's staff receives information sufficient to establish probable cause to believe an actionable violation might have occurred.

(c) Once a complaint has been received, the Board's enforcement staff shall:

- (1) conduct a preliminary evaluation of the complaint within thirty (30) days to determine:

(A) Jurisdiction: whether the complaint provides information sufficient to establish probable cause for the Board's staff to believe an actionable violation might have occurred;

(B) Disciplinary History: whether there has been previous enforcement activity involving the person against whom the complaint has been filed; and

(C) Priority Level: the seriousness of the complaint relative to other pending enforcement matters;

(2) provide the complainant and respondent with information which will permit review of the Board's policies and procedures from the Board's web site regarding complaint investigation and resolution. If the complainant or respondent requests a copy of the policies and procedures in written format a copy shall be mailed upon request.

(3) notify the complainant and respondent of the status of the investigation at least quarterly unless providing notice would jeopardize an investigation; and

(4) maintain a complaint file that includes at least:

(A) the name of the person who filed the complaint unless the complaint was filed anonymously;

(B) the date the complaint was received by the Board's staff;

(C) a description of the subject matter of the complaint;

(D) the name of each person contacted in relation to the complaint;

(E) a summary of the results of the review and investigation of the complaint; and

(F) an explanation for the reason the complaint was dismissed if the complaint was dismissed without action other than the investigation of the complaint.

(d) During the preliminary evaluation period, the Board's staff may contact the complainant, the respondent, and any known witness concerning the complaint.

(e) After the preliminary evaluation period, the Board's staff shall take steps to dismiss the complaint or proceed with an investigation of the allegation(s) against the respondent. A complaint may be referred to another government agency if it appears that the other agency might have jurisdiction over the issue(s) raised in the complaint.

(f) If the Board's staff proceeds with an investigation, the staff shall:

(1) investigate the complaint according to the priority level assigned to the complaint;

(2) notify the complainant and respondent that, as a result of the staff's preliminary evaluation of the complaint, the staff has determined that the Board has jurisdiction over the allegation(s) described in the complaint and has decided to proceed with an investigation of the allegation(s) against the respondent; and

(3) gather sufficient information and evidence to determine whether there is probable cause to believe that a violation of a statutory provision or rule enforced by the Board has occurred.

(g) The Board's staff may conduct an investigation regardless of whether a complaint form was received as described in subsection (a) of this section.

(h) If the information and evidence gathered during an investigation are insufficient to establish probable cause to believe that a violation has occurred, the Board's staff shall:

(1) dismiss the complaint;

(2) send notices to the complainant and respondent regarding the dismissal;

(3) if warranted, include in the respondent's notice a recommendation or warning regarding the respondent's future conduct; and

(4) if a complaint is determined to be unfounded, state in the respondent's notice that no violation was found.

(i) If the information and evidence gathered during an investigation are sufficient to establish probable cause to believe that a violation has occurred, the Board's staff shall:

(1) seek to resolve the matter pursuant to §§3.165, 3.166 or 3.173 of this subchapter; or

(2) issue a warning in accordance with subsection (j). ~~[to the respondent; if the violation is the respondent's first violation and:]~~

~~[(A) the respondent has not received a written warning or advisory notice from the Board;]~~

~~[(B) the respondent provided a satisfactory remedy which has eliminated any harm or threat to the health or safety of the public; and]~~

~~[(C) the guidelines for determining an appropriate penalty for the violation recommend an administrative penalty or a reprimand as an appropriate sanction for the violation.]~~

(j) A warning may be issued by the Executive Director only as follows:

(1) the violation is the Respondent's only violation of the Board's laws and rules;

(2) the Respondent has not previously been subject to a Board warning or order;

(3) the Respondent has provided a satisfactory remedy which has eliminated any harm or threat to the health or safety of the public; and

(4) The Respondent has committed one of the following violations:

(A) failure to provide or timely provide plans and specifications to TDLR under the requirements of Govt. Code Chap. 469 (Elimination of Architectural Barriers);

(B) Unauthorized use of term "landscape architect" or "landscape architecture";

(C) Failure to respond to a Board inquiry;

(D) Failure to provide a statement of jurisdiction;

(E) Use of a non-compliant seal by registrant;

(F) Failure to register or annually renew the registration of a business; or

(G) Creation of misleading impression by a landscape architect advertising for services.

(k) The decision to issue a warning is at the sole discretion of the Executive Director and not available as a result of a contested case proceeding conducted pursuant to the Government Code Chapter 2001.

(l) [(+) Before a proposed settlement agreement may be approved by the Board,] [:]

~~[(1) the complainant, if known, must be notified of the terms of the agreement and the date, time, and location of the meeting during which the Board will consider the agreement; and]~~

~~[(2)] the terms of the agreement must be reviewed by legal counsel for the Board to ensure that all legal requirements have been satisfied.~~

~~(m) [(k)] If a complaint is dismissed, the complainant may submit to the Executive Director a written request for reconsideration. The written request must explain why the complaint should not have been dismissed. The Executive Director may, but is not required to, respond to the request for reconsideration.~~

~~§3.177. Administrative Penalty Schedule.~~

~~If the Board determines that an administrative penalty is the appropriate sanction for a violation of any of the statutory provisions or rules enforced by the Board, the following guidelines shall be applied to guide the Board's assessment of an appropriate administrative penalty:~~

~~(1) In determining whether a minor, moderate, or major penalty is imposed under paragraph (2) of this rule, the following classifications shall apply:
Figure: 22 TAC §3.177(1)~~

~~[(1) The Board shall consider the following factors to determine whether the violation is minor, moderate, or major:]~~

~~[(A) Seriousness of misconduct and efforts to correct the ground for sanction:]~~

~~[(i) Minor--the respondent had demonstrated that he/she was unable that his/her conduct was prohibited and unaware that the conduct was reasonably likely to cause the harm that resulted from the conduct or the respondent has demonstrated that there were significant extenuating circumstances or intervening causes for the violation; and the respondent has demonstrated that he/she provided a satisfactory remedy that alleviated or eliminated any harm or threat to the health or safety of the public.]~~

~~[(ii) Moderate--the violation shows that the respondent knowingly disregarded a standard or practice normally followed by a reasonably prudent person under the same or similar circumstances. A violation of a Board order shall constitute, at a minimum, a moderate violation.]~~

~~[(iii) Major--the conduct demonstrates gross negligence or recklessness or resulted in a threat to the health or safety of the public and the respondent, after being notified of the alleged violation intentionally refused or failed to take prompt and remedial action.]~~

~~[(B) Economic harm:]~~

~~[(i) Minor--there was no apparent economic damage to property or monetary loss to the project owner or other involved persons and entities.]~~

~~[(ii) Moderate--economic damage to property or monetary harm to other persons or entities did not exceed \$1,000, or damage exceeding \$1,000 was reasonably unforeseeable.]~~

~~[(iii) Major--economic damage to property or economic injury to other persons or entities exceeded \$1,000.]~~

~~[(C) Sanction history:]~~

~~[(i) Minor--the respondent has not previously received a written warning, advisory notice or been subject to other enforcement proceedings from the Board.]~~

~~[(ii) Moderate--the respondent was previously subject to an order of the Board or other enforcement proceedings which~~

~~resulted in a finding of a violation of the laws or rules over which the TBAE has jurisdiction.]~~

~~[(iii) Major--the respondent has received at least two prior written notices or has been subject to two disciplinary actions for violation of the rules and laws over which the TBAE has jurisdiction.]~~

~~(2) After determining whether the violation is minor, moderate, or major, the Board shall impose an administrative penalty as follows:~~

~~(A) Minor violations--[if the violation is minor in every category described in paragraph (1) of this section,] an administrative penalty of not more than \$1,000 [500] shall be imposed.~~

~~(B) Moderate violations--[if the violation is moderate in any category described in paragraph (1) of this section,] an administrative penalty or not more than \$3,000 [2,000] shall be imposed.~~

~~(C) Major violations--[if the violation is major in any category described in paragraph (1) of this section or if the Board determines that the facts of the case indicate a higher penalty is necessary in order to deter similar misconduct in the future,] an administrative penalty of not more than \$5,000 shall be imposed.~~

~~(3) In determining the specific amount of an administrative penalty within the minor, moderate, or major range, the Board shall consider the factors outlined in Board Rules 3.141(c) and/or 3.165(f).~~

~~(4) If a violation of the Board's laws or rules is not specifically defined in paragraph (1) as a minor, moderate, or major violation, the Board shall consider the factors outlined in Board Rules 3.141(c) and/or 3.165(f) in determining an appropriate administrative penalty.~~

~~(5) Previous Disciplinary History - If the respondent was previously found to have violated the Board's laws or rules in a warning or Order of the Board, then any subsequent disciplinary action may be considered at the next higher level of severity.~~

~~(6) Multiple Violations~~

~~(A) The administrative penalty ranges discussed in paragraph (2) are to be applied to each individual violation of the Board's laws and rules. If a respondent has violated multiple laws and/or rules, or has committed multiple violations of a single law or rule, the Respondent shall be subject to a separate administrative penalty for each violation.~~

~~(B) Each sheet of plans and specifications created or issued in violation of the Board's laws and rules shall be considered a separate violation for purposes of calculating the total administrative penalty under paragraph (6)(A).~~

~~(C) In the case of a continuing violation, each day a violation continues or occurs shall be considered a separate violation for purposes of calculating the total administrative penalty under paragraph (6)(A).~~

~~(7) The administrative penalties set out in this section may be considered in addition to any other disciplinary actions, such as revocation, suspension, or refusal to renew a registration.~~

~~(8) If the facts of a case are unique or unusual, the Board may suspend the guidelines described in this section.~~

~~[(D) Because of the threat to human health, safety and well-being which necessarily arises out of a Nonregistrant preparing and issuing landscape architectural plans and specifications the Board possesses a compelling interest in ensuring that landscape architectural plans and specifications are prepared and issued only by registered landscape architect or by a person who is working under the active and~~

documented Supervision and Control of a registered Landscape Architect when required by law. If the evidence establishes that Landscape Architectural plans and specifications for a project that is not exempt from the Landscape Architects' Practice Act were prepared by a person who is not registered to engage in the Practice of Landscape Architecture and was not working under the active and documented Supervision and Control of a Landscape Architect the violation shall be presumed to be a major violation and each sheet of architectural plans or separate section of the specifications shall be considered a separate section of the specifications shall be considered a separate violation for purposes of calculating and imposing administrative penalties.}]

{(E) Because of the threat to human health, safety and welfare which necessarily arises from Nonregistrants engaging in the Practice of Landscape Architecture the Board has a compelling interest in ensuring that only those persons who are registered to engage in the Practice of Landscape Architecture or whose work is conducted under the active and documented Supervision and Control of a registered Landscape Architect engage in the Practice of Landscape Architecture. If the evidence establishes that a Landscape Architect has sealed landscape architectural plans and separately numbered section of the specifications without having exercised active and documented Supervision and Control of the Nonregistrants's activities the Board shall presume such conduct by the sealing landscape architect to be a major violation and each sheet of landscape architectural plans or separate section of the specifications shall be considered a separate violation for purposes of calculating and imposing administrative penalties.}]

{(F) The agency is responsible for protecting the public's health, safety and welfare by interpreting and enforcing the Landscape Architects' Practice Act. In fulfilling this statutory duty the Board depends upon, and expects, that Registrants and Applicants will provide complete, truthful and accurate information to the Board upon request. This prompt and accurate provision of information is essential to protecting the public's health, safety and welfare.}]

(9) [(G)] A Landscape Architect, Candidate, or Applicant who fails, without good cause, to provide information to the Board under the provision of §3.171 of this subchapter (relating to Responding to Request for Information) is presumed to be interfering with and preventing the Board from fulfilling its responsibilities. A [For these reasons a] violation of §3.171 of this subchapter shall be considered a minor [moderate] violation if a complete response is not received within 30 days after receipt of the Board's written inquiry. An additional 15 day [Any further] delay constitutes a moderate [major] violation, and each[-: Each] 15 day delay thereafter shall be considered a major violation of these rules.

{(3) In order to determine the appropriate amount in a penalty range described in paragraph (2) of this section, the Board shall consider the factors described in paragraph (1) of this section.}]

{(4) If the facts of a case are unique or unusual, the Board may suspend the guidelines described in 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.

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Lance R. Brenton

General Counsel

Texas Board of Architectural Examiners

Earliest possible date of adoption: August 7, 2016

For further information, please call: (406) 461-4705

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SUBCHAPTER K. HEARINGS--CONTESTED
CASES

22 TAC §3.232

Statutory Authority

The amendments are proposed under the Occupations Code §§1051.202, 1051.252, 1051.401, 1051.451, 1051.452, 1051.501, 1052.251, and 1052.252.

Section 1051.202 provides the Texas Board of Architectural Examiners with authority to promulgate rules to implement Chapters 1051, 1052, and 1053 of the Texas Occupations Code.

Section 1051.252 requires the board to adopt rules to establish a comprehensive procedure for receiving and adjudicating complaints from consumers and service recipients, including procedures regarding sanctions.

Section 1051.401 requires the Board to establish procedures by which a decision to suspend or revoke or a refusal to renew a certificate of registration is made by the board.

Section 1051.451 authorizes the Board to impose an administrative penalty on a person who engages in conduct for which the person is subject to disciplinary action under Chapters 1051, 1052, or 1053, regardless of whether the person holds a certificate of registration.

Section 1051.452 requires the Board to adopt an administrative penalty schedule for violations of Board laws and rules to ensure that the amounts of penalties imposed are appropriate to the violation.

Section 1051.501 grants the board general enforcement authority to ensure that enforcement action is taken against a person who violates Chapters 1051, 1052, or 1053.

Section 1052.251, authorizes the Board to revoke, suspend, or refuse to renew a certificate of registration; reprimand a certificate holder; or impose an administrative penalty on a person following a determination that a ground for discipline exists under §1052.252. Additionally, the Board is authorized to place a registrant on probated suspension, which could include regular reports to the Board, practice limitations, or remedial education until the person attains a degree of skill satisfactory to the board in those areas that are the basis of the probation.

Cross Reference to Statute.

The proposed amendments to these rules do not affect any other statutes.

§3.232. *Board Responsibilities.*

(a) The Board shall investigate Contested Case matters and attempt to resolve Contested Cases informally as provided in Subchapter I of this chapter (relating to Disciplinary Action). However, if a Contested Case is not settled informally pursuant to Subchapter I of this chapter, it shall be referred to SOAH for a formal hearing to determine whether there has been a violation of any of the statutory provisions or rules enforced by the Board.

(b) A formal hearing shall be conducted in accordance with the Rules of Procedure of SOAH.

(c) After a formal hearing of a Contested Case, the SOAH administrative law judge who conducted the formal hearing shall prepare a proposal for decision and submit it to the Board so that the Board may

render a final decision with regard to the Contested Case. The proposal for decision shall include findings of fact and conclusions of law.

(d) If a party submits proposed findings of fact or conclusions of law, the proposal for decision shall include a ruling on each proposed finding or conclusion. [Any party of record in a Contested Case who is adversely affected by the proposal for decision may file exceptions and briefs within 20 days after the date of service of the proposal for decision. Replies to exceptions and briefs may be filed within 15 days after the date for the filing of exceptions and briefs. Exceptions, briefs, and replies shall be filed with the Board and copies shall be served on the administrative law judge and on all other parties in the same manner as for serving other documents in a Contested Case.]

(e) Any party of record in a Contested Case may request an oral hearing before the Board. A request for an oral hearing shall be filed with the Board and copies shall be served on the administrative law judge and on all other parties in the same manner as for serving other documents in a Contested Case. The Board, in its sole discretion, shall determine whether to grant or deny a request for an oral hearing. If a request for an oral hearing is granted, each party of record shall be allotted 30 minutes to make an oral presentation to the Board. The oral presentation shall be limited to matters contained in the administrative record.

(f) Upon the expiration of the time provided for the filing of exceptions and briefs or, if exceptions and briefs are filed, upon the 10th day following the time provided for the filing of replies to exceptions and briefs, the Board may render a decision to finally resolve a Contested Case. The Board may change a finding of fact or conclusion of law made by an administrative law judge or may vacate or modify an order issued by an administrative law judge only if the Board determines:

(1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions;

(2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or

(3) that a technical error in a finding of fact should be changed.

(g) If the Board makes a change to a finding of fact or conclusion of law or vacates or modifies an order pursuant to subsection (f) of this section, the Board must state in writing the specific reason and the legal basis for the change.

(h) The Board shall issue a written order regarding the Board's decision to finally resolve a Contested Case that is not settled informally. The written order shall include findings of fact and conclusions of law that are based on the official record of the Contested Case. The written order may adopt by reference the findings of fact and conclusions of law made by an administrative law judge and included in the proposal for decision submitted to the Board.

(i) Motions for rehearing and appeals may be filed and judicial review of final decisions of the Board may be sought pursuant to the Administrative Procedure Act. The party who appeals a final decision in a Contested Case shall be responsible for the cost of the preparation of the original or a certified copy of the record of the agency proceeding that is required to be sent to the reviewing court.

(j) The Board and the administrative law judge who presides over the formal hearing in a Contested Case shall refer to the following guidelines to determine the appropriate penalty for a violation of any of the statutory provisions or rules enforced by the Board:
Figure: 22 TAC §3.232(j)

(k) The penalty for a violation of any of the statutory provisions or rules enforced by the Board may vary from the penalty recommended in subsection (j) of this section if justified by the circumstances of the matter or the disciplinary history of the respondent. If the Respondent has previously been subject to disciplinary action before the Board, more severe discipline may be imposed.

(l) For any violation where revocation is recommended as an appropriate penalty for the violation, refusing to renew the respondent's certificate of registration also shall be an appropriate penalty for the violation.

(m) If the Board or the administrative law judge determines that an administrative penalty is the appropriate sanction for a violation, the guidelines described in §3.177 shall be applied to determine the amount of the administrative penalty.

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

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Lance R. Brenton

General Counsel

Texas Board of Architectural Examiners

Earliest possible date of adoption: August 7, 2016

For further information, please call: (406) 461-4705



CHAPTER 5. REGISTERED INTERIOR DESIGNERS

The Texas Board of Architectural Examiners proposes the amendment of existing rules §5.184, concerning the Complaint Process; §5.187, concerning the Administrative Penalty Schedule; and §5.242, concerning Board Responsibilities.

The proposed amendments update the Board's disciplinary rules to provide greater guidance in making determinations relating to the issuance of warnings, administrative penalties, and other disciplinary action in enforcing Occupations Code Chapters 1051 and 1053 and Chapter 5 of the Board's rules, relating to regulation of the practice of registered interior design.

The proposed amendments to §5.184 update the Board's requirements relating to the issuance of warnings in disciplinary matters. The proposed rule clarifies that a warning is available only if the violation in question is the only violation of the Board's laws and rules, and the Respondent has not previously been subject to a Board warning or order. Furthermore, proposed subsection (j)(4) identifies the specific violations of the Board's laws and rules that may be resolved with a warning, and clarifies that the issuance of a warning is at the sole discretion of the executive director and is not an available sanction following a contested case under the Administrative Procedure Act.

The proposed amendments to §5.187 revise the Board's rule relating to the imposition of administrative penalties. First, the proposed rule would alter the Board's process for imposing a minor, moderate, or major penalty. As currently written, the rule directs the Board to identify a given violation as minor, moderate, or major based upon the analysis of three factors: seriousness of misconduct, economic harm, and sanction history. The proposed amendments would specifically identify particular violations of the Board's laws and rules as minor, moderate, or major

rather than rely upon the three factor analysis. The identification of each violation as a minor, moderate, or major violation is based on an analysis of Board precedent, as well as the factors identified in Occupations Code §1051.452 as guidance for the Board in determining the appropriate amount of administrative penalties. Second, the proposed amendments would increase the upper limits of the minor and moderate penalty ranges to \$1,000 and \$3,000, respectively. Third, the proposed rule directs the Board to consider the factors in Board Rules 5.151(c) and/or 5.175(f) in determining the specific amount of an administrative penalty within the minor, moderate, or major penalty range, or in determining the appropriate administrative penalty for a violation of the Board's laws or rules that has not been specifically defined as a minor, moderate, or major violation. Fourth, the proposed rule enables the Board to impose an increased administrative penalty if the Respondent has previously been found to have violated the Board's laws or rules, or if the Respondent has committed multiple violations of the Board's laws or rules, and to consider each sheet of architectural plans issued in violation of the Board's laws or rules as a separate violation. Finally, the proposed rule clarifies the Board's authority to impose administrative penalties in addition to other sanctions, such as revocation, suspension, or a refusal to renew a registration.

The proposed amendments to §5.242 revise the Board's guidelines that are used to identify the range of sanctions, in addition to administrative penalties, that are appropriate for certain violations of the Board's laws and rules. These sanctions include suspension, revocation, denial of registration, denial of reapplication, and probationary initial registration. The proposed amendments eliminate a reprimand as a potential ground for discipline, which is consistent with current Board practices, as a reprimand has not been imposed since 2004. Additionally, the proposed amendments include the addition of statutory and rule violations that were not previously included in the guidelines. The proposed amendments would implement Government Code §2001.141, which requires a final decision or order to include a ruling on each proposed finding of fact or conclusion of law submitted by a party under an agency rule. Finally, the proposed amendment clarifies the Board's authority to impose administrative penalties in addition to other sanctions, such as revocation, suspension, or a refusal to renew a registration, and to impose a more severe sanction for a Respondent who has previous disciplinary history with the Board.

Fiscal Note Guidelines

Lance Brenton, General Counsel, Texas Board of Architectural Examiners, has determined that, for the first five-year period the amended rules are in effect, the amendments will have no adverse fiscal impact upon state government, local government, or the Texas Board of Architectural Examiners.

Public Benefit/Cost Note Guidelines

Mr. Brenton, has determined that, for the first five-year period the amended rules are in effect, the expected public benefit is the promotion of consistency and predictability in Board decisions regarding the issuance of warnings in Board investigations and the imposition of administrative penalties and other sanctions in contested cases before the Board. The proposed amendments promote fair and efficient regulation by setting forth the appropriate penalties for violations of Occupations Code Chapter 1053 and Board rules and policies, thereby providing notice to registrants and other members of the public of the potential consequences of such actions. Additionally, the proposed amendments promote the public health and safety by providing guid-

ance to impose disciplinary sanctions at a sufficient level to discourage violations of the law.

The proposed amendments will have an adverse impact upon those individuals who are found to be in violation of the Board's laws and rules and subjected to an administrative penalty or other sanctions. If an administrative penalty is imposed, the amount will vary among individuals depending upon: the nature of the violation; whether multiple violations are at issue; whether the individual has previously been subject to disciplinary action; and consideration of the factors identified in §5.151(c) and/or §5.175(f). The adverse impact of any other sanction will be determined based on the proposed amendments to §5.242, and could include revocation of registration, refusal to renew registration, suspension, denial of application, denial of reapplication, and/or probationary registration.

The proposed rules will have no negative fiscal impact on small or micro-business and no Economic Impact Statement or Regulatory Flexibility Analysis is required.

Public Comment

Comments may be submitted to Lance Brenton, General Counsel, Texas Board of Architectural Examiners, P.O. Box 12337, Austin, Texas 78711-2337.

SUBCHAPTER I. DISCIPLINARY ACTION

22 TAC §5.184, §5.187

Statutory Authority

The amendments are proposed under the Occupations Code §§1051.202, 1051.252, 1051.401, 1051.451, 1051.452, 1051.501, 1053.251, and 1053.252.

Section 1051.202 provides the Texas Board of Architectural Examiners with authority to promulgate rules to implement Chapters 1051, 1052, and 1053 of the Texas Occupations Code.

Section 1051.252 requires the board to adopt rules to establish a comprehensive procedure for receiving and adjudicating complaints from consumers and service recipients, including procedures regarding sanctions.

Section 1051.401 requires the Board to establish procedures by which a decision to suspend or revoke or a refusal to renew a certificate of registration is made by the board.

Section 1051.451 authorizes the Board to impose an administrative penalty on a person who engages in conduct for which the person is subject to disciplinary action under Chapters 1051, 1052, and 1053, regardless of whether the person holds a certificate of registration.

Section 1051.452 requires the Board to adopt an administrative penalty schedule for violations of Board laws and rules to ensure that the amounts of penalties imposed are appropriate to the violation.

Section 1051.501 grants the board general enforcement authority to ensure that enforcement action is taken against a person who violates Chapters 1051, 1052, or 1053.

Section 1053.251, authorizes the Board to revoke, suspend, or refuse to renew a certificate of registration; reprimand a certificate holder; or impose an administrative penalty on a person following a determination that a ground for discipline exists under §1053.252. Additionally, the Board is authorized to place a registrant on probated suspension, which could include regular reports to the Board, practice limitations, or remedial education

until the person attains a degree of skill satisfactory to the board in those areas that are the basis of the probation.

Cross Reference to Statute.

The proposed amendments to these rules do not affect any other statutes.

§5.184. *Complaint Process.*

(a) A person may file a complaint by submitting the following information to the Board:

(1) the name of and contact information for the complainant unless evidence regarding a possible violation was submitted anonymously;

(2) the name of the person against whom the complaint is filed;

(3) the address, telephone number, Web site, or other contact information for the person against whom the complaint is filed, if available;

(4) the date and location of the alleged violation that is the subject of the complaint;

(5) a description of each alleged violation; and

(6) the name, address, and telephone number for any known witness who can provide information regarding the alleged violation.

(b) A complaint should be submitted on the complaint form that may be obtained by accessing the form on the Board's Web site or by contacting the Board's staff. If a completed complaint form is not submitted, the Board's staff will not be able to initiate an investigation unless the Board's staff receives information sufficient to establish probable cause to believe an actionable violation might have occurred.

(c) Once a complaint has been received, the Board's enforcement staff shall:

(1) conduct a preliminary evaluation of the complaint within thirty (30) days to determine:

(A) Jurisdiction: whether the complaint provides information sufficient to establish probable cause for the Board's staff to believe an actionable violation might have occurred;

(B) Disciplinary History: whether there has been previous enforcement activity involving the person against whom the complaint has been filed; and

(C) Priority Level: the seriousness of the complaint relative to other pending enforcement matters;

(2) provide the complainant and respondent with information which will permit review of the Board's policies and procedures from the Board's web site regarding complaint investigation and resolution. If the complainant or respondent requests a copy of the policies and procedures in written format a copy shall be mailed upon request;

(3) notify the complainant and respondent of the status of the investigation at least quarterly unless providing notice would jeopardize an investigation; and

(4) maintain a complaint file that includes at least:

(A) the name of the person who filed the complaint unless the complaint was filed anonymously;

(B) the date the complaint was received by the Board's staff;

(C) a description of the subject matter of the complaint;

(D) the name of each person contacted in relation to the complaint;

(E) a summary of the results of the review and investigation of the complaint; and

(F) an explanation for the reason the complaint was dismissed if the complaint was dismissed without action other than the investigation of the complaint.

(d) After the preliminary evaluation period, the Board's staff may contact the complainant, the respondent, and any known witness concerning the complaint.

(e) After the preliminary evaluation period, the Board's staff shall take steps to dismiss the complaint or proceed with an investigation of the allegation(s) against the respondent. A complaint may be referred to another government agency if it appears that the other agency might have jurisdiction over the issue(s) raised in the complaint.

(f) If the Board's staff proceeds with an investigation, the staff shall:

(1) investigate the complaint according to the priority level assigned to the complaint;

(2) notify the complainant and respondent that, as a result of the staff's preliminary evaluation of the complaint, the staff has determined that the Board has jurisdiction over the allegations(s) described in the complaint and has decided to proceed with an investigation of the allegation(s) against the respondent; and

(3) gather sufficient information and evidence to determine whether there is probable cause to believe that a violation of a statutory provision or rule enforced by the Board has occurred.

(g) The Board's staff may conduct an investigation regardless of whether a complaint form was received as described in subsection (a) of this section.

(h) If the information and evidence gathered during an investigation are insufficient to establish probable cause to believe that a violation has occurred, the Board's staff shall:

(1) dismiss the complaint;

(2) send notices to the complainant and respondent regarding the dismissal;

(3) if warranted, include in the respondent's notice a recommendation or warning regarding the respondent's future conduct; and

(4) if a complaint is determined to be unfounded, state in the respondent's notice that no violation was found.

(i) If the information and evidence gathered during an investigation are sufficient to establish probable cause to believe that a violation has occurred, the Board's staff shall:

(1) seek to resolve the matter pursuant to §§5.175, 5.176 or 5.183 of this subchapter; or

(2) issue a warning in accordance with subsection (j). [~~to the respondent if the violation is the respondent's first violation and:~~]

~~[(A) the respondent has not received a written warning or advisory notice from the Board;]~~

~~[(B) the respondent provided a satisfactory remedy which has eliminated any harm or threat to the health or safety of the public; and]~~

~~[(C) the guidelines for determining an appropriate penalty for the violation recommend an administrative penalty or a reprimand as an appropriate sanction for the violation.]~~

(j) A warning may be issued by the Executive Director only as follows:

(1) the violation is the Respondent's only violation of the Board's laws and rules;

(2) the Respondent has not previously been subject to a Board warning or order;

(3) the Respondent has provided a satisfactory remedy which has eliminated any harm or threat to the health or safety of the public; and

(4) The Respondent has committed one of the following violations:

(A) failure to provide or timely provide plans and specifications to TDLR under the requirements of Govt. Code Chap. 469 (Elimination of Architectural Barriers);

(B) Unauthorized use of term "registered interior designer";

(C) Failure to respond to a Board inquiry;

(D) Failure to provide a statement of jurisdiction;

(E) Use of a non-compliant seal by registrant;

(F) Failure to register or annually renew the registration of a business; or

(G) Creation of misleading impression by a registered interior designer advertising for services.

(k) The decision to issue a warning is at the sole discretion of the Executive Director and not available as a result of a contested case proceeding conducted pursuant to the Government Code Chapter 2001.

(l) [(j)] Before a proposed settlement agreement may be approved by the Board, [:]

[(1) the complainant, if known, must be notified of the terms of the agreement and the date, time, and location of the meeting during which the Board will consider the agreement; and]

[(2)] the terms of the agreement must be reviewed by legal counsel for the Board to ensure that all legal requirements have been satisfied.

(m) [(k)] If a complaint is dismissed, the complainant may submit to the Executive Director a written request for reconsideration. The written request must explain why the complaint should not have been dismissed. The Executive Director may, but is not required to, respond to the request for reconsideration.

§5.187. Administrative Penalty Schedule.

If the Board determines that an administrative penalty is the appropriate sanction for a violation of any of the statutory provisions or rules enforced by the Board, the following guidelines shall be applied to guide the Board's assessment of an appropriate administrative penalty:

(1) In determining whether a minor, moderate, or major penalty is imposed under paragraph (2) of this rule, the following classifications shall apply:
Figure: 22 TAC §5.187(1)

[(1) The Board shall consider the following factors to determine whether the violation is minor, moderate, or major:]

~~[(A) Seriousness of misconduct and efforts to correct the ground for sanction:]~~

~~[(i) Minor--the respondent has demonstrated that he/she was unaware that his/her conduct was prohibited and unaware that the conduct was reasonably likely to cause the harm that resulted from the conduct or the respondent has demonstrated that there were significant extenuating circumstances or intervening causes for the violation; and the respondent has demonstrated that he/she provided a satisfactory remedy that alleviated or eliminated any harm or threat to the health or safety of the public.]~~

~~[(ii) Moderate--the violation shows that the respondent knowingly disregarded a standard or practice normally followed by a reasonably prudent person under the same or similar circumstances. A violation of a Board order shall constitute, at a minimum, a moderate violation.]~~

~~[(iii) Major--the conduct demonstrates gross negligence or recklessness or resulted in a threat to the health or safety of the public and the respondent, after being notified of the alleged violation intentionally refused or failed to take prompt and remedial action.]~~

~~[(B) Economic harm:]~~

~~[(i) Minor--there was no apparent economic damage to property or monetary loss to the project owner or other involved persons and entities.]~~

~~[(ii) Moderate--economic damage to property or monetary harm to other persons or entities did not exceed \$1,000, or damage exceeding \$1,000 was reasonably unforeseeable.]~~

~~[(iii) Major--economic damage to property or economic injury to other persons or entities exceeded \$1,000.]~~

~~[(C) Sanction history:]~~

~~[(i) Minor--the respondent has not previously received a written warning, advisory notice or been subject to other enforcement proceedings from the Board.]~~

~~[(ii) Moderate--the respondent was previously subject to an order of the Board or other enforcement proceedings which resulted in a finding of a violation of the laws or rules over which the TBAE has jurisdiction.]~~

~~[(iii) Major--the respondent has received at least two prior written notices or has been subject to two disciplinary actions for violation of the rules and laws over which the TBAE has jurisdiction.]~~

~~(2) After determining whether the violation is minor, moderate, or major, the Board shall impose an administrative penalty as follows:~~

~~(A) Minor violations--[if the violation is minor in every category described in paragraph (1) of this section,] an administrative penalty of not more than \$1,000 [\$500] shall be imposed.~~

~~(B) Moderate violations--[if the violation is moderate in any category described in paragraph (1) of this section,] an administrative penalty of not more than \$3,000 [\$2,000] shall be imposed.~~

~~(C) Major violations--[if the violation is major in any category described in paragraph (1) of this section or if the Board determines that the facts of the case indicate a higher penalty is necessary in order to deter similar misconduct in the future,] an administrative penalty of not more than \$5,000 shall be imposed.~~

(3) In determining the specific amount of an administrative penalty within the minor, moderate, or major range, the Board shall consider the factors outlined in Board Rules 5.151(c) and/or 5.175(f).

(4) If a violation of the Board's laws or rules is not specifically defined in paragraph (1) as a minor, moderate, or major violation, the Board shall consider the factors outlined in Board Rules 5.151(c) and/or 5.175(f) in determining an appropriate administrative penalty.

(5) Previous Disciplinary History - If the respondent was previously found to have violated the Board's laws or rules in a warning or Order of the Board, then any subsequent disciplinary action may be considered at the next higher level of severity.

(6) Multiple Violations

(A) The administrative penalty ranges discussed in paragraph (2) are to be applied to each individual violation of the Board's laws and rules. If a respondent has violated multiple laws and/or rules, or has committed multiple violations of a single law or rule, the Respondent shall be subject to a separate administrative penalty for each violation.

(B) Each sheet of architectural plans and specifications created or issued in violation of the Board's laws and rules shall be considered a separate violation for purposes of calculating the total administrative penalty under paragraph (6)(A).

(C) In the case of a continuing violation, each day a violation continues or occurs shall be considered a separate violation for purposes of calculating the total administrative penalty under paragraph (6)(A).

(7) The administrative penalties set out in this section may be considered in addition to any other disciplinary actions, such as revocation, suspension, or refusal to renew a registration.

(8) If the facts of a case are unique or unusual, the Board may suspend the guidelines described in this section.

[(D) Because of the threat to human health, safety and well-being which necessarily arises from a Nonregistrant representing himself or herself to be registered as a Registered Interior Designer the Board possesses a compelling interest in ensuring that only those persons who are permitted by statute and rule to use the title "registered interior designer" do so. If the evidence establishes that a person not registered as a Registered Interior Designer has represented himself or herself as a registrant, the violation shall be classified as a major violation and each sheet of Interior Design plans or separate section of the specifications shall be considered a separate violation for purposes of calculating and imposing administrative penalties.]

[(E) The agency is responsible for protecting the public's health, safety and welfare by interpreting and enforcing the Interior Designers' Registration Law. In fulfilling this statutory duty the Board depends upon, and expects, that Registrants, Candidates and Applicants will provide complete, truthful and accurate information to the Board upon request. This prompt and accurate provision of information is essential to protecting the public's health, safety and welfare.]

(9) [(F)] A Registered Interior Designer, a Candidate, or an Applicant who fails, without good cause, to provide information to the Board under §5.181 of this subchapter (relating to Responding to Request for Information) is presumed to be interfering with and preventing the Board from fulfilling its responsibilities. A [For these reasons a] violation of §5.181 of this subchapter shall be considered a minor [moderate] violation if a complete response is not received within 30 days after receipt of the Board's written inquiry [the violation]. An additional 15 day [Any further] delay constitutes a moderate [major]

violation, and each[- Each] 15 day delay thereafter shall be considered a separate major violation of these rules.

[(3) In order to determine the appropriate amount in a penalty range described in paragraph (2) of this section, the Board shall consider the factors described in paragraph (1) of this section.]

[(4) If the facts of a case are unique or unusual, the Board may suspend the guidelines described in 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.

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Lance R. Brenton

General Counsel

Texas Board of Architectural Examiners

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For further information, please call: (406) 461-4705



SUBCHAPTER K. HEARINGS--CONTESTED CASES

22 TAC §5.242

Statutory Authority

The amendments are proposed under the Occupations Code §§1051.202, 1051.252, 1051.401, 1051.451, 1051.452, 1051.501, 1053.251, and 1053.252.

Section 1051.202 provides the Texas Board of Architectural Examiners with authority to promulgate rules to implement Chapters 1051, 1052, and 1053 of the Texas Occupations Code.

Section 1051.252 requires the board to adopt rules to establish a comprehensive procedure for receiving and adjudicating complaints from consumers and service recipients, including procedures regarding sanctions.

Section 1051.401 requires the Board to establish procedures by which a decision to suspend or revoke or a refusal to renew a certificate of registration is made by the board.

Section 1051.451 authorizes the Board to impose an administrative penalty on a person who engages in conduct for which the person is subject to disciplinary action under Chapters 1051, 1052, and 1053, regardless of whether the person holds a certificate of registration.

Section 1051.452 requires the Board to adopt an administrative penalty schedule for violations of Board laws and rules to ensure that the amounts of penalties imposed are appropriate to the violation.

Section 1051.501 grants the board general enforcement authority to ensure that enforcement action is taken against a person who violates Chapters 1051, 1052, or 1053.

Section 1053.251, authorizes the Board to revoke, suspend, or refuse to renew a certificate of registration; reprimand a certificate holder; or impose an administrative penalty on a person following a determination that a ground for discipline exists under §1053.252. Additionally, the Board is authorized to place a registrant on probated suspension, which could include regular reports to the Board, practice limitations, or remedial education

until the person attains a degree of skill satisfactory to the board in those areas that are the basis of the probation.

Cross Reference to Statute.

The proposed amendments to these rules do not affect any other statutes.

§5.242. Board Responsibilities.

(a) The Board shall investigate Contested Case matters and attempt to resolve Contested Cases informally as provided in Subchapter I of this chapter (relating to Disciplinary Action). However, if a Contested Case is not settled informally pursuant to Subchapter I of this chapter, it shall be referred to SOAH for a formal hearing to determine whether there has been a violation of any of the statutory provisions or rules enforced by the Board.

(b) A formal hearing shall be conducted in accordance with the Rules of Procedure of SOAH.

(c) After a formal hearing of a Contested Case, the SOAH administrative law judge who conducted the formal hearing shall prepare a proposal for decision and submit it to the Board so that the Board may render a final decision with regard to the Contested Case. The proposal for decision shall include findings of fact and conclusions of law.

(d) If a party submits proposed findings of fact or conclusions of law, the proposal for decision shall include a ruling on each proposed finding or conclusion. [Any party of record in a Contested Case who is adversely affected by the proposal for decision may file exceptions and briefs within 20 days after the date of service of the proposal for decision. Replies to exceptions and briefs may be filed within 15 days after the date for the filing of exceptions and briefs. Exceptions, briefs, and replies shall be filed with the Board and copies shall be served on the administrative law judge and on all other parties in the same manner as for serving other documents in a Contested Case.]

(e) Any party of record in a Contested Case may request an oral hearing before the Board. A request for an oral hearing shall be filed with the Board and copies shall be served on the administrative law judge and on all other parties in the same manner as for serving other documents in a Contested Case. The Board, in its sole discretion, shall determine whether to grant or deny a request for an oral hearing. If a request for an oral hearing is granted, each party of record shall be allotted 30 minutes to make an oral presentation to the Board. The oral presentation shall be confined to matters contained within the administrative record.

(f) Upon the expiration of the time provided for the filing of exceptions and briefs or, if exceptions and briefs are filed, upon the 10th day following the time provided for the filing of replies to exceptions and briefs, the Board may render a decision to finally resolve a Contested Case. The Board may change a finding of fact or conclusion of law made by an administrative law judge or may vacate or modify an order issued by an administrative law judge only if the Board determines:

- (1) that the administrative law judge did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions;
 - (2) that a prior administrative decision on which the administrative law judge relied is incorrect or should be changed; or
 - (3) that a technical error in a finding of fact should be changed.
- (g) If the Board makes a change to a finding of fact or conclusion of law or vacates or modifies an order pursuant to subsection (f)

of this section, the Board must state in writing the specific reason and the legal basis for the change.

(h) The Board shall issue a written order regarding the Board's decision to finally resolve a Contested Case that is not settled informally. The written order shall include findings of fact and conclusions of law that are based on the official record of the Contested Case. The written order may adopt by reference the findings of fact and conclusions of law made by an administrative law judge and included in the proposal for decision submitted to the Board.

(i) Motions for rehearing and appeals may be filed and judicial review of final decisions of the Board may be sought pursuant to the Administrative Procedure Act. The party who appeals a final decision in a Contested Case shall be responsible for the cost of the preparation of the original or a certified copy of the record of the agency proceeding that is required to be sent to the reviewing court.

(j) The Board and the administrative law judge who presides over the formal hearing in a Contested Case shall refer to the following guidelines to determine the appropriate penalty for a violation of any of the statutory provisions or rules enforced by the Board:
Figure: 22 TAC §5.242(j)

(k) The penalty for a violation of any of the statutory provisions or rules enforced by the Board may vary from the penalty recommended in subsection (j) of this section if justified by the circumstances of the matter or the disciplinary history of the respondent. If the Respondent has previously been subject to disciplinary action before the Board, more severe discipline may be imposed.

(l) For any violation where revocation is recommended as an appropriate penalty for the violation, refusing to renew the respondent's certificate of registration also shall be an appropriate penalty for the violation.

(m) If the Board or the administrative law judge determines that an administrative penalty is the appropriate sanction for a violation, the guidelines described in §5.187 of this title (relating to Administrative Penalty Schedule) shall be applied to determine the amount of the administrative penalty.

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

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Lance R. Brenton

General Counsel

Texas Board of Architectural Examiners

Earliest possible date of adoption: August 7, 2016

For further information, please call: (406) 461-4705



PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 100. GENERAL PROVISIONS

22 TAC §100.6

The State Board of Dental Examiners (Board) proposes new §100.6, concerning the executive committee of the Board. The rule explains the Board process of creating an executive committee.

Kelly Parker, Executive Director, has determined that for the first five-year period the proposed rule is in effect, there will not be any fiscal implications for state or local government as a result of enforcing or administering the rule.

Kelly Parker has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of administering this section will be to clarify the procedures relating to creating the executive committee. Ms. Parker has determined that for the first five-year period the proposed rule is in effect, costs to persons or small businesses will be minimal. There is no foreseeable impact on employment in any regional area where the rule is enforced or administered.

Comments on the proposed new rule may be submitted to Tyler Vance, Assistant General Counsel, 333 Guadalupe, Suite 3-800, Austin, Texas 78732, Fax (512) 463-7452, rulecomments@tsbde.texas.gov no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by this proposed rule.

§100.6. Executive Committee of the Board.

(a) Executive Committee. The executive committee is a permanent and standing committee comprised of the presiding officer of the board, the secretary of the board, and the chair of each standing committee.

(b) Membership. The executive committee may not exceed five members. The chairs of standing committees shall join the executive committee in order of designation as chair of their respective standing committees until the executive committee has five members. When a chair of a standing committee discontinues serving as a chair of the standing committee, a vacancy on the executive committee is filled by the chair of the standing committee who has served as chair for the longest period of time but is not yet serving on the executive committee.

(c) Chair. The presiding officer is chair of the executive committee.

(d) The responsibilities and authority of the executive committee shall include the duties and powers described below and other responsibilities and charges as needed by the board or the agency:

(1) ensure records are maintained related to the membership, meetings, recommendations, and actions of all committees, and ensure such information is accessible to the public on the agency's website;

(2) discuss and delegate tasks to other committees;

(3) take action on matters of urgency that may arise between board meetings, including the delegation of proceedings pursuant to Tex. Occ. Code §263.004 to an ad hoc subcommittee of the executive committee;

(4) assist in the presentation of information concerning the board and the regulation of the practice of dentistry to the Legislature and other state officials;

(5) review staff reports regarding finances and the budget;

(6) formulate and make recommendations to the board concerning future board goals and objectives and the establishment of priorities and methods for their accomplishment;

(7) study and make recommendations to the board regarding the roles and responsibilities of the board members and board committees;

(8) study and make recommendations to the board regarding ways to improve the efficiency and effectiveness of the administration of the board;

(9) study and make recommendations to the board regarding board rules or any area of board function that, in the judgment of the committee, needs consideration; and

(10) make recommendations to the board regarding matters brought to the attention of the executive committee.

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 21, 2016.

TRD-201603129

Kelly Parker

Executive Director

State Board of Dental Examiners

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 475-0977



22 TAC §100.7

The State Board of Dental Examiners (Board) proposes new §100.7, concerning the standing committees of the Board. The rule explains the Board process of creating standing committees.

Kelly Parker, Executive Director, has determined that for the first five-year period the proposed rule is in effect, there will not be any fiscal implications for state or local government as a result of enforcing or administering the rule.

Kelly Parker has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of administering this section will be to clarify the procedures relating to creating standing committees. Ms. Parker has determined that for the first five-year period the proposed rule is in effect, costs to persons or small businesses will be minimal. There is no foreseeable impact on employment in any regional area where the rule is enforced or administered.

Comments on the proposed new rule may be submitted to Tyler Vance, Assistant General Counsel, 333 Guadalupe, Suite 3-800, Austin, Texas 78732, Fax (512) 463-7452, rulecomments@tsbde.texas.gov no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by this proposed rule.

§100.7. Standing Committees of the Board.

(a) Creation and dissolution. The board, through rule, may establish standing committees as it deems necessary. Standing commit-

tees and appointments to standing committees shall be reviewed at least annually by the board's presiding officer to determine whether there is a continuing need for the existence of a standing committee or for a board member's appointment to a standing committee.

(b) Membership. The presiding officer of the board shall appoint members of the board to serve on standing committees. An appointment to a standing committee shall be made for a term of two years but may be terminated at any point by the presiding officer. Committee members may be re-appointed or replaced at the discretion of the presiding officer. At least one dentist member of the board and at least one non-dentist member of the board shall serve on each standing committee. The board's presiding officer shall be an ex-officio member of each standing committee.

(c) Chair. The presiding officer shall designate one member of each standing committee to serve as chair of the standing committee. No board member shall serve as chair of more than one standing committee at a time.

(d) Meetings and Participation. Each board member shall serve on at least one and no more than three standing committees, or two standing committees and the executive committee, except the presiding officer who is an ex-officio member of all standing committees.

(e) Open Meetings Act. Standing committee meetings shall be open to the public and held in compliance with chapter 551 of the Texas Government Code.

(f) Committee actions. The actions of standing committees are recommendations only and are not binding until ratification by the board at a regularly scheduled meeting, with the exception of permits approved by the Anesthesia Committee.

(g) The following are standing committees of the board. The responsibilities and authority of these committees shall include the duties and powers described below and other responsibilities and charges that the board may delegate to these committees.

(1) Anesthesia Committee.

(A) review applications for level 3 and level 4 sedation/anesthesia permits and sedation/anesthesia portability permits, and make recommendations to the board concerning any proposed denial of a permit;

(B) study and make recommendations to the board concerning the administration of sedation/anesthesia in dental treatment; including but not limited to permitting, regulation, and/or discipline of sedation/anesthesia permit holders, applicants, or other licensees;

(C) study and make recommendations to the board concerning board rules regarding or affecting the administration of sedation/anesthesia in dental treatment; and

(D) study and make recommendations to the board concerning any other issue brought to the attention of the committee.

(2) Dental Practice Committee.

(A) study and make recommendations to the board regarding board rules, policies, or other actions pertaining to the standard of care in the practice of dentistry;

(B) study and make recommendations to the board regarding issues concerning or referred by the Dental Hygiene Advisory Committee or the Dental Lab Certification Council; and

(C) study and make recommendations to the board concerning ethical issues related to the practice of dentistry.

(3) Disciplinary Review Committee.

(A) oversee the taking of public action by the board, including disciplinary and remedial action, and give guidance to the board and agency staff regarding improvements of the disciplinary process and effective enforcement of the Act and board rules;

(B) monitor the effectiveness, appropriateness, and timeliness of the disciplinary process and enforcement of the Act and board rules;

(C) make recommendations regarding rules and policies to guide agency staff and the board in their determination of appropriate action on violations of the Act and board rules;

(D) make recommendations regarding resolution and disposition of specific cases;

(E) make recommendations regarding the dismissals of complaints and closure of investigations;

(F) make recommendations regarding the modification of prior actions of the board; and

(G) make recommendations to agency staff and the board regarding policies, priorities, budget, and other matters related to the disciplinary process.

(4) Licensing Committee.

(A) review applications for licensure and permits, make determinations of eligibility and report to the board its recommendations as provided by the Dental Practice and board rules;

(B) review board rules regarding licensure and make recommendations to the board regarding changes or implementation of such rules;

(C) evaluate and approve remediation plans;

(D) evaluate each examination accepted by the board;

(E) investigate and report to the board any problems in the administration of examinations and recommend and implement ways of correcting identified problems;

(F) make recommendations to the board regarding post-graduate training permits and issues concerning dentists in training;

(G) maintain communication with Texas dental schools;

(H) study and make recommendations to the board regarding maintenance of licensure requirements, including continuing education requirements, courses, and course providers;

(I) develop and review board rules regarding all persons and entities subject to the Board's jurisdiction, and make recommendations to the board regarding changes or implementation of such rules;

(J) make recommendations to the board regarding matters brought to the attention of the licensing committee.

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 21, 2016.

TRD-201603130

Kelly Parker

Executive Director

State Board of Dental Examiners

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For further information, please call: (512) 475-0977

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Kelly Parker
Executive Director
State Board of Dental Examiners

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 475-0977

◆ ◆ ◆
22 TAC §100.8

The State Board of Dental Examiners (Board) proposes new §100.8, concerning the ad hoc committees of the Board. The rule explains the Board process of creating ad hoc committees.

Kelly Parker, Executive Director, has determined that for the first five-year period the proposed rule is in effect, there will not be any fiscal implications for state or local government as a result of enforcing or administering the rule.

Kelly Parker has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of administering this section will be to clarify the procedures relating to creating ad hoc committees. Ms. Parker has determined that for the first five-year period the proposed rule is in effect, costs to persons or small businesses will be minimal. There is no foreseeable impact on employment in any regional area where the rule is enforced or administered.

Comments on the proposed new rule may be submitted to Tyler Vance, Assistant General Counsel, 333 Guadalupe, Suite 3-800, Austin, Texas 78732, Fax (512) 463-7452, rulecomments@tsbde.texas.gov no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by this proposed rule.

§100.8. Ad Hoc Committees of the Board.

(a) Creation and dissolution. The presiding officer may establish ad hoc committees of board members to address specific subjects, purposes, or ends. In addition, the board, in a regularly scheduled meeting, may vote to establish ad hoc committees of board members to address specific subjects, purposes, or ends. Unless continued in existence by the presiding officer or a vote of the board, ad hoc committees of the board are abolished the sooner of one year from the date of creation or when the specific subject, purpose, or end for which the ad hoc committee was established, have been served.

(b) Membership. The presiding officer of the board shall appoint members of the board to serve on each ad hoc committee and shall designate a chair for each ad hoc committee. At least one dentist member of the board and at least one non-dentist member of the board shall serve on each ad hoc committee. The board's presiding officer shall be an ex officio member of each ad hoc committee.

(c) Open Meetings Act. Ad hoc committee meetings shall be open to the public and held in compliance with chapter 551 of the Texas Government Code.

(d) Purpose. At the time the presiding officer or the board establishes an ad hoc committee, the presiding officer will assign it a purpose, role, responsibility, and goal.

(e) Committee actions. The actions of ad hoc committees are recommendations only and are not binding unless ratified by the board at a regularly scheduled meeting, with the exception of action taken by an ad hoc subcommittee of the executive committee convened pursuant to §263.004 of the Act, board rule §107.69 and board rule §107.100(e).

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

◆ ◆ ◆
22 TAC §100.9

The State Board of Dental Examiners (Board) proposes new §100.9, concerning the advisory committees and workgroups established by the Board. The rule explains the Board process of creating advisory committees and workgroups established by the Board.

Kelly Parker, Executive Director, has determined that for the first five-year period the proposed rule is in effect, there will not be any fiscal implications for state or local government as a result of enforcing or administering the rule.

Kelly Parker has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of administering this section will be to clarify the procedures relating to creating advisory committees and workgroups established by the Board. Ms. Parker has determined that for the first five-year period the proposed rule is in effect, costs to persons or small businesses will be minimal. There is no foreseeable impact on employment in any regional area where the rule is enforced or administered.

Comments on the proposed new rule may be submitted to Tyler Vance, Assistant General Counsel, 333 Guadalupe, Suite 3-800, Austin, Texas 78732, Fax (512) 463-7452, rulecomments@tsbde.texas.gov no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by this proposed rule.

§100.9. Advisory Committees and Workgroups Established the Board.

(a) In addition to any specific statutory authority to establish particular advisory committees, the board may authorize advisory committees from outside the board's membership to advise the board on rulemaking, pursuant to §2001.031 of the Texas Government Code and subject to chapter 2110 of the Texas Government Code, State Agency Advisory Committees.

(b) Creation and dissolution. The board, in a regularly scheduled meeting, may vote to establish advisory committees and workgroups from outside the board's membership to address specific subjects, purposes, or ends. Unless continued by a vote of the board, advisory committees and workgroups outside the board's membership are abolished the sooner of one year from the date of creation or when the specific subject, purpose, or end for which the advisory committee or workgroup was established, have been served.

(c) Chair. Each advisory committee or workgroup shall select from among its members a chairperson who shall preside over the advisory committee or workgroup and shall report to the board or agency as needed.

(d) Membership. The presiding officer shall determine the method by which members are designated to the advisory committee or workgroup. The membership of an advisory committee must provide a balanced representation between members of the dental industry and consumers of the dental industry. Advisory committee and workgroup members shall serve terms as determined by the board.

(e) Board member liaisons. The presiding officer may appoint board member or board members to serve as a liaison(s) to an advisory committee or workgroup and report to the board the recommendations of the advisory committee or workgroup for consideration by the board. The role of a board member liaison is limited to clarifying the board's charge and intent to the advisory committee or workgroup.

(f) Agency staff liaisons. The executive director of the agency may assign agency staff to assist the advisory committee and workgroup.

(g) Meetings and participation. All meetings shall be open to the public and noticed on the Secretary of State's website to allow the public an opportunity to participate.

(h) Purpose. The board rule establishing the advisory committee or workgroup shall state the purpose and tasks of the committee and describe the manner in which the committee will report to the board.

(i) Committee actions. The actions of advisory committees are recommendations only.

(j) The following is an advisory committee and workgroup established by the board or established by statute: Dental Hygiene Advisory Committee, established by Subchapter B of Chapter 262 of the Texas Occupations Code.

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 21, 2016.

TRD-201603132
Kelly Parker
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: August 7, 2016
For further information, please call: (512) 475-0977



22 TAC §100.11

The State Board of Dental Examiners (Board) proposes new §100.11, concerning stakeholder meetings convened by staff. This rule explains the process and purpose of stakeholder meetings that are convened by staff.

Kelly Parker, Executive Director, has determined that for the first five-year period the proposed rule is in effect, there will not be any fiscal implications for state or local government as a result of enforcing or administering the rule.

Kelly Parker has also determined that for the first five-year period the proposed rule is in effect, the public benefit anticipated as a result of administering this section will be to clarify the procedures relating to convening stakeholder meetings that are convened by staff. Ms. Parker has determined that for the first five-year period the proposed rule is in effect, costs to persons or small businesses will be minimal. There is no foreseeable impact on employment in any regional area where the rule is enforced or administered.

Comments on the proposed new rule may be submitted to Tyler Vance, Assistant General Counsel, 333 Guadalupe, Suite 3-800, Austin, Texas 78732, Fax (512) 463-7452, rulecomments@tsbde.texas.gov no later than 30 days from the date that the proposed rule is published in the *Texas Register*.

This rule is proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by this proposed rule.

§100.11. Stakeholder Meetings Convened by Staff.

(a) Stakeholder meetings are convened by board staff to conduct research and collect information related to topics and issues of interest related to the board, the practice of dentistry, the Dental Practice Act and board rules, and agency administration.

(b) The purpose of stakeholder meetings is to provide the public an opportunity to contribute to the rule research and drafting process prior to official action by the board.

(c) Staff shall prepare a report of each stakeholder meeting for presentation to the board at the next scheduled board meeting and publication on the agency's website.

(d) All meetings shall be open to the public and noticed on the Secretary of State's website to allow the public an opportunity to participate.

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 24, 2016.

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Kelly Parker
Executive Director
State Board of Dental Examiners
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For further information, please call: (512) 475-0977



CHAPTER 107. DENTAL BOARD PROCEDURES

SUBCHAPTER B. PROCEDURES FOR INVESTIGATING COMPLAINTS

22 TAC §§107.100 - 107.108, 107.110

The State Board of Dental Examiners (Board) proposes the repeal of 22 TAC §§107.100, 107.101, 107.102, 107.103, 107.104, 107.105, 107.106, 107.107, 107.108, and 107.110, concerning procedures for investigating complaints.

The agency seeks to repeal these sections and replace them with proposed new rules. The proposed new rules seek to better explain the board's process for receiving and investigating complaints.

Kelly Parker, Executive Director, has determined that for the first five-year period the proposed repeals are in effect, the repealed rules will not have foreseeable implications relating to cost or revenue of state or local government.

Ms. Parker has also determined that for the first five-year period the proposed repeals are in effect, the repealed rules will ensure the protection of public health and safety. Ms. Parker has determined that for the first five-year period the proposed repeals are in effect, the repealed rules will not have foreseeable economic costs to persons or small businesses who are required to comply with the rules. There is no foreseeable impact on employment in any regional area where the repealed rules are enforced or administered.

Comments on the proposed repeals may be submitted to Tyler Vance, Assistant General Counsel, 333 Guadalupe, Suite 3-800, Austin, Texas 78732, Fax (512) 463-7452, rulecomments@tsbde.texas.gov, no later than 30 days from the date that the proposed rules are published in the *Texas Register*.

The repeals are proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

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

§107.100. *Receipt, Processing, and Coordination of Complaints.*

§107.101. *Preliminary Inquiry of a Complaint.*

§107.102. *Commencement of an Official Complaint.*

§107.103. *Disposition of an Official Complaint.*

§107.104. *Confidentiality of Investigations.*

§107.105. *Request for Information and Records from Licensees.*

§107.106. *Use of Expert Panel.*

§107.107. *Selection of Expert Reviewers.*

§107.108. *Determination of Competency by the Expert Panel.*

§107.110. *Compliance.*

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 27, 2016.

TRD-201603237

Kelly Parker

Executive Director

State Board of Dental Examiners

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 475-0977



22 TAC §§107.100 - 107.109

The State Board of Dental Examiners (Board) proposes new §§107.100 - 107.109, concerning procedures for investigating complaints. The proposed new rules provide greater clarification and explanation of the board's internal processes from receiving an initial complaint through investigation.

Kelly Parker, Executive Director, has determined that for the first five-year period the proposed rules are in effect, there will not be any fiscal implications for state or local government as a result of enforcing or administering the new rules.

Kelly Parker has also determined that for the first five-year period the proposed rules are in effect, the public benefit anticipated as a result of administering these sections will be to clarify the

board's internal processes concerning processing of complaints and investigations. Ms. Parker has determined that for the first five-year period the proposed rules are in effect, costs to persons or small businesses will be minimal. There is no foreseeable impact on employment in any regional area where the rules are enforced or administered.

Comments on the proposed new rules may be submitted to Tyler Vance, Assistant General Counsel, 333 Guadalupe, Suite 3-800, Austin, Texas 78732, Fax (512) 475-0977, rulecomments@tsbde.texas.gov no later than 30 days from the date that the proposed rules are published in the *Texas Register*.

These new rules are proposed under Texas Occupations Code §254.001(a), which gives the Board authority to adopt rules necessary to perform its duties and ensure compliance with state laws relating to the practice of dentistry to protect the public health and safety.

No statutes are affected by these proposed new rules.

§107.100. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--Title 3, Subtitle D, Chapter 251 - 267, Texas Occupations Code.

(2) Complaint--The term complaint includes complaints submitted on the agency's official complaint form, complaints initiated internally on the agency's internal complaint form, and self-reports submitted by licensees pursuant to §108.6 of this title (relating to Report of Patient Death or Injury Requiring Hospitalization).

(3) Jurisdictional Complaint--A complaint received by the board that if true, would constitute a violation of the Act or board rules.

(4) Jurisdictional Not Filed Complaint--A jurisdictional complaint received by the board on which the board decides not to proceed with an official investigation. These complaints are closed during the preliminary investigation.

(5) Jurisdictional Filed Complaint--A jurisdictional complaint on which the board has determined to proceed with an official investigation.

(6) Preliminary Investigation--An investigation conducted by the agency upon the receipt of a complaint to determine whether the complaint is jurisdictional and whether the complaint should be filed and an official investigation commenced.

(7) Official Investigation--An investigation conducted by the agency of a complaint that, after a preliminary investigation, is determined to be a jurisdictional filed complaint.

(8) Respondent--The person or entity that is identified as the subject of a complaint received by the agency.

§107.101. Responsibilities of Investigations Division and Dental Practice Division.

(a) The Investigations Division, under supervision of the Director of Investigations, processes and investigates complaints received by or initiated by the agency. All investigations shall comply with §255 of the Act.

(b) The Dental Practice Division, under supervision of the Dental Director, assists in the preliminary investigation of complaints related to professional competency and coordinates the official investigation of complaints related to professional competency, including the use of the Dental Review Panel in the official investigation.

§107.102. Complaints.

(a) Complaints shall be submitted on the official complaint form.

(b) Complaints shall contain the following information:

(1) the name and contact information of the complainant;

(2) the name of the person or entity against whom the complaint is filed;

(3) the time and place of the alleged violation of the Act or board rules; and

(4) if applicable, the name and birthdate of the patient who was treated.

(c) Jurisdictional complaints that are received by the board and do not comply with subsections (a) and (b) of this section may be closed as "Jurisdictional-Not Filed" during the preliminary investigation if they contain insufficient evidence or information to determine probable cause exists to proceed to an official investigation. The Director of Investigations or Dental Director may initiate an internal complaint based on the allegations made in such a complaint if the allegations made in the complaint, if true, would constitute a clear, imminent, or continuing threat to a person's physical health or well-being. These complaints name the State of Texas as the complainant.

§107.103. Preliminary Investigation of a Complaint.

(a) Each complaint received by the agency undergoes a preliminary investigation. The preliminary investigation determines the following:

(1) whether the board has jurisdiction over the complaint;

(2) whether the continued practice by a licensee/registrant or the continued performance by a licensee/registrant of a procedure for which the person holds a license or registration would constitute a clear, imminent, or continuing threat to a person's physical health or well-being; and

(3) whether there is probable cause to justify commencement of an official investigation.

(b) Determination of jurisdiction. A complaint is jurisdictional if it alleges conduct, that if true, would constitute a violation of the Act or board rules. A complaint is not jurisdictional if the complaint is received by the agency after the fourth anniversary of the date the act that is the basis of the complaint occurred; or the complainant discovered, or in the exercise of reasonable diligence should have discovered, the occurrence of the act that is the basis of the complaint. A complaint that is closed in the preliminary investigation because the board has no jurisdiction over the complaint is a "Dismissed-Non Jurisdictional" complaint.

(c) If the board has jurisdiction over the complaint, board staff shall complete the preliminary investigation of the complaint not later than the 60th day after the date the agency received the complaint. If the complaint alleges a violation of the standard of care, board staff conducting the preliminary investigation of the complaint shall be or shall consult with a licensed dentist or dental hygienist who is a member of the Dental Practice Division or a member of the board.

(d) In the preliminary investigation, board staff shall determine whether the continued practice by a licensee/registrant or the continued performance by a licensee/registrant of a procedure for which the person holds a license or registration would constitute a clear, imminent or continuing threat to a person's physical health or well-being. If such determination is made, board staff may refer such complaint to the suspension panel of the board for a temporary suspension pursuant to §263.004 of Act.

(e) In the preliminary investigation, board staff may make reasonable efforts to contact the complainant concerning the complaint. Any additional information received from the complainant will be added to the information maintained on the complaint.

(f) In the preliminary investigation, the respondent may be given the opportunity to respond to the allegations. If the respondent is given this opportunity, the response must be received within the time prescribed by board staff. Any additional information received from the respondent will be added to the information maintained on the complaint.

(g) In the preliminary investigation of each jurisdictional complaint, the following minimum additional evidence will be gathered by the Investigations division:

(1) The history of the respondent collected and maintained by the agency;

(2) The history of the respondent maintained by the National Practitioner's Data Bank;

(3) Whether the respondent is a participant in the state Medicaid program and whether the allegations made in the complaint involve services provided under the state Medicaid program, for reporting purposes pursuant to §254.012 of the Act; and

(4) medical and dental records, as needed.

(h) At the conclusion of the preliminary investigation of a jurisdictional complaint, board staff shall determine whether to commence an official investigation of the complaint. A jurisdictional complaint that is closed during the preliminary investigation without proceeding to an official investigation is considered "Jurisdictional-Not Filed." A complaint that proceeds to an official investigation is considered a "Jurisdictional-Filed" complaint.

(i) If board staff fails to complete the preliminary investigation within 60 days of receiving the complaint, the board's official investigation of the complaint commences on the 60th day, and the complaint is considered a "Jurisdictional-Filed" complaint.

(j) Appeal. Following the receipt of the notice that a complaint has been closed during the preliminary investigation as a "Jurisdictional-Not Filed" complaint, the complainant may appeal the closure of the complaint to the board.

(1) To be considered by the board, the appeal must:

(A) be submitted in writing to the agency;

(B) received by the agency no later than the 45th day after the mailing date of the notice of closure of the Jurisdictional-Not Filed complaint; and

(C) list the reason(s) for the appeal, providing sufficient information to indicate that an official investigation is warranted.

(2) Review of an Appeal. Appeals will be considered by the board in a public meeting. The board shall determine one of the following:

(A) The appeal is denied;

(B) Additional information must be obtained before a determination on the appeal can be made; or

(C) The appeal is granted.

(3) Personal Appearances. The complainant has the right to personally appear before the board considering the appeal. This appearance must be scheduled through agency staff. This appearance may be limited in time and scope by the presiding officer of the board.

(4) Notice. The complainant shall be notified of the board's decision concerning the appeal.

(5) Appeals Limited. Only one appeal shall be allowed for each complaint.

(6) Granted Appeals. If the board grants an appeal, the original complaint remains closed, and a new complaint is opened to officially investigate the complaint. The official investigation of the new complaint commences on the date the board grants an appeal.

§107.104. Official Investigation of a Complaint.

(a) Once an official investigation commences, board staff shall notify the complainant and respondent of the filing of the complaint and the commencing of the official investigation. The complainant and the respondent shall receive notice of the complaint's status, at least quarterly, until final disposition of the complaint, unless such notice would jeopardize an investigation.

(b) The official investigation of a complaint may include referral to a panel of experts for review.

(c) As of September 1, 2016, board staff shall classify each filed complaint into one or more of the following allegation categories:

(1) Standard of Care: failure to treat a patient according to the standard of care in the practice of dentistry or dental hygiene.

(2) Sanitation: failure to maintain the dental office in a sanitary condition.

(3) Dishonorable Conduct: unprofessional or dishonorable conduct, including conduct identified in §108.9 of this title (related to Dishonorable Conduct).

(4) Administrative: failure to comply with administrative requirements of the Act or board rules.

(5) Business Promotion: failure to comply with the requirements of the Act or board rules relating to advertising and referral schemes.

(6) Practicing Dentistry without a License.

(7) Non-compliance: failure to comply or timely comply with an Order or Remedial Plan issued by the board.

(d) Board staff shall assign each filed complaint a priority classification, as follows:

(1) Priority 1 includes allegations of dental treatment causing serious patient harm, impairment, serious criminal activity, inappropriate contact with a patient, and other allegations determined by the Director of Investigations to require an expedited investigation or consideration of temporary suspension pursuant to §263.004 of the Act.

(2) Priority 2 record-keeping violations, administrative violations, allegations of practicing dentistry without a license that do not allege serious patient harm, and other allegations that do not allege serious patient harm.

(3) A complaint's priority classification may be changed following approval of the Director of Investigation or the Dental Director.

§107.105. Collection of Information and Records.

(a) Dental Records. Upon request by board staff, a dental custodian of records shall provide copies of dental records or original records. Board staff may require a dental custodian of records to submit records immediately if required by the urgency of the situation or the possibility that the records may be lost, damaged, or destroyed.

(b) Response to Board Requests. In addition to the requirements of responding or reporting to the board under this section, a licensee/registrant shall respond in writing to all written board requests for information within ten days of receipt of such request.

(c) Business Records Affidavits. Dental records must be provided under a business records affidavit or as otherwise required by board staff.

(d) Failure to Comply.

(1) Administrative Penalty. Failure to comply with board staff's request for records or information may be grounds for the issuance of an administrative penalty citation pursuant to §254.0115 of the Act.

(2) Disciplinary Action. Failure to comply with board staff's request for records or information may be unprofessional and dishonorable conduct that is subject to disciplinary action by the board pursuant to §263.002 of the Act.

(3) Civil Penalty. Failure to comply with board staff's request for records and other evidence or failure to comply with other law regulating dental patient records may be subject to a civil penalty pursuant to §258.0511 and §264.101 of the Act.

(4) Criminal penalty. Failure to comply with board staff's request for records and other evidence or failure to comply with other law regulating dental patient records, in violation of §258.0511, is a criminal offense pursuant to §264.152 of the Act.

§107.106. Confidentiality of Investigations.

(a) Investigation files and other records are confidential, except board staff shall inform the license holder of the specific allegations against the license holder.

(b) No employee, agent, or member of the board may disclose confidential information except in the following circumstances:

(1) to another local, state or federal regulatory agency;

(2) to local, state or federal law enforcement agencies;

(3) to other persons if required during the course of the investigation;

(4) to other entities as required by law; and

(5) a person who has provided a statement may receive a copy of the statement.

(c) A final disciplinary action of the board is not excepted from public disclosure, including:

(1) the revocation or suspension of a license/registration;

(2) the placement on probation with conditions of a license/registration that has been suspended;

(3) the reprimand of a licensee/registrant;

(4) the issuance of a warning order to a licensee/registrant;

and

(5) a final cease and desist order issued to a non-licensee.

(d) A final public action of the board is not excepted from public disclosure, including:

(1) a non-disciplinary remedial plan; and

(2) an administrative penalty citation.

(e) Files and other records collected during the investigation of a license application are confidential, except board staff shall maintain a public profile of each licensee that contains the following information:

- (1) License name and former last name;
- (2) License number;
- (3) License status;
- (4) License issue date;
- (5) License expiration date;
- (6) Primary address;
- (7) Information related to issuance of nitrous and sedation/anesthesia permits;
- (8) Area of practice reported by licensee/registrant;
- (9) Dental school and year of graduation; and
- (10) Year of birth.

§107.107. Use of Dental Review Panel.

(a) If the preliminary investigation finds that there is probable cause to indicate that an act by a licensee/registrant fell below the minimum standard of care, the relevant information and records collected by board staff shall be reviewed by a panel of experts during the official investigation. Each panel of experts shall include an initial and second reviewer and, if necessary, a third reviewer. The panel of experts for an investigation shall be selected from members of the Dental Review Panel.

(b) Composition and Duties. The Dental Review Panel shall be composed of dentists and dental hygienists appointed by the board to assist with complaints and investigations relating to professional competency by acting as expert dentist and dental hygienist reviewers.

(c) Qualifications. To be eligible to serve on the Dental Review Panel, a dentist or dental hygienist must meet the following criteria:

- (1) licensed in Texas to practice dentistry or dental hygiene;
- (2) no history of disciplinary action by the board in the ten years prior to application;
- (3) acceptable malpractice complaint history;
- (4) in active practice currently and at the time of the alleged violation, or supervising clinical care in an academic setting;
- (5) demonstrated knowledge of accepted standards of dental care for the diagnosis, care and treatment related to the alleged violation; and
- (6) demonstrated training or experience to offer an expert opinion regarding accepted standards of dental care.

(d) Term; Resignation; Removal.

(1) An expert reviewer shall serve on the Dental Review Panel until resignation or removal from the Dental Review Panel or non-renewal of contract.

(2) An expert reviewer may resign from the Dental Review Panel at any time.

(3) An expert reviewer may be removed from the Dental Review Panel for good cause at any time on order of the Executive Director. Good cause for removal includes:

- (A) failure to maintain the eligibility requirements set forth in subsection (c) of this section;
- (B) failure to inform the board of potential or apparent conflicts of interest;

(C) repeated failure to timely review complaints or timely submit reports to the board;

(D) repeated failure to prepare the reports in the prescribed format; and

(E) direct contact with the complainant or the respondent.

(e) The presiding officer or board secretary may make an interim appointment of an expert reviewer to serve the board until the reviewer can be considered for appointment by the board at the next board meeting.

§107.108. Assignment of Dental Review Panel Members.

(a) Reviewers for a particular complaint shall be assigned from among those Dental Review Panel members who practice in the same or similar specialty as the Respondent identified in the filed complaint.

(b) If an assigned reviewer has a potential or apparent conflict of interest that would prevent the reviewer from providing a fair and unbiased opinion, that reviewer shall not review the case and another reviewer shall be assigned from among those Dental Review Panel members who practice in the same or similar specialty as the Respondent identified in the filed complaint.

(1) A potential conflict of interest exists if the selected reviewer lives or practices dentistry or dental hygiene in the same geographical market as the Respondent identified in the filed complaint and:

(A) is in direct competition with the licensee/registrant;

or

(B) knows the licensee/registrant.

(2) An apparent conflict of interest exists if the reviewer:

(A) has a direct financial interest or relationship with any matter, party, or witness that would give the appearance of a conflict of interest;

(B) has a familial relationship within the third degree of affinity with any party or witness; or

(C) determines that the reviewer has knowledge of information that has not been provided by board staff and that the reviewer cannot set aside that knowledge and fairly and impartially consider the matter based solely on the information provided by board staff.

(c) If no reviewer agrees to review the case who can qualify under the requirements of subsections (a) and (b) of this section, a reviewer who has a potential conflict may review the case, provided the expert reviewer's report discloses the nature of the potential conflict.

(d) If any assigned reviewer has a potential or apparent conflict of interest, the reviewer shall notify board staff in the Dental Practice Division of the potential or apparent conflict.

§107.109. Review by Dental Review Panel Members.

(a) The initial reviewer shall review all the relevant information and records collected by the agency and determine whether the respondent has violated the standard of care applicable to the circumstances and issue a preliminary written report of that determination.

(b) The second reviewer shall review the initial reviewer's preliminary report and all the relevant information and records collected by the agency and determine whether the respondent has violated the standard of care applicable to the circumstances. If the second reviewer agrees with the conclusions of the initial reviewer, the second reviewer shall inform the initial reviewer and the initial reviewer shall issue a

final written report on the matter. If the second reviewer does not agree with the conclusions of the initial reviewer, the second reviewer shall issue a secondary written report of his determination.

(c) If the initial and second reviewer do not agree on the determination, a third reviewer will be necessary. The third reviewer shall review the preliminary and secondary report and all the relevant information and records collected by the agency and determine whether the respondent has violated the standard of care applicable to the circumstances and issue a final written report of that determination. The final written report shall be issued by the third reviewer or the reviewer with whom the third reviewer concurs.

(d) The written reports shall include the following:

(1) the general qualifications of each reviewer; and

(2) the opinions of each reviewer regarding:

(A) the relevant facts concerning the dental care rendered;

(B) the applicable standard of care;

(C) the application of the standard of care to the relevant facts;

(D) a determination of whether the standard of care has been violated; and

(E) the clinical basis for the determinations, including any reliance on peer-reviewed journals, studies, or reports.

(e) The reviewers may consult and communicate with each other in formulating their opinions and reports.

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 24, 2016.

TRD-201603210

Kelly Parker

Executive Director

State Board of Dental Examiners

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 475-0977



PART 10. TEXAS FUNERAL SERVICE COMMISSION

CHAPTER 203. LICENSING AND ENFORCEMENT--SPECIFIC SUBSTANTIVE RULES

SUBCHAPTER A. LICENSING

22 TAC §203.5, §203.7

The Texas Funeral Service Commission (Commission) proposes to amend §203.5 and §203.7 in Subchapter A to clarify questions regarding the provisional license program. The amended rules will provide clarification on licensing matters to provisional applicants, accredited mortuary colleges and other interested parties. Specifically the amendments will clarify the education waiver, the mortuary law exam expiration, and what is required for re-applications for a provisional license.

As a result of stakeholder meetings and Commission review in 2014-2015, the Commission decided to extensively reorder and update its rules to provide more clarity to both industry members and consumers. The reorganized rules took effect in October 2015. Since that time, several questions have been raised regarding the provisional license program. This rule submission attempts to clarify and address those concerns.

The amendment to §203.5(a) clarifies the educational waiver provided for in statute is only good for an applicant who has never held a provisional license. The stated intent of the statute was to provide a mechanism for people to work in the field prior to attending mortuary school. By making this change, people could determine if they had an aptitude for the funeral business prior to spending money on attending mortuary school. In the last few months, provisional licensees have dropped out of school for a variety of reasons and have approached the agency about an education waiver. This amendment will ensure the intent of the statute is upheld.

The amendment to §203.5(b) clarifies that a person who has completed coursework and "filed for graduation" but has not graduated may continue in the provisional program. There currently is a gap between the time a person completes coursework and is a certified graduate. This gap primarily is due to timing of taking the National Board exams. This amendment will ensure the provisional licenses of these individuals are not canceled because of the way mortuary schools certify graduates.

The amendment to §203.5(n) clarifies the mortuary law exam expiration date is tied to filing an application. Under the old rules, the mortuary law exam score was valid for 24 months. Under the new rules, an applicant is required to pass the exam prior to licensure. In order to not create a financial hardship, the 24 month expiration date was eliminated so a person does not have to take the exam again prior to exiting the program. In the last few months, the agency has had people apply for a provisional license who took the exam many months/years ago and want that score to count. This circumvents the intent of the rule that you must pass the exam prior to getting a provisional license. This amendment states the examinee must apply for a provisional license within six months of taking the exam or the exam score is invalid.

The amendment to §203.7 clarifies a NEW application for a provisional license (even if the person previously had a license) triggers both a new criminal background check and the requirement for a new mortuary law exam. This amendment is related to the elimination of the mortuary law exam expiration and will ensure an applicant meets all the requirements for licensure.

Janice McCoy, Executive Director, has determined that for the first five-year period the amended rules are in effect there will be no fiscal impact for state or local governments as a result of enforcing or administering the amended rules.

Ms. McCoy has determined that for each year of the first five-year period the amended rules are in effect the public benefit anticipated as a result of enforcing the proposed rules will be clarity in the administration of the provisional license program. Ms. McCoy has also determined that there will be no effect on large, small or micro-businesses; that there is no anticipated negative economic costs to persons who are required to comply with the rules as proposed; and that there will be no impact on local employment or economies.

Comments on the proposal may be submitted by August 8, 2016 to Mr. Kyle Smith at P.O. Box 12217, Capitol Station, Austin,

Texas 78711-1440, (512) 479-5064 (fax) or electronically to info@tfsc.texas.gov.

The rules are proposed under Texas Occupations Code, Chapter 651. The Commission interprets §651.152 as authorizing it to adopt rules as necessary to administer and enforce Chapter 651, including Texas Occupations Code Subchapter G - License Requirements: Provisional License Holders (§§651.301 - 651.306).

No other statutes, articles, or codes are affected by these sections.

§203.5. *Provisional License.*

(a) An applicant for a provisional license must meet the eligibility requirements of Occupations Code, §651.302 and shall submit to a criminal background check. Upon written application, the Commission shall waive the requirements of Occupations Code, §651.302(a)(2) and (b)(2) for a period not to exceed 12 months to an applicant who is otherwise qualified. This education waiver may be granted only to a person who has never held a provisional license issued by the Commission.

(b) An applicant who is enrolled in an accredited mortuary college must have the college forward a letter of enrollment prior to a provisional license being issued. A provisional license holder who was granted an education waiver under Occupations Code §651.302(c) must have the college forward a letter of enrollment prior to a provisional license [licensed] being renewed. An applicant or a provisional license holder who has completed coursework but is not a certified graduate, may continue to hold a provisional license if the person has the college forward a letter stating the person has filed for graduation and provide an expected graduation date within 3 months.

(c) - (m) (No change.)

(n) Examination Requirements

(1) An applicant for full licensure as a funeral director from the certificate program must pass the Texas State Board Examination as described in Occupations Code, §651.255.

(2) An applicant for full licensure who holds an Associate of Applied Science degree is required to pass either or both of the examinations as described in Occupations Code, §§651.255 - 651.256.

(3) Prior to being issued a provisional license, an applicant must pass the State Mortuary Law Examination administered by the Commission. If a person fails to submit an application for licensure within 6 months of taking the Mortuary Law Examination, the score is invalidated and the person must retake and pass the exam prior to licensure.

(4) A passing score of at least 75% is required for each examination described in paragraphs (1) - (3) of this subsection.

§203.7. *Provisional License Reinstatement and Reapplication.*

(a) (No change.)

(b) A person whose provisional license is cancelled for failure to complete the program within the prescribed time may apply for a new provisional license. As an applicant for a new license, the person is required to submit to a new criminal background check and retake and pass the State Mortuary Law Examination. Casework completed under a previous license may not be counted toward the requirements of the new license unless the applicant petitions the Executive Director for a hardship exemption. The petition must demonstrate the personal situation and reasons why the casework should count. If the Executive Director determines that the previously completed casework should not be counted under the new license, the Executive Director's decision

may be appealed, in writing, and the appeal will be considered at the Commission's next regularly scheduled meeting.

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 23, 2016.

TRD-201603187

Janet McCoy

Executive Director

Texas Funeral Service Commission

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 936-2469



22 TAC §203.9

The Texas Funeral Service Commission (Commission) proposes to amend §203.9 to provide that change of ownership affidavits may require the new owner to submit a fee along with the affidavit. The proposed amendment affects subsection (c).

Prior to a rule change in October 2015, the only way ownership could be changed was through the submission of a new establishment application along with a new license application fee of \$462. The new application also triggered an inspection even though the only change was in the ownership of the funeral establishment.

This rule was amended because the ownership of many funeral homes was passed from parent to child and the child wanted to maintain the original license number, but could not because the previous rule required a new license and therefore a new license number. Since October 2015, approximately 20 funeral homes have used the ownership affidavit to change the ownership of the funeral establishment, with more using the form each month.

If the rule is adopted, the Commission could, but would not be required to, adopt a fee to accompany the ownership affidavit.

Janice McCoy, Executive Director, has determined that for the first five-year period the amended rule is in effect there will be no fiscal impact for state or local governments as a result of enforcing or administering the amended rule. She also has determined there will be no impact on local employment or economies and no effect on large, small or micro-businesses.

Depending on whether the Commission adopts a fee to accompany the ownership affidavit, there could be a negligible negative economic cost to persons who are required to comply with the rule as proposed. However, the cost would be lower than applying for a new license.

Ms. McCoy has determined that for each year of the first five-year period the amended rule is in effect the public benefit is continuity of operations for the Commission.

Comments on the proposal may be submitted by August 8, 2016 to Mr. Kyle Smith at P.O. Box 12217, Capitol Station, Austin, Texas 78711-1440, (512) 479-5064 (fax) or electronically to info@tfsc.texas.gov.

The rule is proposed under Texas Occupations Code, Chapter 651. The Commission interprets §651.152 as authorizing it to adopt rules as necessary to administer and enforce Chapter 651, including Texas Occupations Code Chapter 651.154, Fees.

No other statutes, articles, or codes are affected by this section.

§203.9. *Licensure of Funeral Establishments and Commercial Embalming Establishments.*

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

(c) A funeral establishment or commercial embalming facility may effect a change of ownership by either submitting a new license application under subsection (a) or by notifying the Commission, on a form prescribed by the Commission, within 30 days. In submitting the form, the new owner must attest to the information contained on the form and must submit any documentation required by the Commission. The Commission may assess a fee to accompany the form attesting to the ownership fee. The fee may not exceed half the cost of applying for a new establishment license.

(d) (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 23, 2016.

TRD-201603183

Janet McCoy

Executive Director

Texas Funeral Service Commission

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 936-2469



PART 21. TEXAS STATE BOARD OF EXAMINERS OF PSYCHOLOGISTS

CHAPTER 465. RULES OF PRACTICE

22 TAC §465.11

The Texas State Board of Examiners of Psychologists proposed amendment to §465.11, Informed Consent/Describing Psychological Services. The proposed amendment will clarify the duty to obtain informed consent in an inpatient setting, and reduce the regulatory burden by eliminating any requirement for duplicative informed consent when a patient has already given a general consent. The proposed change will also reduce confusion by referencing the rule governing informed consent in the public schools.

Darrel D. Spinks, Executive Director, has determined that for the first five-year period the proposed amendment will be in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the rule.

Mr. Spinks has also 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 to help the Board protect the public. There will be no economic costs to persons required to comply with this rule. There will be no effect on small businesses or local economies.

Comments on the proposed amendment may be submitted to Brenda Skiff, Texas State Board of Examiners of Psychologists, 333 Guadalupe, Ste 2-450, Austin, Texas 78701 within 30 days of publication of this proposal in the *Texas Register*. Comments may also be submitted via fax to (512) 305-7701, or via email to brenda@tsbep.texas.gov.

The amendment is proposed under Texas Occupations Code, Title 3, Subtitle I, Chapter 501, which provides the Texas State

Board of Examiners of Psychologists with the authority to make all rules, not inconsistent with the Constitution and Laws of this State, which are reasonably necessary for the proper performance of its duties and regulations of proceedings before it.

No other code, articles or statutes are affected by this section.

§465.11. *Informed Consent/Describing Psychological Services.*

(a) Except in an inpatient setting where a general consent has been signed, licensees must [Licensees] obtain and document in writing informed consent concerning all services they intend to provide to the patient, client or other recipient(s) of the psychological services prior to initiating the services, using language that is reasonably understandable to the recipients unless consent is precluded by applicable federal or state law.

(b) Licensees provide appropriate information as needed during the course of the services about changes in the nature of the services to the patient client or other recipient(s) of the services using language that is reasonably understandable to the recipient to ensure informed consent.

(c) Licensees provide appropriate information as needed, during the course of the services to the patient client and other recipient(s) and afterward if requested, to explain the results and conclusions reached concerning the services using language that is reasonably understandable to the recipient(s).

(d) When a licensee agrees to provide services to a person, group or organization at the request of a third party, the licensee clarifies to all of the parties the nature of the relationship between the licensee and each party at the outset of the service and at any time during the services that the circumstances change. This clarification includes the role of the licensee with each party, the probable uses of the services and the results of the services, and all potential limits to the confidentiality between the recipient(s) of the services and the licensee.

(e) When a licensee agrees to provide services to several persons who have a relationship, such as spouses, couples, parents and children, or in group therapy, the licensee clarifies at the outset the professional relationship between the licensee and each of the individuals involved, including the probable use of the services and information obtained, confidentiality, expectations of each participant, and the access of each participant to records generated in the course of the services.

(f) At any time that a licensee knows or should know that he or she may be called on to perform potentially conflicting roles (such as marital counselor to husband and wife, and then witness for one party in a divorce proceeding), the licensee explains the potential conflict to all affected parties and adjusts or withdraws from all professional services in accordance with Board rules and applicable state and federal law. Further, licensees who encounter personal problems or conflicts as described in Board rule §465.9(i) of this title (relating to Competency) [Rule 465.9(i)] that will prevent them from performing their work-related activities in a competent and timely manner must inform their clients of the personal problem or conflict and discuss appropriate termination and/or referral to insure that the services are completed in a timely manner.

(g) When persons are legally incapable of giving informed consent, licensees obtain informed consent from any individual legally designated to provide substitute consent.

(h) When informed consent is precluded by law, the licensee describes the nature and purpose of all services, as well as the confidentiality of the services and all applicable limits thereto, that he or she intends to provide to the patient, client, or other recipient(s) of the psy-

chological services prior to initiating the services using language that is reasonably understandable to the recipient(s).

(i) Informed consent for school psychological services is governed by Board rule §465.38 of this title (relating to Psychological Services for Public Schools).

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 21, 2016.

TRD-201603126

Darrel D. Spinks

Executive Director

Texas State Board of Examiners of Psychologists

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 305-7706



TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 9. TRAINING

SUBCHAPTER B. EMPLOYEE TRAINING AND EDUCATION

30 TAC §§9.11 - 9.13, 9.15 - 9.17

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §§9.11 - 9.13 and §§9.15 - 9.17.

Background and Summary of the Factual Basis for the Proposed Rules

House Bill (HB) 3337, 84th Texas Legislature, 2015, requires the commission to adopt rules requiring that before an agency administrator or employee may be reimbursed for tuition expenses, the executive director must authorize the tuition reimbursement payment (Texas Government Code, §656.048). HB 3337, which became effective September 1, 2015, was intended to provide the appropriate executive-level oversight for authorizing payments for potentially costly reimbursements. Along with revisions to agency policy, Chapter 9, Subchapter B, Employee Training and Education, will also need to be updated to reflect the changes of HB 3337.

In addition to updating §9.15, Reimbursement, revisions are proposed to other areas of Chapter 9, to improve clarity and reflect current TCEQ training practices.

Section by Section Discussion

The commission proposes to amend §9.11, Definitions, in order to reduce repetition in the existing rule. Additionally, the commission proposes to amend the title of §9.11 from "Definition" to "Definition of Training."

The commission proposes to amend §9.12, Scope, in order to reduce repetition in the existing rule. Additionally, the commission proposes to amend the title of §9.12 from "Scope" to "Training Components."

The commission proposes to amend §9.13, Eligibility, to remove outdated program language and to clarify the functions of the Training Unit to mirror updates to agency policy (OPP 16.01, Training and Development).

The commission proposes to amend §9.15, Reimbursement, to implement HB 3337, which requires the commission to adopt rules requiring that before an agency administrator or employee may be reimbursed for tuition expenses, the executive director must authorize the tuition reimbursement payment (Texas Government Code, §656.048). Additionally, the commission proposes to amend §9.15 to remove outdated program language and to clarify the functions of the Training Unit to mirror updates to agency policy (OPP 16.01, Training and Development).

The commission proposes to amend §9.16, Training Records, to remove outdated program language and to clarify the functions of the Training Unit to mirror updates to agency policy (OPP 16.01, Training and Development).

The commission proposes to amend §9.17, At-Will Employment Status, to clarify that participation in the agency's training and education programs does not affect an employee's at-will status.

Fiscal Note: Costs to State and Local Government

Maribel Montalvo, Analyst in the Chief Financial Officer's Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rules would implement HB 3337 and require an agency executive director to authorize tuition reimbursement payments thereby ensuring appropriate executive-level oversight of potentially costly reimbursements to an agency administrator or employee for tuition expenses.

HB 3337 requires that an agency adopt rules to implement the bill by September 1, 2015. Along with revisions to agency policy, Chapter 9, Subchapter B, Employee Training and Education, will also need to be updated to reflect the changes of HB 3337. There are no costs expected for the agency or any other unit of state or local government to implement or administer the proposed rules.

Public Benefits and Costs

Ms. Montalvo has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules would be a greater oversight through executive level authorization of the agency's tuition reimbursement payments. The agency currently has a policy in place for reimbursement; HB 3337 added another level of approvals; however, it does not require additional resources to implement it.

No fiscal implications are anticipated for businesses or individuals due to implementation or administration of the proposed rules.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. Furthermore, it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a).

A "major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Because the specific intent of the proposed rulemaking is procedural in nature and revises procedures concerning how training reimbursements are approved, the rulemaking does not meet the definition of a "major environmental rule."

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated this proposed rulemaking action and performed a preliminary analysis of whether the proposed rulemaking is subject to Texas Government Code, Chapter 2007. The primary purpose of the proposed rulemaking is to revise TCEQ rules regarding the approval process for reimbursing trainings and to reflect current changes to how TCEQ conducts training. Promulgation and enforcement of the rules will not burden private real property. Further, the proposed rulemaking does not affect private property in a manner which restricts or limits an owner's right to the property that would otherwise exist in the absence of governmental action. Consequently, the proposed rulemaking action does not meet the definition of a takings under Texas Government Code, §2007.002(5).

Consistency with the Coastal Management Program

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 2, 2016, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Derek Baxter, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2015-039-009-AD. The comment period closes on August 8, 2016. Copies of the proposed rulemaking can be obtained from the TCEQ's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Amber Kaskie, Staffing, Classification and Organizational Development, Human Resources & Staff Services Division, at (512) 239-0137 or Yen Tran, Employment Law and Ethics Section, General Law Division, at (512) 239-4610.

Statutory Authority

The amendments are proposed under the authority of the Texas Government Code, §656.048, concerning Rules Relating to Training and Education, which provides the commission authority to adopt rules requiring that before an administrator or employee of the agency may be reimbursed under Texas Government Code, §656.047(b), the executive head of the agency must authorize the tuition reimbursement payment; and Texas Government Code, §2001.004, concerning Requirement to Adopt Rules of Practice and Index Rules, Orders, and Decisions, which requires state agencies to adopt procedural rules.

Additionally, the amendments are proposed under the Texas Water Code (TWC), §5.103, concerning Rules, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and TWC, §5.105, concerning General Policy, which authorizes the commission by rule to establish and approve all general policy of the commission.

The proposed amendments implement House Bill 3337, Texas Government Code, §656.041 *et seq.* (State Employee's Training Act), and TWC, §5.103, Rules.

§9.11. *Definition of Training [Definitions].*

"Training" means instruction, teaching, or other education received by an employee that is designed to enhance the ability of the employee to perform the employee's job. Training can include job-oriented training that is provided within the agency by staff, other state entities, federal organizations, or private vendors. It can also include workshops, seminars, institutes, training sessions, college courses, and other programs or activities offered outside the agency. [The following words

and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.}]

~~[(1) Education assistance—Reimbursement of specific costs for job-related learning opportunities provided by universities, colleges, or other institutions of higher learning.}]~~

~~[(2) In-service training and education—Job-oriented training that is provided within the agency by staff, other state entities, federal organizations, or private vendors.}]~~

~~[(3) Out-of-agency staff development—Workshops, seminars, institutes, training sessions, college courses, and other programs or activities offered outside the agency either within or outside the state.}]~~

§9.12. Training Components [Scope].

Employee training and education consists of [includes two components: the] employee training opportunities [program] and the education assistance program.

(1) Employees are offered [The employee training program includes the full range of] training opportunities [provided] through in-house [in-service] training and education as well as out-of-agency staff development opportunities.

(A) In-house training is job-oriented training that is provided within the agency by staff, other state entities, federal organizations, or private vendors. In-house training can include core courses identified by the executive director, technical courses, computer training (from basic to advanced courses), staff development courses, and management development courses. [In-service training includes, but is not limited to:]

~~[(i) core curricula courses identified by the executive director for completion by all employees to ensure compliance with federal and state mandates, as well as critical agency policies and procedures;]~~

~~[(ii) technical courses that satisfy technical knowledge and skill requirements for effective job performance in a specific classification series;]~~

~~[(iii) computer-related basic and advanced courses for desktop applications, as well as advanced courses for information technology professionals and other staff who use advanced computer applications;]~~

~~[(iv) staff development courses that satisfy general knowledge and skill requirements for effective job performance in diverse classification series; and]~~

~~[(v) management development courses that satisfy knowledge and skill requirements for effective job performance in supervisory, managerial, and executive positions.}]~~

(B) Out-of-agency staff development is offered outside the agency either within or outside the state and includes [but is not limited to,] workshops, seminars, institutes, training sessions, and other programs or activities [offered outside the agency either within or outside the state].

~~[(C) The employee training program encompasses training delivered via a variety of media including, but not limited to, computer-based, videotape, Internet-based, satellite-broadcast, webcast, and instructor-led.}]~~

(2) The education assistance program provides external learning [out-of-agency staff development] opportunities to enhance job-related knowledge and skills. It includes courses provided by an accredited [through a] university, college, or other institution of

higher learning delivered through [via] a variety of different [delivery] media, such as instructor-led courses, online courses, and courses not credited towards a degree [or Internet-based].

§9.13. Eligibility.

(a) Employee training opportunities [program]. Employees are eligible to participate in the agency's training opportunities [program] to increase their job-related knowledge and skills, without regard to race, color, religion, sex, sexual orientation, age, national origin, disability, or veteran status.

(b) Education assistance program. Employees [Full-time employees] may participate in the agency's education assistance program without regard to the employee's race, color, religion, sex, sexual orientation, age, national origin, disability, or veteran status. To qualify for reimbursement, employees must [if they] meet the following eligibility requirements as set forth in the agency's policies:

- (1) full-time employment requirement;
- (2) [(4)] tenure requirement;
- (3) [(2)] performance requirements; and
- (4) [(3)] conduct requirements.

§9.15. Reimbursement.

(a) Employee training opportunities [program].

(1) Funding for employee training is provided by [through] the Human Resources and Staff Services Division [agency's central training account] or the employee's [respective] division.

(2) The employee's [respective] division also funds travel-related expenses for training participation.

(b) Education assistance program. Upon the recommendation of the employee's division director and with approval of the executive director, the [The] employee's respective division funds may be used to reimburse the employee for [reimbursement of] specific tuition-related expenses that have been approved by the division director. To qualify for reimbursement, the employee must successfully complete the [courses] requested course at [by the employee must be provided through] an accredited institution of higher education, [learning] and the course must be:

(1) directly related to improving specific knowledge and skills pertinent to essential job functions of the current or prospective position;

~~[(2) related to essential job functions of the current or prospective position;]~~

(2) [(3)] needed for a special job assignment; or

(3) [(4)] required for a career ladder promotion.

§9.16. Training Records.

(a) The Human Resources and Staff Services Division maintains [Training Academy shall maintain] training records for all agency employees using [via] an electronic learning [automated training] management system.

(b) Employees can choose to place a copy of their training records in their personnel file. [Supervisors shall maintain individual training records for their employees that include training not provided through the Training Academy.]]

§9.17. At-Will Employment Status.

Approval to participate in the agency's training and education programs does [shall] not in any way affect an employee's at-will status. Participation in these programs does [shall] not constitute a guarantee or indication of future employment in a current or prospective position.

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 24, 2016.

TRD-201603233

David Timberger

Director, General Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 239-6812



CHAPTER 116. CONTROL OF AIR POLLUTION BY PERMITS FOR NEW CONSTRUCTION OR MODIFICATION

SUBCHAPTER B. NEW SOURCE REVIEW PERMITS

DIVISION 3. PUBLIC NOTIFICATION AND COMMENT PROCEDURES

30 TAC §§116.130 - 116.134, 116.136, 116.137

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to repeal §§116.130 - 116.134, 116.136, and 116.137.

If adopted, the commission will submit the repeal of §§116.130 - 116.134, 116.136, and 116.137 to the United States Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP).

Background and Summary of the Factual Basis for the Proposed Rules

Sections 116.130 - 116.134, 116.136, and 116.137 were adopted August 27, 1993, (18 TexReg 5746) as public notification and comment procedures for New Source Review air permit applications in a rulemaking action that restructured the existing air quality permit program rules for the Texas Air Control Board. Except for §116.136, these rules were repealed and readopted by the Texas Natural Resource Conservation Commission (TNRCC, predecessor of the TCEQ) on June 17, 1998, and re-submitted to EPA. With the exception of §116.130(c) (regarding hazardous air pollutants which are not part of the SIP), these rules were approved into the SIP, as published in the September 18, 2002, issue of the *Federal Register* (67 FedReg 58709).

In 1999, the 76th Texas Legislature enacted House Bill (HB) 801, which revised public participation in environmental permitting. TCEQ adopted rules to implement HB 801 (and other bills) that consolidated the public participation rules across the agency as published in the September 24, 1999, issue of the *Texas Register* (24 TexReg 8190). That rulemaking included rules in 30 TAC Chapter 39 (Public Notice), Subchapters H (Applicability and General Provisions) and K (Public Notice of Air Quality Permit Applications), that apply to certain air quality permit applications declared administratively complete on or after September 1, 1999. TCEQ submitted portions of the rulemaking to implement HB 801 to the EPA as revisions to the SIP. The public participation rules in Chapter 116 that were superseded by the rules adopted to implement HB 801 were not repealed at that time

because the rules applied to pending applications that were declared administratively complete before September 1, 1999.

In 2010, TCEQ conducted a rulemaking published in the June 18, 2010, issue of the *Texas Register* (35 TexReg 5198) that clarified the public participation requirements for air quality applications. TCEQ's adoption notice included discussions addressing EPA's concerns about TCEQ's SIP submittal of the 1999 rules to implement HB 801, as well as several TCEQ public participation rulemakings for air quality permit applications adopted from 1999 - 2010, and the final set of rules submitted as SIP revisions in 2010. EPA's approvals of the 2010 submittal are published in the January 6, 2014, issue of the *Federal Register* (79 FedReg 551); the March 30, 2015, issue of the *Federal Register* (80 FedReg 16573); and the October 6, 2015, issue of the *Federal Register* (80 FedReg 60295). In addition, EPA has approved subsequent changes to public participation rules adopted by the commission in 2014, as published in the November 20, 2014, issue of the *Federal Register* (79 FedReg 66626). At the time of this proposal, no public participation rules remain pending EPA review. Inclusion in the SIP ensures the public participation requirements are federally enforceable.

No applications for which §§116.130 - 116.134, 116.136, and 116.137 are applicable remain pending with the commission. Repealing the obsolete rules and revising the SIP by removing §§116.130 - 116.134, 116.136, and 116.137 would eliminate any possible confusion as to what the applicable public participation requirements are in the SIP. The public's opportunity to participate in the air permitting process will not change nor be affected in any way as a result of this repeal.

Federal Clean Air Act §110(l)

All revisions to the SIP are subject to EPA's finding that the revision will not interfere with any applicable requirement concerning attainment and reasonable further progress of the national ambient air quality standards, or any other requirement of the Federal Clean Air Act, 42 United States Code (USC), §7410(l). This statute has been interpreted to be whether the revision will "make air quality worse" (*Kentucky Resources Council, Inc. v. EPA*, 467 F.3d 986 (6th Cir. 2006), cited with approval in *Galveston-Houston Association for Smog Prevention (GHASP) v. U.S. EPA*, 289 Fed. Appx. 745, 2008 WL 3471872 (5th Cir.)). Because procedural rules have no direct nexus with air quality, and because the current applicable public participation rules are approved as part of the Texas SIP, EPA should find that there is no backsliding from the current SIP and that this SIP revision complies with 42 USC, §7410(l).

Section by Section Discussion

The commission proposes the repeal of §116.130 (Applicability); §116.131 (Public Notification Requirements); §116.132 (Public Notice Format); §116.133 (Sign Posting Requirements); §116.134 (Notification of Affected Agencies); §116.36 (Public Comment Procedures); and §116.137 (Notification of Final Action by the Commission), because the rules were superseded and are obsolete. These rules apply to air permitting applications that were administratively complete before September 1, 1999. No pending applications meet that criterion.

Fiscal Note: Costs to State and Local Government

Jeffrey Horvath, Analyst in the Chief Financial Officer's Division, has determined that for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the

agency or for other units of state or local government as a result of administration or enforcement of the proposed rules.

The proposed rules would repeal Chapter 116, Subchapter B, Division 3 regarding public notice and participation, as these rules are obsolete. The obsolete rules apply to case-by-case air quality permit applications that were administratively complete before September 1, 1999. HB 801 superseded the public participation rules in Chapter 116 for all applications received on and after September 1, 1999. The rules that implemented HB 801 nullified the rules that would be repealed.

The rules are proposed for repeal as they have been obsolete since the Air Permits Division completed review of the last administratively complete application submitted before September 1, 1999. The current requirements for public participation for air permitting applications are in Chapter 39 and are not affected by this proposed rulemaking. The proposed rulemaking does not remove or add fees and does not affect requirements for any regulated entities. No fiscal implications are anticipated for the agency or any other unit of state or local government.

Public Benefits and Costs

Mr. Horvath has also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be clear and concise rules regarding the public participation requirements for air permit applications.

The proposed rules are not anticipated to result in fiscal implications for businesses or individuals. The rules are proposed for repeal as they have been obsolete since the Air Permits Division completed review of the last administratively complete application submitted before September 1, 1999. The current requirements for public participation for air permitting applications are in Chapter 39 and are not affected by this proposed rulemaking. The proposed rulemaking does not remove or add fees and does not affect requirements for any regulated entities.

Small Business and Micro-Business Assessment

No adverse fiscal implications are anticipated due to the implementation or administration of the proposed rules for the first five-year period the proposed rules are in effect for small or micro-businesses. The rulemaking does not propose additional or new requirements or expand or delete the coverage of the current requirements.

Small Business Regulatory Flexibility Analysis

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules do not adversely affect a small or micro-business in a material way for the first five years the proposed rules are in effect.

Local Employment Impact Statement

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

Draft Regulatory Impact Analysis Determination

The commission reviewed the rulemaking action in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the action is not subject to Texas Government Code, §2001.0225 because it does not meet

the definition of a "major environmental rule" as defined in that statute. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks 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 the state or a sector of the state. The proposed repeal of §§116.130 - 116.134, 116.136, and 116.137 is procedural in nature and is not specifically intended to protect the environment or reduce risks to human health from environmental exposure, nor does it affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Rather, this rulemaking repeals obsolete rules and proposes that EPA remove them from the SIP to ensure there is no confusion regarding the applicable rules for public participation for air quality permit applications.

As defined in the Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: exceed a standard set by federal law, unless the rule is specifically required by state law; exceed an express requirement of state law, unless the rule is specifically required by federal law; exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or adopt a rule solely under the general authority of the commission. The proposed repeal of §§116.130 - 116.134, 116.136, and 116.137 do not exceed an express requirement of state law or a requirement of a delegation agreement, and were not developed solely under the general powers of the agency, but is authorized by specific sections of the Texas Government Code and the Texas Water Code that are cited in the statutory authority section of this preamble. Therefore, this rulemaking is not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225(b).

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Takings Impact Assessment

The commission evaluated the proposed rulemaking and performed an analysis of whether Texas Government Code, Chapter 2007, is applicable. The proposed repeal of §§116.130 - 116.134, 116.136, and 116.137 is procedural in nature and will not burden private real property. The proposed rulemaking does not affect private property in a manner that restricts or limits an owner's right to the property that would otherwise exist in the absence of a governmental action. Consequently, this rulemaking action does not meet the definition of a taking under Texas Government Code, §2007.002(5). The proposed rulemaking does not directly prevent a nuisance or prevent an immediate threat to life or property. Therefore, this rulemaking action will not constitute a taking under Texas Government Code, Chapter 2007.

Consistency with the Coastal Management Program

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) relating to rules subject to the Coastal Management Program and will, therefore, require that goals and policies of the Texas Coastal Management Program (CMP) be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Advisory Committee and determined that the rulemaking is procedural in nature and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

Effect on Sites Subject to the Federal Operating Permits Program

All of the requirements in Chapter 116 are applicable requirements under 30 TAC Chapter 122 (Federal Operating Permits Program). However, the sections proposed for repeal are procedural rules applicants must follow to be issued a New Source Review permit for applications administratively complete prior to September 1, 1999, and would not have been directly referenced in Title V permits. Therefore, no effect on sites subject to the Federal Operating Permits program is expected if the commission repeals these rules.

Announcement of Hearing

The commission will hold a public hearing on this proposal in Austin on August 2, 2016, at 2:00 p.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal from 1:30 p.m. to 2:00 p.m., prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services, at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

Submittal of Comments

Written comments may be submitted to Sherry Davis, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at: <http://www1.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2016-026-116-AI. The comment period closes on August 8, 2016. Copies of the proposed rulemaking can be obtained from the commission's website at http://www.tceq.texas.gov/rules/propose_adopt.html. For further information, please contact Tasha Burns, Air Permits Division, at (512) 239-5868.

Statutory Authority

The repeals are proposed under Texas Water Code, §5.103, Rules and §5.105, General Policy; Texas Health and Safety Code (THSC), §382.002, Policy and Purpose; THSC, §382.003, Definitions; THSC, §382.011, General Powers and Duties; THSC, §382.012, State Air Control Plan; THSC, §382.017, Rules; THSC, §382.051, Permitting Authority of Commission; Rules; THSC, §382.0511, Permit Consolidation and Amendment; THSC, §382.0518, Preconstruction Permit; THSC, §382.055, Review and Renewal of Preconstruction Permit;

THSC, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing; THSC, §382.058, Notice of and Hearing on Construction of Concrete Plant Under Permit by Rule, Standard Permit, or Exemption; and 42 United States Code (USC), §7401, *et seq.*

The proposed repeals implement TWC, §5.103 and §5.105; THSC, §§382.002, 382.003, 382.011, 382.012, 382.017, 382.051, 382.0511, 382.0518, 382.055, 382.056, and 382.058; and 42 USC, §7401, *et seq.*

§116.130. *Applicability.*

§116.131. *Public Notification Requirements.*

§116.132. *Public Notice Format.*

§116.133. *Sign Posting Requirements.*

§116.134. *Notification of Affected Agencies.*

§116.136. *Public Comment Procedures.*

§116.137. *Notification of Final Action by the Commission.*

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 24, 2016.

TRD-201603209

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 239-2141

TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 9. EXPLORATION AND LEASING OF STATE OIL AND GAS

SUBCHAPTER D. PAYING ROYALTY TO THE STATE

31 TAC §9.51

BACKGROUND AND ANALYSIS OF PROPOSED AMENDMENT

On behalf of the School Land Board ("SLB"), the General Land Office ("GLO") proposes an amendment to 31 TAC §9.51 (relating to Royalty and Reporting Obligations to the State) by adding a new subsection (b)(3)(E)(iv).

The proposed amendment clarifies the procedures and standards for the reduction by the SLB of interest charged or penalties assessed under Texas Natural Resources Code §52.131 or any other interest or penalties assessed by the Land Commissioner relating to unpaid or delinquent royalties, or unfiled or delinquent reports.

FISCAL AND EMPLOYMENT IMPACTS

Brian Carter, Senior Deputy Director of Asset Enhancement of the GLO, has determined that (i) during the first five-year period

the proposed amended rule is in effect, there will be no cost or fiscal implications for local governments expected as a result of enforcing or administering the rule, and that any fiscal impact of reduced penalties and/or interest on the State or the permanent school fund will be offset by reducing the inherent risks of litigation and/or by the more efficient use of audit, revenue reporting, and collections staff in pursuing other and greater amounts due relating to unpaid or delinquent royalties of other lessees, and (ii) there will be no impact on employment expected.

PUBLIC BENEFIT

Mr. Carter also has determined that, during the first five-year period the proposed amended rule is in effect, the public benefits expected from the proposed amendment include clarification of the procedures and standards used by the SLB in evaluating requests for reduced penalties and/or interest, greater transparency in agency decision making, and more efficient use of staff time for maintaining income into the permanent school fund. Mr. Carter has further determined that, during the same period, there are no persons required to comply with this rule amendment, and that there are no probable costs to persons who seek to take advantage of the rule amendment.

PUBLIC COMMENT REQUEST

Comments may be submitted to Walter Talley, Office of General Counsel, Texas General Land Office, 1700 N. Congress Avenue, Austin, Texas 78701 or by facsimile (512) 463-6311, by no later than 30 days after publication.

Mark Havens, General Counsel of the GLO, has determined, and certifies, that the proposed amendment is within the SLB's authority to adopt.

STATUTORY AUTHORITY

This amendment to 31 TAC §9.51 is proposed pursuant to the authority set out in Texas Natural Resources Code (1) §52.131(j), which states that the SLB may provide procedures and standards for reduction of interest charged or penalties assessed under Texas Natural Resources Code §52.131 or any other interest or penalties assessed by the Land Commissioner relating to unpaid or delinquent royalties, and (2) §52.131(h), which states that the Land Commissioner may establish by rule a reasonable penalty for late filing of reports or any other instrument to be filed pursuant to Texas Natural Resources Code, Chapter 52.

§9.51. *Royalty and Reporting Obligations to the State.*

(a) (No change.)

(b) Monetary royalties and reports.

(1) - (2) (No change.)

(3) Penalties and interest.

(A) - (D) (No change.)

(E) Reduction of penalty and/or interest. For royalties due on or after February 26, 2010, interest rate assessed on delinquent royalties shall be determined as of the date of the first business day of the year the royalty becomes delinquent and will be reduced to prime plus one percent.

(i) - (iii) (No change.)

(iv) A lessee may request in writing a reduction of interest charged or penalties assessed under Texas Natural Resource Code §52.131 or any other interest or penalties assessed by the commissioner relating to unpaid or delinquent royalties, or late filed reports. The board may consider any factors when considering such a request,

including the facts and circumstances supporting the lessee's request for a reduction, any history of delinquency by the lessee, any good faith attempts of the lessee to rectify the consequences of the delinquency, including by paying the amount of the unpaid or delinquent royalty, the recommendations of staff, and the costs and risks associated with litigation. For governmental efficiency, the board may delegate to the commissioner and/or to staff designated by the commissioner for this purpose the authority to reduce interest charged or penalties assessed relating to unpaid or delinquent royalties if the aggregate unreduced amount of such penalties and interest is equal to or less than a de minimis amount established by the board from time to time at a regular or special public meeting.

(4) - (5) (No change.)

(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 June 22, 2016.

TRD-201603173

Anne L. Idsal

Chief Clerk, Deputy Land Commissioner

General Land Office

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 475-1859



PART 4. SCHOOL LAND BOARD

CHAPTER 151. OPERATIONS OF THE SCHOOL LAND BOARD

31 TAC §151.6

The School Land Board (SLB) proposes an amendment to 31 Texas Administrative Code §151.6, relating to the Procedures for the Release of Funds from the Real Estate Special Fund Account. The amendment affects paragraph (1)(C).

The proposed amendment to §151.6(1)(C) more accurately reflects how the Chief Investment Officer of the Texas General Land Office will calculate for the School Land Board (SLB) the amounts of money available for release from the Real Estate Special Fund Account (RESFA) to either the Available School Fund (ASF) or the State Board of Education (SBOE) for investment in the Permanent School Fund (PSF), as required by §51.413(b) of the Texas Natural Resources Code.

Rusty Martin, Chief Investment Officer for the Texas General Land Office, has determined that for each year of the first five years the amended section as proposed is in effect there will be no fiscal implications for the state or units of local government as a result of enforcing or administering the amended section as the amendment relates solely to the administrative functions of the SLB.

Mr. Martin has also determined that there will be no effect on small business, and a local employment impact statement on the proposed amendment is not required, because the proposed rule will not have any identifiable material adverse affect on any local economy in the first five years it will be in effect.

Comments may be submitted to Mr. Walter Talley, Texas Register Liaison, Texas General Land Office, Office of General Counsel, P.O. Box 12873, Austin, Texas 78711-2873; facsimile number (512) 463-6311; email address, walter.talley@glo.texas.gov. Comments must be received no later than 5:00 p.m., 30 (thirty) days after the proposed amendment is published.

The amendment is proposed under Texas Natural Resources Code, Chapter 51, including §51.407 and §51.413(b), which authorizes the board to adopt rules to establish the procedure to be used to determine the amount and date of any transfer of money from the RESFA to either the ASF or the SBOE for investment in the PSF.

Texas Natural Resources Code §51.413 and §32.061 are affected by this proposed rulemaking.

§151.6. Procedures for the Release of Funds from the Real Estate Special Fund Account.

These rules shall establish the procedures to be used by the School Land Board (SLB) to determine the dates that releases will be made and the amounts of money that will be released on those dates from the Real Estate Special Fund Account (RESFA) to either the Available School Fund (ASF) or the State Board of Education (SBOE) for investment in the Permanent School Fund (PSF), as required by §51.413(b) of the Texas Natural Resources Code.

(1) Not later than July 31 of each even-numbered year, the Chief Investment Officer (CIO) of the General Land Office (GLO) will perform an analysis, using March 31 GLO investment valuation data, as follows:

(A) - (B) (No change.)

(C) Determine the average quarterly change in the amount determined in paragraph (1)(A) of this section [average market value of the Portfolio] over the trailing sixteen-quarter measurement period. Multiply this amount times 4 and add the resulting product to the amount determined in paragraph (1)(A) of this section. Round the resulting amount up or down to the nearest \$5,000,000 increment.

(2) - (3) (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 27, 2016.

TRD-201603248

Anne L. Idsal

Chief Clerk, Deputy Land Commissioner

General Land Office

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 475-1859



TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 7. PREPAID HIGHER EDUCATION TUITION PROGRAM

SUBCHAPTER N. TEXAS ACHIEVING A BETTER LIFE EXPERIENCE (ABLE) PROGRAM

34 TAC §§7.181 - 7.197

The Comptroller of Public Accounts proposes new §§7.181, concerning definitions; 7.182, concerning tax exempt status requirements; 7.183, concerning participation agreement; 7.184, concerning designated beneficiary and eligible individual; 7.185, concerning participant; 7.186, concerning fees and other charges; 7.187, concerning contributions; 7.188, concerning distributions; 7.189, concerning rollovers; 7.190, concerning change of beneficiary; 7.191, concerning change of participant; 7.192, concerning reporting; 7.193, concerning account termination; 7.194, concerning investments; 7.195, concerning refunds; 7.196, concerning termination or modification of program; and 7.197, concerning program limitations. The new sections will be under Chapter 7, Prepaid Higher Education Tuition Program, new Subchapter N, Texas Achieving a Better Life Experience (ABLE) Program.

The new sections implement Senate Bill 1664, 84th Legislature, 2015. Senate Bill 1664 amends Education Code, Chapter 54, by adding Subchapter J, Texas Achieving a Better Life Experience (ABLE) Program (hereinafter referred to as the "Texas ABLE Program" or "Program"). Senate Bill 1664 directs the Texas Prepaid Higher Education Tuition Board ("Board") to administer the new Texas ABLESM Program. Under the new law, the Program allows certain people with disabilities to have special savings accounts for disability-related expenses without losing eligibility for certain benefits under Supplemental Security Income, Medicaid, and other public benefits.

New §7.181 sets out definitions to be used in the Texas ABLE Program.

New §7.182 details the tax exempt status requirements of the Texas ABLE Program.

New §7.183 details the criteria to be included in the Texas ABLE Program's participation agreement and the information that must be provided by the participant on the agreement upon enrollment in the Texas ABLE Program.

New §7.184 details the requirements of a designated beneficiary and eligible individual for the Texas ABLE Program.

New §7.185 details the requirements of a participant for the Texas ABLE Program.

New §7.186 provides that fees and other charges may be assessed to administer the Texas ABLE Program.

New §7.187 explains the type of and limitations on contributions that will be accepted by the Texas ABLE Program.

New §7.188 details criteria related to distributions of the Texas ABLE Program.

New §7.189 provides details about the Texas ABLE Program's acceptance or transfer of rollover funds to or from other qualified ABLE programs.

New §7.190 provides information about a change of beneficiary of a Texas ABLE Program account.

New §7.191 provides information about a change of participant of a Texas ABLE Program account.

New §7.192 provides information on the Texas ABLE Program's reporting requirements.

New §7.193 lists information on voluntary and involuntary terminations of Texas ABLE Program accounts.

New §7.194 provides information on investment of funds in a Texas ABLE Program account.

New §7.195 details criteria for refund of available funds in a Texas ABLE Program account.

New §7.196 provides information on termination or modification of the Texas ABLE Program.

New §7.197 details limitations of the Texas ABLE Program.

Tom Currah, Chief Revenue Estimator, has determined that for the first five-year period the rules 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 rules are in effect, the public benefit anticipated as a result of enforcing the rules will be by outlining eligibility provisions and operating procedures of the Texas ABLE program. The proposed rules would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rules.

Comments on the proposal may be submitted to Linda A. Fernandez, Director, Educational Opportunities and Investment Division, P.O. Box 13407, Austin, Texas 78711-3407. Comments must be received no later than 30 days from the date of publication of the proposals in the *Texas Register*.

The new sections are proposed under Senate Bill 1664, 84th Legislature, 2015, which requires the Board to administer the Texas Achieving a Better Life Experience Program and Education Code, §54.904(a)(2), which authorizes the Board to adopt rules to implement the Program.

The new sections implement Education Code, Chapter 54, Subchapter J (Texas Achieving a Better Life Experience (ABLE) Program).

§7.181. Definitions.

(a) The following words, terms, and phrases, when used in this subchapter, shall have the following meanings. In addition, definitions set forth in Internal Revenue Code, §529A and Senate Bill 1664, 84th Legislature, 2015 are incorporated in these rules.

(1) ABLE account or "account"--Has the meaning assigned by Internal Revenue Code, §529A and means an account in the Texas ABLE Program.

(2) ABLE Program or "Program"--The Texas Achieving a Better Life Experience Program created under Education Code, Chapter 54, Subchapter J.

(3) Available funds--The balance of funds held in an ABLE account, after deducting any holds, fees or expenses, or pending transactions, including funeral expenses that may be incurred following the death of a designated beneficiary.

(4) Board--Prepaid Higher Education Tuition Board established under Education Code, §54.602.

(5) Contribution--Amounts paid by contributors to an ABLE account.

(6) Contributor--Any person who makes a contribution to an ABLE account.

(7) Designated beneficiary--A resident of this state with a disability who is an eligible individual and named as the beneficiary of an ABLE account. The term may also include out-of-state residents to the extent allowed by law.

(8) Disability certification--With respect to the individual who is the eligible individual, a certification to the satisfaction of the Secretary of the United States Treasury by the individual or the parent or custodian, or other authorized fiduciary of the individual, that certifies that the individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, or is blind within the meaning of Social Security Act, §1614(a)(2) and such blindness or disability occurred before the date on which the individual attained age 26.

(9) Distribution--Any amounts paid by the ABLE Program to or on behalf of an eligible individual.

(10) Eligibility affidavit--The participant's self-verification under oath in a format acceptable to the Board or as required by state or federal regulations that the designated beneficiary of the account is currently an eligible individual as defined by Internal Revenue Code, §529A because:

(A) the designated beneficiary of the account is currently entitled to benefits based on blindness or disability under Social Security Act, Title II or XVI and such blindness or disability occurred before the date on which the individual attained age 26; or

(B) a disability certification with respect to the designated beneficiary that meets the requirements of Internal Revenue Code, §529A(e)(2) has been filed with the Secretary of the United States Treasury for such taxable year.

(11) Eligible individual--A person who meets the requirements of Internal Revenue Code, §529A and is certified by an eligibility affidavit to the Board as eligible to participate in the ABLE Program.

(12) Eligible member of the family--An eligible individual and a member of the family of the former beneficiary to the extent provided by Internal Revenue Code, §529A.

(13) Excess contribution--Contributions that would cause an ABLE account to exceed:

(A) the amount established by the Board in accordance with Internal Revenue Code, Title 26, §529(b)(6); or

(B) the amount in effect under Internal Revenue Code, Title 26, §2503(b) for the calendar year in which the taxable year begins in accordance with Internal Revenue Code, §529A.

(14) Financial institution--A bank, a trust company, a depository trust company, an insurance company, a broker-dealer, a registered investment company or investment manager, the Texas Treasury Safekeeping Trust Company, or another similar financial institution authorized to transact business in this state.

(15) Internal Revenue Code--The Internal Revenue Code of 1986.

(16) Investment options--Investment options offered by the Program for selection by the participant.

(17) Participant--A designated beneficiary or the parent or custodian or other fiduciary of the beneficiary who has entered into a participation agreement.

(18) Participation agreement--A contract between a participant and the Board under this subchapter that conforms to the requirements prescribed by this subchapter and Internal Revenue Code, §529A and includes the application for enrollment submitted in good order.

(19) Plan manager--An entity, including a financial institution, any state or federal agency, contractor or state or multi-state consortium engaged by the Board to carry out certain duties as specified and delegated by the Board for administration of the Program.

(20) Qualified disability expenses--Any expenses related to the eligible individual's blindness or disability that are made for the benefit of the eligible individual who is the designated beneficiary, and includes expenses for education, housing, transportation, employment training and support, assistive technology and personal support services, health, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and any other expenses that may be identified from time to time in future guidance published in the Internal Revenue Bulletin or by amendments to Internal Revenue Code, §529A.

(21) Transfer to state--The reimbursement that may be paid to the state Medicaid program upon the designated beneficiary's death. After timely claim submitted in good order, the reimbursement will be made from any available funds and will be calculated according to Internal Revenue Code, §529A(f) and any exceptions identified in the Medicaid Estate Recovery Program (MERP).

(b) In the event of a conflict in the definitions, the Program definitions shall be governed by Internal Revenue Code, §529A, Education Code, Chapter 54, Subchapter J, and these rules, in that order.

§7.182. Tax Exempt Status Requirements.

The provisions of this section are intended to meet the requirements of Internal Revenue Code, §529A.

(1) The Board, to the extent allowed by law, may contract with another state, including a state or multi-state consortium, that administers a qualified ABLE program as authorized by Internal Revenue Code, §529A to act as plan manager, provide certain services under a contractual arrangement or provide residents of this state with access to a qualified ABLE program.

(2) A contribution to an ABLE account must be made in cash or cash equivalent.

(3) The Board will monitor contributions to an ABLE account so that total contributions to an ABLE account for a designated beneficiary do not result in aggregate contributions from all contributors exceeding the limitation in effect under Internal Revenue Code, §529A(b)(2)(B).

(4) The Board will monitor contributions to an ABLE account so that contributions will not be accepted if the aggregate balance, including the contribution amount and any earnings, of an ABLE account for a designated beneficiary would exceed an excess contribution as defined in these rules.

(5) The Board shall provide separate accounting for each designated beneficiary.

(6) A designated beneficiary is limited to one ABLE account, and each ABLE account may have only one owner, who will be the designated beneficiary. Unless, the participant is also the designated beneficiary, the participant may not have and will not acquire a beneficial interest in the ABLE account, and the participant will administer the account for the benefit of the designated beneficiary.

(7) A designated beneficiary must be a Texas resident at the time of establishing and maintaining an active account in the Texas ABLE Program. The Board may act to accept out-of-state residents into the Program to the extent allowed by law.

(8) A designated beneficiary may, directly or indirectly, direct the investment of any contributions to an ABLE account, only to the extent allowed by Internal Revenue Code, §529A.

(9) The Board shall determine the earnings portion of each distribution, if any, in accordance with methods that are consistent with Internal Revenue Code, §529A; any earnings on contributions included in distributions for qualified disability expenses shall not be includible in gross income to the extent provided by Internal Revenue Code, §529A.

(10) The Board shall report distributions of the designated beneficiary to the Secretary of the United States Treasury, as required by Internal Revenue Code, §529A.

(11) The participant, designated beneficiary, and any other contributor, may not use any interest in or portion of an ABLE account as security for a loan.

(12) Available funds may be rolled over to the extent allowed by Internal Revenue Code, §529A and United States Treasury regulations as described in §7.189 of this title (relating to Rollovers).

(13) A change in the designated beneficiary of an ABLE account during a taxable year shall not be treated as a taxable distribution on Internal Revenue Service Form 1099QA for that taxable year for purposes of paragraph (9) of this section if the new beneficiary is an eligible member of the family.

(14) Except as provided by the Secretary of the United States Treasury, and for the purpose of applying Internal Revenue Code, §72, all distributions during a taxable year shall be treated as one distribution and the value of the account shall be computed and reported on Internal Revenue Service Form 1099QA as of the close of the calendar year in which the taxable year begins.

(15) The Board shall submit notices, statements, and reports as required to maintain compliance with Internal Revenue Code, §529A and any other state and federal requirements.

(16) The Board will make any transfers to state in compliance with Internal Revenue Code, §529A and any exceptions allowed by the Medicaid Estate Recovery Program (MERP).

§7.183. Participation Agreement.

(a) The Board will designate the start date of the Texas ABLE Program. The Board may begin enrolling participants as soon as reasonably practical to allow sufficient time for successful development and implementation of the Program. To enroll in the Program, a participant shall enter into a participation agreement with the Board to establish an ABLE account for an Eligible Individual.

(b) The participation agreement may include, but is not limited to, the following terms:

(1) the requirements and applicable restrictions for:

(A) opening an ABLE account;

(B) making contributions to an ABLE account; and

(C) limiting the directing of the investment of contributions, earnings, or balance of the account, as provided under Internal Revenue Code, §529A.

(2) The eligibility requirements for a participant to enter into a participation agreement and the rights of the participant and designated beneficiary, if other than the participant;

(3) administrative and other fees and charges applicable to the ABLE account;

(4) the terms and conditions under which an ABLE account or participation agreement may be modified, transferred, or terminated; and

(5) any other terms and conditions the Board considers necessary or appropriate, including those necessary to conform the ABLE account to the requirements of Internal Revenue Code, §529A and other applicable state or federal laws or requirements.

(c) The participant must provide the following information on the participation agreement:

(1) the name, address, social security number or tax identification number, telephone number, relationship to beneficiary, and email, if any, of the participant;

(2) the name, address, date of birth, and social security number of the designated beneficiary;

(3) an eligibility affidavit in a format approved by the Board or required by state or federal regulations to self-certify that the designated beneficiary is an eligible individual;

(4) directions related to investment of account contributions and earnings, if any;

(5) acceptance of the terms and conditions of the Texas ABLE Program, including any subsequent modifications, transfers, amendments, or terminations;

(6) acceptance of any fees and charges applicable to a Texas ABLE account;

(7) acceptance of the terms under which another person may be substituted as the designated beneficiary;

(8) acceptance of the terms under which another person may be substituted as the participant;

(9) acceptance of the calendar year as the taxable year for purposes of the Program;

(10) verification under oath that, unless the participant is also the designated beneficiary, the participant does not have and will not acquire a beneficial interest in the ABLE account and that the participant will administer the account for the benefit of the designated beneficiary; and

(11) any other information required by the Board.

(d) If the Board finds a participant has made a material misrepresentation regarding personal information or eligibility on the participation agreement or in any communication regarding the Texas ABLE Program, the Board may refund the balance of any available funds in the ABLE account subject to any unpaid expenses or fees due the Program and, if applicable, transfer to state following the designated beneficiary's death.

(e) The Board may amend a participation agreement throughout the term of the agreement.

(f) The participant is responsible for maintaining up-to-date contact information for the ABLE account.

(g) The terms of the participation agreement shall be binding on the designated beneficiary and participant.

(h) The rights of participants and designated beneficiaries are subject to the provisions of these rules; Education Code, Chapter 54, Subchapter J; Internal Revenue Code, §529A; and the terms and conditions of the participation agreement. To the extent of irreconcilable conflict, the provisions of Internal Revenue Code, §529A; Education

Code, Chapter 54, Subchapter J; and these rules prevail over the participation agreement.

(i) Any amendment to Internal Revenue Code, §529A; Education Code, Chapter 54, Subchapter J; or these rules that would apply to a participation agreement, will automatically govern over the participation agreement to the extent of any conflict, and the participation agreement will be automatically amended to accommodate such changes. The Board shall provide prompt notification to participants of any such amendments in written or electronic form as determined by the Board.

§7.184. Designated Beneficiary and Eligible Individual.

(a) Subject to any changes in federal or state laws, an individual is an eligible individual for a taxable year if during such taxable year:

(1) the individual is entitled to benefits based on blindness or disability under Social Security Act, Title II or XVI and such blindness or disability occurred before the date on which the individual attained age 26; or

(2) a disability certification with respect to such individual that meets the requirements of Internal Revenue Code, §529A(e)(2) has been filed with the Secretary of the United States Treasury for such taxable year.

(b) Further, an individual is an eligible individual only if the individual is a resident of Texas at the time the ABLE account is established. The Board may act to accept out-of-state residents into the program to the extent allowed by law.

(c) If at any time, the Program becomes aware that the eligible individual no longer meets any residency requirements, or no longer meets the requirements of Internal Revenue Code, §529A, the individual's ABLE account will be closed and any available funds will be refunded to the participant on behalf of the designated beneficiary. In the event that available funds are refunded by the Program because of failure to meet residency requirements or failure to meet the requirements of Internal Revenue Code, §529A, the Program will provide advance written or electronic notification to the participant of a pending refund within a reasonable time, but not less than thirty (30) days, prior to the refund by the Program.

(d) The participant shall recertify that the designated beneficiary is an eligible individual:

(1) periodically as required by the Board in a form acceptable to the Board, or

(2) upon request to reestablish a closed account.

(e) Beginning on the first day of the following calendar year that a beneficiary ceases to be an eligible individual, the Texas ABLE Program will no longer accept contributions to the beneficiary's ABLE account.

§7.185. Participant.

(a) The participant must be the designated beneficiary or a fiduciary authorized by law to act on behalf of the designated beneficiary, including a parent, guardian, custodian, or trustee. The Board may limit the types of fiduciaries allowed to be participants.

(b) Because a designated beneficiary is limited to one ABLE account, the participant who applies for enrollment must have the legal authority to act on behalf of a beneficiary. The Board may determine who has legal authority to apply for enrollment on behalf of a designated beneficiary, and may require written consent from individuals who have legal authority to act on behalf of a beneficiary.

(c) A participant who is not the designated beneficiary may not have or acquire a beneficial interest in an account.

(d) A participant who is not the designated beneficiary must administer the account for the benefit of the designated beneficiary.

§7.186. Fees and Other Charges.

(a) As authorized by Education Code, Subchapter J, §54.9045, the Board may collect, or authorize the collection of, fees and other charges in connection with any agreement, contract, or transaction relating to the Texas ABLE Program in amounts not exceeding the amount necessary to recover the cost of establishing and maintaining the Program.

(b) The Board may assess, or authorize the assessment of, fees and other charges to an ABLE account to administer the Program.

§7.187. Contributions.

(a) Any person may make contributions to an ABLE account for a taxable year, for the benefit of a designated beneficiary who is an eligible individual for such taxable year. Any contributions to an ABLE account, excluding any excess contributions, are an asset of the account for the benefit of the designated beneficiary.

(b) No contributions will be accepted for an ABLE account unless:

(1) the contribution is in U.S. dollars in the form of a check, money order, cashier's check, automatic contribution plan, ACH, or payroll deduction;

(2) the designated beneficiary is an eligible individual during the taxable year; or

(3) if such contribution would result in contributions from all contributors to an ABLE account for the taxable year to exceed an excess contribution as defined in these rules.

(c) Any contributions to an ABLE account on behalf of a designated beneficiary may be subject to any applicable Internal Revenue Service gift tax rules in effect at the time of the contribution, as provided by Internal Revenue Code, §529A.

(d) Excess contributions to an ABLE account will be rejected and refunded automatically to the contributor making the excess contribution after obtaining the taxpayer identification number of the contributor.

(e) Any contributions returned for any of the above reasons will not include earnings or interest.

(f) Informational materials used in connection with a contribution to an ABLE account must clearly indicate that the account is not insured by this state and that neither the principal deposited nor the investment return is guaranteed by the state.

§7.188. Distributions.

(a) A request for a distribution may be submitted to the Program in a format approved by the Board. The Program may request additional information as necessary to process a distribution.

(b) The participant is responsible for submitting correct information regarding a distribution to a payee.

(c) The Program is not responsible for any late fees or other fees or penalties that may be due to a payee related to the distribution.

(d) The participant is responsible for maintaining sufficient records regarding the distribution adequate to substantiate to the Internal Revenue Service or the Social Security Administration that a distribution is for a qualified disability expense.

(e) Any taxes or penalties due the Internal Revenue Service for distributions that are not qualified disability expenses are the responsibility of the participant.

§7.189. Rollovers.

(a) Direct rollovers. To the extent allowed by Internal Revenue Code, §529A, available funds in a Texas ABLE Program account may be rolled over (transferred) to another qualified ABLE program in another state (a rollover) for the same beneficiary, or for another beneficiary who is an eligible member of the family. The Texas ABLE Program will accept rollovers (transfers) of funds from a qualified ABLE program in another state for the same beneficiary, or for another beneficiary who is an eligible member of the family. Available funds from a Texas ABLE account may be rolled over (transferred) to another Texas ABLE account for another beneficiary who is an eligible member of the family.

(b) Indirect rollovers. The Program will accept indirect rollovers that are received not later than the 60th day after the date of such payment or distribution by the other qualified ABLE program, for the benefit of an eligible individual if the amount received is accompanied by a statement from the other qualified ABLE program providing:

(1) the date the account in the other qualified ABLE program was closed;

(2) the amount of contributions to the other qualified ABLE program for the calendar year in which the indirect rollover occurs; and

(3) the amount of any earnings included in the amount of the indirect rollover.

(c) Indirect rollovers of available funds from the Texas ABLE Program to another qualified ABLE program are subject to the requirements of Internal Revenue Code, §529A and subject to that state's requirements.

(d) Rollovers may not result in more than one ABLE account per designated beneficiary.

§7.190. Change of Beneficiary.

(a) A request to change the beneficiary of an ABLE account to another eligible member of the family must be submitted in a format approved by the Board.

(b) The Board may charge a fee to process a change of beneficiary for an account.

(c) A change of beneficiary that satisfies Internal Revenue Code, §529A will not be treated as a distribution.

§7.191. Change of Participant.

(a) If the participant is not the designated beneficiary, the participant may be changed to another individual that meets the requirements of a participant in accordance with §7.185 of this title (relating to Participant), upon submittal of a request to the Board in a form approved by the Board, or may be changed by operation of law or contract.

(b) If the participant is the designated beneficiary, the participant may be changed to another individual that meets the requirements of a participant in accordance with §7.185 of this title, if the beneficiary submits a request to the Board in a form approved by the Board, or upon submission of a court order.

(c) The Board may charge a fee to process a change of participant for an account.

§7.192. Reporting.

(a) The Program will provide a periodic statement of account to the participant no less than annually. The statement will include, but not be limited to, the following information related to the account for the period reported:

- (1) contributions;
- (2) distributions;
- (3) value of the account as of the report ending date; and
- (4) any earnings or losses during the period reported.

(b) The Program will report account information to the Internal Revenue Service, Social Security Administration, or other state or federal regulatory bodies as required by Internal Revenue Code, §529A, United States Treasury regulations or guidance, or other state or federal reporting requirements.

(c) The Program will issue Internal Revenue Service Forms 1099-QA and 5498-QA and any other forms mandated in accordance with Internal Revenue Service instructions for ABLE programs for the calendar year in which any distribution is made from an account.

(d) Participants may request a statement of the balance in their ABLE account at any time subject to any fees that may be charged by the Program or plan manager.

§7.193. Account Termination.

(a) Voluntary termination. A participant may voluntarily terminate an ABLE account in accordance with the terms of the participation agreement and by using the procedures approved by the Board.

(b) Involuntary termination. If the Board finds a participant has made a material misrepresentation regarding personal information or eligibility on the participation agreement or in any communication regarding the Texas ABLE Program, the Board may involuntarily terminate and refund any available funds of the ABLE account subject to any unpaid expenses or fees due the Program, and, if applicable, for transfer to state following the designated beneficiary's death. A material misrepresentation includes, but is not limited to, providing a false taxpayer identification number or a false certification that an individual is an eligible individual or eligible member of the family.

(c) A distribution related to account termination will be reported to the Internal Revenue Service and other state and federal agencies as required and may have adverse tax or benefit consequences to the beneficiary.

(d) In the event that available funds are refunded by the Program for involuntary account termination, to include but not limited to material misrepresentation, the Program will provide advance written or electronic notification to the participant of a pending refund within a reasonable time, but not less than thirty (30) days if allowed by state or federal law, prior to the refund by the Program.

§7.194. Investments.

(a) The Board shall administer and invest the assets of the Program. The Board shall serve as the trustee of the assets of the Program.

(b) The Board may delegate to duly appointed financial institutions or plan manager(s) authority to act on behalf of the Board in the investment and reinvestment of all or part of the assets of the Program and may also delegate to those financial institutions or plan manager(s) the authority to act on behalf of the Board in the holding, purchasing, selling, assigning, transferring, or disposing of any or all of the securities and investments in which the funds in the ABLE account have been invested, as well as the proceeds from the investment of those funds.

(c) The Board may select one or more financial institutions to serve as custodian of all or part of the Program's assets.

(d) In the Board's discretion, the Board may contract with one or more financial institutions to serve as plan manager and to invest the money in ABLE accounts.

(e) In exercising or delegating investment powers and authority, the Board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of actions or decisions related to investment of assets of the Texas ABLE Program. A member of the Board is not liable for any action taken or omitted with respect to the exercise of, or delegation of, those powers and authority if the member discharged the duties of the member's position in good faith and with the degree of diligence, care, and skill that a prudent person acting in a like capacity and familiar with those matters would use in the conduct of an enterprise of a like character and with like aims.

(f) As applicable, the Board shall adopt an investment policy statement for the Program, set the asset allocation of the Program, select the underlying investments of the Program, and the Board shall promptly deposit and invest contributions, excluding any excess contributions, and any earnings as directed by the participant. No earnings or interest will accrue to an ABLE account before the funds have been invested.

(g) For investment purposes, the Board may pool funds, or authorize the pooling of funds, from ABLE accounts with other funds administered by the Board. If funds from the ABLE accounts are pooled with other funds administered by the Board, the Board shall track, monitor, report, and record separately, all investment activity related to the ABLE accounts, including any earnings, fees, or charges or expenses associated with each ABLE account.

(h) A participant may direct the investment of any contributions or any earnings on contributions only to the extent allowed by Internal Revenue Code, §529A.

(i) No investment, financial, or benefits advice is offered to participants, eligible individuals, eligible members of the family, parents, designated beneficiaries, or their custodians or fiduciaries acting on their behalf, from the State of Texas, the comptroller, the Board, the Texas ABLE Program, the Texas ABLE Advisory Committee, or from their employees, vendors, or agents, nor do they assume any responsibility for the performance of any investment option. The decision to enroll in the Program, the selection of investment options, and the suitability of such options is entirely the responsibility of the participant.

§7.195. Refunds.

(a) The participant may cancel a participation agreement at will and request refund of all of the available funds of an ABLE account less any amounts due for transfer to state, if applicable, at any time in a format approved by the Board.

(b) The Board shall determine the calculation method of any refunds due for cancellations, excess contributions, transfer to state, or death of the designated beneficiary.

(c) Any refunds due to cancellation or termination of an ABLE account, not including any amounts due for transfer to state, if applicable, will be payable to the designated beneficiary or participant on behalf of the designated beneficiary unless the Program is legally directed otherwise.

(d) Excess contributions will automatically be refunded to the contributor by the Program without earnings or interest.

(e) Distributions, including any earnings included in a refund, will be reported to the Internal Revenue Service, Social Security Administration, and any other state or federal agencies as required by law and may subject the distributee to income tax on any earnings and a tax penalty and could affect benefits or result in legal consequences.

§7.196. Termination or Modification of Program.

(a) The comptroller shall notify the governor and legislature and recommend that the Board not administer such Program or that the Program be modified or terminated if the comptroller determines that the Program is not financially feasible.

(b) The Board may adjust the terms of the Program as necessary to ensure the financial feasibility of the Program, to ensure compliance with all applicable laws and regulations, or to facilitate the ability of participants to obtain or maintain federal income tax benefits or treatment provided by Internal Revenue Code, §529A. The Board shall promptly provide notification by any written or electronic communication as authorized and determined by the Board regarding a change in the terms of the Program affecting participants or designated beneficiaries. To the extent provided by state or federal law, the Board may allow up to 60 calendar days from the date of such notice for participants to exit the Program by withdrawing any available funds under the then-current terms. If participants do not opt to exit the Program during the opt-out period, they shall be deemed to have accepted the new terms and their ABLÉ accounts shall be subject to the new terms on the effective date of the change.

(c) If the Program is terminated by the legislature, any available funds in an ABLÉ account will be paid, to the extent possible, to the designated beneficiary or the participant on behalf of the designated beneficiary, subject to any outstanding fees or charges due the Program and, if applicable, transfer to state following the designated beneficiary's death.

(d) In the event that available funds are refunded by the Program due to termination of the Program, the Program will provide advance written or electronic notification to the participant of a pending refund within a reasonable time, but not less than thirty (30) days, prior to the refund by the Program.

§7.197. Program Limitations.

(a) Nothing in this Program or in any participation agreement entered into under this Program may be construed to guarantee that amounts saved under the Program will be sufficient to cover the qualified disability expenses of a designated beneficiary.

(b) Nothing in this Program or in any participation agreement entered into under this Program may be construed to create any obligation of the State of Texas, any agency or instrumentality of the State of Texas, financial institution or plan manager to guarantee for the benefit of a participant:

- (1) the return of any amount contributed to an account;
- (2) the rate of interest or other return on an account; or
- (3) the payment of interest or other return on an account.

(c) An ABLÉ account is not insured by the State of Texas. The principal deposited into an ABLÉ account is not guaranteed by the State of Texas. The investment return of an ABLÉ account is not guaranteed by the State of Texas.

(d) The participant is fully responsible for any impact an ABLÉ account might have on the designated beneficiary's eligibility for Supplemental Security Income, Medicaid, or other public benefits.

(e) The participant is fully responsible for notifying and providing the Program with accurate account information, including current mailing address, necessary for delivery of account statements, notices, or correspondence.

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 27, 2016.

TRD-201603244

Lita Gonzalez

General Counsel

Comptroller of Public Accounts

Earliest possible date of adoption: August 7, 2016

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



PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 81. INSURANCE

34 TAC §§81.1, 81.3, 81.5, 81.7 - 81.9, 81.11

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code (TAC) Chapter 81, concerning Insurance, by amending §81.1 (Definitions), §81.3 (Administration), §81.5 (Eligibility), §81.7 (Enrollment and Participation), §81.8 (Waiver of Health Coverage), §81.9 (Grievance Procedure), and §81.11 (Termination of Coverage).

ERS administers employment-related benefits, including insurance benefits through the Group Benefits Program (GBP), for several classes of State of Texas public servants, including elected officials, appointed public officers, public employees and their dependents, and other persons eligible to participate in the GBP. ERS proposes amendments to Chapter 81 to comply with recent legislation which added Subchapter J to Chapter 1551, Insurance Code, in connection with a state consumer-directed health plan and to comply with provisions of the Affordable Care Act (ACA). In addition, the proposed amendments would simplify plan administration and provide clarification to GBP plan participants, including consolidation of the available GBP optional coverages into one subsection.

Section 81.1, concerning Definitions, is proposed to be amended to update the rule to use more current terminology, provide clarity to existing definitions, provide definitions to terms that previously existed within the rule, and to eliminate definitions that are no longer necessary. A definition for "Consumer Directed HealthSelectSM" was added for the new GBP high deductible health plan, in connection with the new Insurance Code Chapter 1551, Subchapter J. "GBP health coverage" was also included to describe all of the health plans that are offered through the GBP. The definition of a "spouse" as a dependent in the GBP was reformatted to add additional clarity and guidance to GBP participants that a member's spouse must be formally married or informally married with a filed Declaration of Informal Marriage prior to the effective date of the dependent spouse's enrollment in the GBP. The amendment also creates a narrow exception to the requirement based on clear and compelling evidence that the marriage existed prior to enrollment in the GBP. The definition regarding dependents is also proposed to be amended to specify the requirements for continued health insurance eligibility for children over age 26 who are mentally or physically incapacitated in accordance with Texas Insurance Code §1551.004(a)(3).

The term "insurance required contribution" is proposed to replace "premium" throughout Chapter 81 to more clearly reflect that plans within the GBP are governmental insurance programs that include self-funded benefit plans that do not have traditional premiums like non-governmental plans subject to state insurance laws. GBP benefits are governed by Chapter 1551, In-

insurance Code, and have statutory eligibility and enrollment requirements that are different from other insurance benefits offered outside of the GBP.

Section 81.3, concerning Administration, is proposed to be amended to be titled "Health Maintenance Organizations." The proposed amendments provide additional clarity regarding the requirements of health maintenance organizations (HMOs) in the GBP, and there are no substantive changes to the HMO provisions. The rules regarding administration of the insurance required contributions and state contributions in the GBP, currently in §81.3(b) and (c), are proposed to be moved to §81.7, in order to aggregate the information within a rule that is relevant to that subject and make it easier for users to find applicable rules for a particular subject.

Section 81.5, concerning Eligibility, is proposed to be amended to clarify that a former COBRA unmarried child is eligible to enroll a newly acquired dependent child within 30 days of the child's date of birth or placement for adoption. Otherwise, these particular GBP participants cannot add dependents to their coverage. Additionally, subsections of §81.5 were moved within the section to provide better organization of the rule.

Section 81.5 (Eligibility) and §81.7 (Enrollment and Participation) are proposed to be amended to comply with provisions of the ACA by decreasing the waiting period for coverage to the first day of the month following 60 days of employment, deleting references to a preexisting conditions limitation or exclusion, and to provide that married dependents under age 26, who are otherwise eligible dependents, may continue to be enrolled as dependents and are not required to apply for COBRA coverage until they reach age 26.

Section 81.7, concerning Enrollment and Participation, is proposed to be amended to include subsections moved from §81.3, addressing payment of insurance required contributions and state contributions, in order to aggregate the information within a rule that is relevant to that subject and to clarify the payment of insurance required contributions by the type of participant. The proposed amendments add language to clarify that a Medicare-eligible surviving dependent, eligible for health coverage under the GBP, may be automatically enrolled in the Medicare Advantage Plan unless the surviving dependent opts out and enrolls in other coverage. The proposed amendments also add requirements related to the new optional coverage for a vision plan and the new health benefits plan, Consumer Directed HealthSelect, offered through the GBP, and reflect that the Consumer Directed HealthSelect, commuter spending accounts, vision plan, limited purpose flexible spending accounts, and health savings accounts are additional coverages and plans available to certain eligible members and participants. The proposed amendments also allow participants enrolled in an HMO, whose contract is not renewed, to enroll in another approved HMO for which they are eligible. Such participants may also enroll in HealthSelect or Consumer Directed HealthSelect instead of another HMO. The proposed amendments also clarify qualifying life events that may permit a change in coverage for participants, including dropping or adding eligible dependents, if the requested change is consistent with the qualifying life event. In addition, proposed amendments clarify that annual enrollment opportunities are at times announced by ERS in order to specify that there are different annual enrollment opportunities for members who are not Medicare-eligible and for those members who are not active employees and are eligible for Medicare. Section 81.7 is also proposed to be amended to

repeal §81.7(j), the provision reflecting the preexisting conditions exclusion for the GBP disability income insurance plan, because the rule is not necessary since the Master Benefit Plan Document for the long- and short-term disability plan already includes such requirements.

Section 81.8, concerning Waiver of Health Coverage, is proposed to be amended to provide better organization and additional clarity regarding incentive credits.

Section 81.9, concerning Grievance Procedure, is proposed to be amended by changing the title of the section to "Grievance Procedures" to reflect that there is more than one type of grievance procedure, depending on the particular GBP plan, to clarify the grievance procedures applicable for the different types of plans in the GBP and to provide more details regarding the grievance procedures. The proposed amendments provide additional clarity regarding available grievance rights for participants whose claims are denied by administering firms or carriers in the GBP, clarify that participants with a denied claim in certain plans must request reconsideration from the carrier or administering firm prior to seeking grievance review by ERS, and reflect that the applicable plan documents set forth grievance procedures for denied claims.

Section 81.11, concerning Termination of Coverage, is proposed to be amended by changing the title of the section to "Cancellation of Coverage and Sanctions," to make a distinction between sanctions and cancellation of coverage, which can be unrelated to sanctions. The proposed amendments reorganize the rule for better clarity regarding the conditions and timeframes for cancellation of GBP coverage for participants.

Ms. Paula A. Jones, Deputy Executive Director and General Counsel, has determined that for the first five-year period the rules are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the rules. To Ms. Jones' knowledge, there are no known anticipated economic costs to persons who are required to comply with the rules as proposed other than to pay the costs associated with participating in GBP coverage, and, to her knowledge, small businesses should not be affected.

Ms. Jones also 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 rules include the reasons stated above, and also because the proposed rules would better serve GBP participants, their employers and other stakeholders by having a more streamlined and better organized chapter that is easier to review and administer.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, Deputy Executive Director and General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207 or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is August 8, 2016, at 10:00 a.m.

The amendments are proposed under the Texas Insurance Code, §1551.052, which provides authorization for the ERS Board of Trustees to adopt rules necessary to carry out its statutory duties and responsibilities and under §1551.068, Texas Insurance Code, which authorizes the ERS Board of Trustees to modify, amend, or interpret rules to the extent necessary to comply with any applicable federal law.

No other statutes are affected by the proposed amendments.

§81.1. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Accelerated life benefit--~~A [An amount of] term life insurance benefit to be paid in advance of the death of an insured member [employee, annuitant,] or dependent, as requested by the insured member [employee or annuitant] and approved by the carrier or administering firm, in accordance with the terms of the group term life insurance plan as permitted by §1551.254 of the Act. An accelerated[; Insurance Code: Accelerated] life benefit payment may be requested only if the insured person is diagnosed with [upon diagnosis of] a terminal condition and only once during the lifetime of the insured person. For purposes of this definition, a [employee, annuitant, or dependent. A] terminal condition is an incurable [a non-correctable] health condition that the administering firm or carrier determines with reasonable medical certainty will result in the death of the insured within 12 months.~~

(2) Act--~~The Texas Employees Group Benefits Act, [Act of the 77th Legislature, 2001, as amended,] Insurance Code, Chapter 1551, as amended.~~

(3) Active duty--~~An employee's [The] expenditure of time and energy in the service of his/her employer, including elected officials of the state of Texas who are eligible for coverage under the Act. An employee is [will be considered to be] on active duty on each day of a regular paid vacation or regular paid sick leave or on a non-working day, if the employee was on active duty on the last preceding workday [working day].~~

(4) AD&D--~~Voluntary accidental [Accidental] death and dismemberment coverage.~~

(5) Age of employee--~~The age to be used for determining optional term life and AD&D insurance required contributions. For these purposes, the age of the employee is [voluntary AD&D insurancee premiums will be] the employee's attained age on September 1 [as of the employee's first day of active duty within a contract year].~~

(6) Annuitant--~~A retired person who is eligible under §1551.102 of [authorized by] the Act to participate in the GBP and meets all requirements for retirement from a state retirement program or the Optional Retirement Program [as an annuitant].~~

(7) Basic plan--~~The plan of group insurance, including prescription drug coverage, determined by the Board of Trustees [trustee], currently HealthSelect or HealthSelect Medicare Advantage participant-only, as applicable, [participant only] and basic term life insurance coverage, in which every eligible full-time employee and annuitant[; or non-Medicare eligible retiree or dependent who is eligible for group insurance at the time of retirement], is automatically enrolled after meeting any applicable [completion of any required] waiting period or unless participation is expressly waived.~~

(8) Benefits Coordinator--~~A person employed by an employer to provide assistance to its employees and their dependents with all aspects of GBP participation. The benefits coordinator for all other GBP participants is ERS.~~

(9) ~~[(8)] Board of Trustees or Board [or trustee]--The Board of Trustees [board of trustees] of the Employees Retirement System of Texas.~~

(10) CHIP--~~Children's Health Insurance Program.~~

(11) CMS--~~Centers for Medicare and Medicaid Services or its successor agency.~~

(12) COBRA--~~Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law 99-272, and any subsequent amendments.~~

(13) Consumer Directed HealthSelectSM--~~The self-funded high deductible health benefit plan offered through the GBP and administered by the Employees Retirement System of Texas and qualified carriers or administering firms.~~

(14) Dependent--~~With respect to an eligible member, means the member's:~~

(A) spouse, as recognized by applicable law, which includes only a married spouse as evidenced by a properly issued and completed marriage license or an informally married spouse whose marriage is memorialized by a Declaration of Informal Marriage and filed of record with an appropriate governmental authority. Absent clear and compelling evidence of an informal marriage existing at the time of enrollment and deemed sufficient by ERS, it is a plan design requirement that the licensed marriage or Declaration of Informal Marriage must occur, or be filed, as applicable, prior to the effective date of the dependent spouse's enrollment in the GBP;

(B) child under 26 years of age;

(C) child age 26 and older whom the Board of Trustees or its designee determines is certified by an approved practitioner to be mentally or physically incapacitated from gainful employment, and earns less than the monthly wage standard for enrolling in CHIP in Texas for a family of one at the time of application or reevaluation. If the child earns more than this wage standard for a period of six months or longer in any calendar year, then the child must demonstrate to ERS his/her continued eligibility for dependent coverage by proving he/she is dependent on the member for care or support and either lives with the member or has care provided by the member on a regular basis; and

~~[(9) Contract year--A contract year begins on the first day of September and ends on the last day of the following August.]~~

~~[(10) Department--Commission, board, agency, division, institution of higher education, or department of the state of Texas created as such by the constitution or statutes of this state, or other governmental entity whose employees or retirees are authorized by the Act to participate in the Program.]~~

~~[(11) Dependent--The spouse of an employee or retiree and unmarried children under 25 years of age, including:]~~

~~[(A) the natural child of an employee/retiree;]~~

~~[(B) a legally adopted child (including a child living with the adopting parents during the period of probation);]~~

~~[(C) a stepchild whose primary place of residence is the employee/retiree's household;]~~

~~[(D) a foster child whose primary place of residence is the employee/retiree's household and who is not covered by another governmental health program;]~~

~~[(E) a child whose primary place of residence is the household of which the employee/retiree is head and to whom the employee/retiree is legal guardian of the person;]~~

~~[(F) a child who is in a parent-child relationship to the employee/retiree, provided the child's primary place of residence is the household of the employee/retiree, the employee/retiree provides the necessary care and support for the child, and if the natural parent of the child is 21 years of age or older, the natural parent does not reside in the same household;]~~

~~[(G) a child who is considered a dependent of the employee/retiree for federal income tax purposes and who is a child of the employee/retiree's eligible child;]~~

{(H) an eligible child, as defined in this subsection, for whom the employee/retiree must provide medical support pursuant to a valid order from a court of competent jurisdiction; or}

{(I) a child eligible under §1551.004, Insurance Code, provided that the child's mental disability or physical incapacity is a medically determinable condition which prevents the child from engaging in self-sustaining employment, that the condition commences before the date of the child's 25th birthday, and that satisfactory proof of such condition and dependency is submitted by the employee/retiree within 31 days following such child's attainment of age 25 and at such intervals thereafter as may be required by the system.}

{(12) Dependent--EFFECTIVE SEPTEMBER 1, 2010, paragraph (11) of this section, shall apply to an individual claimed as a dependent for a plan year that began before September 1, 2010.}

{(A) In this chapter, "dependent," with respect to an individual eligible to participate in the group benefits program, means the individual's:}

{(i) spouse;}

{(ii) child younger than 26 years of age;}

{(iii) child of any age who the board of trustees determines lives with or has the child's care provided by the individual on a regular basis if the child is mentally or physically incapacitated to the extent that the child is dependent on the individual for care or support, as determined by the board of trustees;}

{(iv) child of any age who is unmarried, for purposes of health benefit coverage under Insurance Code, Chapter 1551, on expiration of the child's continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. No. 99-272) and its subsequent amendments; and}

{(D) [(v)] [a] child under age 26 who is the member's [a] ward, as that term is defined by §1002.030, Texas Estates Code [§601, Texas Probate Code].

{(E) [(B)] In this section, "child" includes:

(i) a natural child, adopted child, stepchild, foster child; or a child in the possession of a participant who is designated as managing conservator of the child under an irrevocable or unrevoked affidavit of relinquishment under [Chapter 161 of the] Texas Family Code, Chapter 161; or

(ii) a child who is related to the member by blood or marriage and was claimed as the member's [a] dependent on his/her [the] federal income tax return [of an individual who is eligible to participate in the group benefits program] for the tax [calendar] year preceding the plan year in which the child is first enrolled as the member's [a] dependent in the GBP, [under Insurance Code, Chapter 1551,] and for each subsequent year in which the child is enrolled as the member's [a] dependent. The federal income tax return must have been filed when first due or before any timely extensions expired.

{(F) [(C)] The requirement in subparagraph (E)(ii) [(B)(ii)] of this paragraph that a child must be claimed as the member's [a] dependent on his/her [a] federal income tax return [in the calendar year] preceding the child's enrollment does not apply if:

(i) the child is born in the year in which the child is first enrolled; or

(ii) the member [participant] can demonstrate good cause for not claiming the child as a dependent in the preceding tax [calendar] year.

{(D) In this section, "spouse" means a person recognized as a spouse under Texas law and includes only a ceremonially married spouse or an informally married spouse whose marriage is memorialized by a Declaration of Informal Marriage as authorized by Texas law and filed of record with an appropriate governmental authority prior to the date of the dependent spouse's enrollment in the GBP.}

{(13) Eligible to receive an annuity--Refers to a person who, in accordance with the Act, meets all requirements for retirement from a state retirement program or the Optional Retirement Program.}

{(15) [(14)] Employee--A person eligible to participate in the GBP under §1551.101 of the Act, which includes an appointed or elected state officer, judicial officer, or employee in the service of the state of Texas. The term also includes an eligible employee of an institution of higher education and any persons required or permitted by the Act to enroll as members. [authorized by the Act to participate in the Program as an employee].

{(16) Employer--State of Texas and its agencies, institutions of higher education, and other governmental or quasi-governmental employers within the state whose employees or annuitants are authorized by the Act to participate in the GBP.

{(17) ERS--Employees Retirement System of Texas.

{(15) Employing office--For a retiree covered by this Program, the office of the Employees Retirement System of Texas in Austin, Texas or the retiree's last employing department; for an active employee, the employee's employing department.}

{(18) [(16)] Evidence of insurability--Evidence [Such evidence] required by ERS, an administering firm, or a qualified carrier for approval of coverage or changes in coverage other than GBP health coverage [in HealthSelect, HMO or Medicare Advantage Plan] pursuant to the enrollment and participation provisions in this chapter [rules of §81.7(i) of this chapter (relating to Enrollment and Participation)].

{(19) Executive director--The executive director of the Employees Retirement System of Texas. All references to the executive director also include the person or position designated by the executive director or Board of Trustees to perform the relevant function of the executive director.

{(20) [(17)] Former COBRA unmarried child--A member's unmarried child who is at least 26 years of age, who had GBP coverage as a dependent until the child became ineligible, who had continuation coverage under COBRA until that coverage expired, and who reinstates GBP coverage pursuant to §1551.158 of the Act [child of an employee or retiree who is unmarried; whose GBP coverage as a dependent has ceased; and who upon expiration of continuation coverage under the Consolidated Omnibus Budget Reconciliation Act, Public Law 99-272 (COBRA) reinstates GBP coverage].

{(21) GBP (Group Benefits Program)--The Texas Employees Group Benefits Program as established and administered by the Board of Trustees pursuant to the Act.

{(22) GBP health coverage--Includes HealthSelectSM of Texas, Consumer Directed HealthSelectSM, HMOs and Medicare Advantage plans, as applicable.

{(23) Health insurance waiting period--The applicable waiting period defined in §1551.1055 of the Act.

{(24) [(18)] HealthSelectSM of Texas--The self-funded [statewide] health benefit plan offered in the GBP and administered by the Employees Retirement System of Texas [self-insured by the Employees Life, Accident and Health Insurance and Benefits Fund,

as administered by the Employees Retirement System of Texas] and a qualified carrier or administering firm. HealthSelect of Texas also includes a Prescription Drug Plan administered by a Pharmacy Benefit Manager approved by the Board.

(25) [(19)] HealthSelectSM [HealthSelect] Medicare Rx--A plan, approved by the Board of Trustees [Board], that provides prescription drug coverage designed for [Medicare] participants who are eligible for Medicare-primary coverage in the GBP as permitted by CMS [the federal Centers for Medicare and Medicaid Services (CMS) or its successor agency].

(26) [(20)] HMO--A health maintenance organization, as defined by §1551.007 of the Act, and approved by the Board of Trustees [board] to provide health care coverage [benefits] to eligible participants in the GBP [Program in lieu of participation in the Program's HealthSelect of Texas plan].

(27) [(21)] Insurance required contribution [premium expenses]--Any out-of-pocket charge [premium] incurred by a member [participant,] or by a member's [spouse or] dependent [of such participant,] as payment for coverage provided under the GBP [Program] that exceeds the state's or employer's contributions made on behalf of the member [institution's contributions offered as an employee benefit by the employer. The types of premium expense covered by the premium conversion plan include out-of-pocket premium for group term life, health (including HMO premiums), AD&D, and dental, but do not include out-of-pocket premium for long or short term disability or dependent term life].

(28) [(22)] LWOP (Leave without pay) [Leave without pay]--The leave status of an employee who is certified by his/her employer [a department administrator] to be absent from active duty for an entire calendar month, who does not receive any compensation for time absent from active duty, [that month,] and who has not received a refund of retirement contributions based upon the most recent term of employment.

(29) [(23)] Medicare Advantage Plan--A plan, approved by the Board of Trustees [board], that provides health coverage for participants who are eligible for Medicare-primary coverage. The plan is [benefits that are] administered as a Medicare Advantage Plan as permitted by CMS [the federal Centers for Medicare and Medicaid Services (CMS) or its successor agency,] through:

(A) a health maintenance organization; or

(B) any other plan, organization, carrier or administering firm [or organization] approved by the Board of Trustees to provide the coverage [board for Medicare-eligible participants].

(30) [(24)] Medicare-eligible--The status of a participant who is eligible for primary coverage under Medicare Part A and/or Part B [and B in return for a monthly premium]. Eligibility may extend to a dependent that is qualified to receive Medicare benefits as his/her primary coverage as permitted by CMS [or its successor agency].

(31) Member--For purposes of this chapter only regarding insurance plan participation in the GBP, a member is a participant who is an employee, retiree, or other person eligible to participate in the GBP as provided under the Act and who is not a dependent.

(32) Minimum retiree optional life--A standard \$10,000 term life insurance policy whose insurance required contribution is set solely on the basis of the benefit rather than on the retiree's age. It is available for retirees at any time during their retirement. If a retiree does not have life insurance, the retiree may apply for this coverage with evidence of insurability. If the retiree has Election 1 or Election 2 optional life, the retiree may elect to reduce the life coverage to this

coverage by requesting the change without an application or evidence of insurability.

(33) Optional Coverage--Coverage established by the Board of Trustees in the GBP and as set forth in §81.7(c)(1)(A) - (K).

(34) [(25)] ORP--The Optional Retirement Program as provided in the Government Code, Chapter 830.

(35) [(26)] Participant--An employee, annuitant, or dependent, as defined in the Act, a surviving spouse or child of a deceased member, or any other person eligible for coverage under the Act and enrolled in any coverage offered under the GBP. [An eligible individual who participates in the group benefits program.]

(36) [(27)] Placement for adoption--The legal status of a child under which a person assumes and retains the [A person's assumption and retention of a] legal obligation for total or partial support of the [a] child in anticipation of the person's adoption of such child.

(37) [(28)] Preexisting condition--Any injury or medical condition [sickness,] for which a participant [the employee] received medical treatment [treatment,] or services, or was [took] prescribed drugs or medicines during the three-month period immediately prior to the effective date of such coverage. However, if the evidence of insurability requirements set forth in §81.7(d) [§81.7(i)] of this chapter must first be satisfied, the three-month period for purposes of determining the preexisting conditions exclusion will be the three-month period immediately preceding the date of the employee's completed application for coverage.

(38) [(29)] Premium conversion plan--A separate plan, under the Internal Revenue Code, §79 and §106, adopted by the Board of Trustees [board of trustees] and designed to provide premium conversion as described in §81.7(b) [§81.7(g)] of this chapter.

[(30)] Program--The Texas Employees Group Benefits Program as established by the Board pursuant to the Act and known as the Group Benefits Program (GBP).]

(39) [(31)] Retiree--An employee who retires or is retired and who:

(A) is authorized by the Act to participate in the GBP [Program] as an annuitant [a retiree];

(B) on August 31, 1992, was a participant in a group insurance program administered by an institution of higher education; or

(C) on the date of retirement, meets the service credit requirements of the Act [Insurance Code] for participation in the GBP [Program] as an annuitant; and

(i) on August 31, 2001, was an eligible employee with an employer [a department] whose employees are authorized to participate in the GBP [Program] and, on the date of retirement has three years of service with such an employer [a department];

(ii) on August 31, 2001, had three years of service as an eligible employee with an employer [a department] whose employees are authorized to participate in the GBP; [Program,] or

(iii) is determined by ERS to be eligible as described by §1551.102 and §1551.114 of the Act; [Insurance Code].

(40) [(32)] Salary--The amount of compensation, which includes the employee's regular salary, longevity, shift differential, hazardous duty pay, and benefit replacement pay, received by an employee as of the employee's first day of active duty and as of September 1, for an existing or rehired employee. This amount is [salary to be] used for determining optional term life and disability income limitations [with

be the employee's regular salary, including longevity, shift differential, hazardous duty pay, and benefit replacement pay, received by the employee as of the employee's first day of active duty within a contract year. No other component of compensation shall be included]. Non-salaried elected and appointed [eleeective and appointive] officials and members of the Legislature may use the salary of a state district judge or their actual salary as of September 1 of each year.

~~[(33) System--The Employees Retirement System of Texas.]~~

~~(41) [(34)] TRS--The Teacher Retirement System of Texas.~~

§81.3. Health Maintenance Organizations [Administration].

~~[(a) Health maintenanece organizations.]~~

~~(a) [(4)] The Board of Trustees [board] may approve a health maintenance organization (HMO) to offer a health care services [benefits] plan to participants in the GBP [Program]. The Board of Trustees [board] may:~~

~~(1) [(A)] utilize a bidding process to approve one or more HMOs in areas of the state determined by the Board of Trustees [board] to be regional bidding areas (RBAs);~~

~~(2) [(B)] utilize an application process to approve one or more HMOs in areas of the state determined by the Board of Trustees [board] to be non-bidding areas;~~

~~(3) [(C)] determine the criteria to be used to approve the HMOs for the RBAs and non-bidding areas;~~

~~(4) [(D)] determine the number of HMOs to approve in each RBA and non-bidding area; and~~

~~(5) [(E)] determine the length of the contracts with the approved HMOs.~~

~~(b) [(2)] In order to seek approval, an HMO must submit to ERS:~~

~~(1) [(A)] a separate [submit an] application to provide health care services in each area of interest [benefits in the areas] within the state of Texas determined by the Board of Trustees [board] to be non-bidding areas; or~~

~~(2) [(B)] [submit] a proposal, in response to a request for bid, in the format determined by ERS to provide health care services in [the system for] one or more of the designated RBAs. [RBAs; or]~~

~~[(C) submit application(s) and bid(s).]~~

~~(c) [(3)] An HMO seeking Board of Trustees' [board] approval of its proposal in response to a request for bid in one or more of the RBAs[;] must demonstrate compliance with [satisfy] the following conditions to the satisfaction of the Board of Trustees:~~

~~(1) [(A)] the [The] HMO must be licensed by the Texas Department of Insurance to operate in the state of Texas; [Texas.]~~

~~(2) [(B)] the [The] HMO must have prior experience [been] providing health care services in the RBA for at least 6 months prior to September 1 of the fiscal year in which the proposal [bid response] is due to be filed with ERS; [the system.]~~

~~(3) [Also,] the HMO must have [demonstrate] the capacity to provide adequate health care services[; as determined by the system,] to the GBP participants in the relevant RBAs; [program participants.]~~

~~(4) the HMO must propose rates at the time and in the format prescribed by ERS. If the HMO's proposed rates are adopted by the Board of Trustees, the HMO may not modify the rates without the approval of the Board of Trustees;~~

~~[(C) The HMO must submit the bid, with rates, to the board at the time and in the format prescribed by the system. Once adopted by the board, the rates may not be modified without the approval of the board.]~~

~~(5) the HMO must submit a separate proposal in order to request [A request for] expansion into [of] a non-contiguous service area[; as described in this section, shall require a separate application.]~~

~~(6) [(D)] the HMO must agree to all [The HMO agrees to the] provisions contained in the contract between ERS [the system] and the HMO as adopted for the duration of the contract; [entire time specified in the contract.]~~

~~(7) [(E)] the [The] HMO must provide standardized benefits as described in the contract between ERS and the HMO; [the system and the HMO. This document, which is to be considered a part of this section for all purposes, may be obtained from the executive director of the system.]~~

~~(8) [(F)] the HMO must agree that if the HMO [If an HMO, approved by the board,] fails to maintain compliance with the contract, ERS [the board] has the right to cancel the [existing] contract with that HMO and seek other remedies [upon proper notice] as specified in the contract; and[.]~~

~~(9) [(G)] the HMO must agree that if the HMO loses its Texas state license, it [An HMO that loses its state license] will automatically become ineligible to offer its health care services [benefits] plan to participants in the GBP [Program].~~

~~(d) [(4)] An HMO, seeking Board of Trustees' [board] approval of its [in response to an] application to provide health care services in one or more of the non-bidding areas[;] must demonstrate compliance with all of the conditions set forth in subsection (c) of this section to the satisfaction of the Board of Trustees. [satisfy the following conditions:]~~

~~[(A) The HMO must be licensed by the Texas Department of Insurance to operate in the state of Texas.]~~

~~[(B) The HMO must have been providing managed care services in the area for which the application is made for at least 6 months prior to September 1 of the fiscal year in which the application is due to be filed with the system. Also, the HMO must demonstrate the capacity to provide adequate services; as determined by the system, to the program participants.]~~

~~[(C) The HMO must submit the application, with rates, to the board at the time and in the format prescribed by the system. Once adopted by the board the rates may not be modified without the approval of the board.]~~

~~[(D) The HMO agrees to the provisions contained in the contract between the system and the HMO as adopted for the entire time specified in the contract.]~~

~~[(E) The HMO must provide standardized benefits as described in the contract between the system and the HMO. This document, which is to be considered a part of this section for all purposes, may be obtained from the executive director of the system.]~~

~~[(F) If an HMO, approved by the board, fails to maintain compliance with the contract, the board has the right to cancel the existing contract with that HMO upon proper notice as specified in the contract.]~~

~~[(G) An HMO that loses its state license will automatically become ineligible to offer its health benefits plan to participants in the insurance program.]~~

[(b) Payment of Premiums.]

[(1) Premiums for coverage provided under the Program are funded from three sources: state contributions, system contributions, and participant contributions. The Legislature appropriates monies to fund group insurance benefits for all employees as defined in the Act. Monies for employees compensated from funds other than the General Appropriations Act are appropriated from the official operating budget of the respective department. In addition, the system may contribute an additional amount, as determined by the trustee, for payment of premiums for participants. A participant who applies for coverage for which the monthly premium exceeds the state's or employing department's and the system's contribution must pay the excess amount.]

[(2) A participant's share of premiums shall be paid through deductions from monthly compensation or annuities or by direct payment, as provided in this paragraph.]

[(A) An employee or annuitant who applies for coverage for which the monthly premium exceeds the state or employing department and the system contributions must authorize on a form prescribed by the system a deduction from his or her monthly compensation or annuity to pay the difference. If the compensation or annuity is insufficient to provide for the appropriate deduction, the participant must pay premiums directly as provided in subparagraph (B)(i) of this paragraph. Failure to make the required payment of premiums by the due date will result in the cancellation of all coverages not fully funded by the state contribution. A participant entitled to the state contribution will retain member only health and basic life coverage provided the state contribution is sufficient to cover the premium for such coverage. If the state contribution is not sufficient for member only coverage in the health plan selected, the participant will be enrolled in the basic plan except as provided for in §81.7(m)(2)(B) of this chapter (relating to Enrollment and Participation).]

[(B) A participant shall pay premiums directly, as provided in this subparagraph, if the participant is not on a payroll or is in a leave without pay status; is not receiving an annuity from a state retirement system from which the appropriate premiums may be deducted; or is not receiving a salary or annuity sufficient to allow for a full required premium deduction.]

[(i) An employee whose salary is insufficient, or who is a non-salaried board member, shall pay monthly premiums in advance through the employing department. Any other participant to whom this subparagraph applies shall pay monthly premiums in advance to the system. Premium payments are due on the first day of the month covered and must be postmarked or received by the system or the employing department, whichever is appropriate, within 30 days of the due date to avoid cancellation of coverage. Failure to make the required premium payment by the due date will result in cancellation of all coverages not fully funded by the state contribution, if applicable. A person entitled to the state contribution will retain member only health and basic life coverage provided the state contribution is sufficient to cover the premium for such coverage. If the state contribution is not sufficient for member only coverage in the health plan selected by the employee or retiree, the employee or retiree will be enrolled in the basic plan except as provided for in §81.7(m)(2)(B) of this chapter.]

[(ii) A person who continues group health and dental benefits as provided in §81.5(k) of this chapter (relating to Eligibility) must pay premiums in advance on a monthly basis. Premiums for such a person will be 102% of the rates charged for other participants in the same coverage category and with the same plan. All premiums due for the election/enrollment period must be postmarked or received

by the Employees Retirement System of Texas on or before the date indicated on the continuation of coverage enrollment form. Subsequent premiums are due on the first day of the month covered and must be postmarked or received by the Employees Retirement System of Texas within 30 days of the due date to avoid cancellation of coverage.]

[(iii) A person who continues group health and dental benefits as provided in §81.5(k)(3) of this chapter must pay premiums in advance on a monthly basis. Premiums for such a person for each month of coverage after the 18th month of coverage will be 150% of the rates charged for other participants in the same coverage category and with the same plan. All premiums are due on the first day of the coverage month and must be postmarked or received by the Employees Retirement System of Texas within 30 days of the due date to avoid cancellation of coverage.]

[(e) EFFECTIVE SEPTEMBER 1, 2014, the amount of state contributions for certain retirees will be tiered in accordance with §1551.3196, Texas Insurance Code.]

[(1) Solely for the purpose of determining the applicability of Section 29, Chapter 618 (S.B. 1459), Acts of the 83rd Legislature, Regular Session, 2013, to individuals who are not participating in the Program as a Retiree, an individual is considered grandfathered at the time of retirement and not subject to §1551.3196, Texas Insurance Code if, on or before September 1, 2014, the individual has served in one or more positions for at least five years for which the individual was eligible to participate in the Program as an Employee.]

[(2) Records of the Employees Retirement System of Texas shall be used to determine whether or not an individual meets the grandfathering requirements specified in paragraph (1) of this subsection. ERS may, in its sole discretion, require an individual to provide additional documentation satisfactory to ERS that the individual meets the grandfathering requirements specified in paragraph (1) of this subsection.]

§81.5. Eligibility.

(a) Employees.

(1) Full-time Employees. Eligibility for GBP health coverage for full-time employees begins on the first day of the calendar month following the employee's completion of the health insurance waiting period. If the employee described in paragraphs (A) or (B) does not enroll in GBP health coverage on or before becoming eligible, he/she will automatically be enrolled in HealthSelect of Texas upon becoming eligible.

(A) [(a)] [Full-time employees.] A full-time employee of an employer other than an institution of higher education[, elected officer, or appointed officer of the state of Texas is eligible for automatic coverage upon completion of the waiting period established in §1551.1055, Insurance Code. A rehired full-time employee, reelected officer, or reappointed officer of the state of Texas, including a new full-time employee, each] with existing, current, and continuous GBP health coverage as of the date the employee begins active duty or the elected or appointed officer is qualified for and begins to hold office, is eligible for GBP health coverage under this subsection [automatic coverage] without a waiting period provided there has been no break in coverage in the GBP. [However, an]

(B) A full-time employee of an institution of higher education is [and the employee's eligible dependents are] eligible for GBP health coverage on the first day that an employee performs services as an employee of an institution of higher education only if:

(i) [(1)] the full amount of insurance required contributions [premiums] are paid for the employee's coverage from the

first date of employment through the completion of the health insurance waiting period [defined in §1551.1055(a), Insurance Code];

(ii) [(2)] any insurance required contributions [premiums] paid as provided in clause (i) of this subparagraph [paragraph (1) of this subsection] shall not be paid using money appropriated from the general revenue fund; and

(iii) [(3)] any institution of higher education electing to pay the insurance required contribution [premium] for any employee as described in this subparagraph [subsection] must do so for all eligible similarly situated full-time employees.

(2) [(b)] Part-time employees.

(A) A part-time employee or other employee of an employer other than an institution of higher education who is not eligible for automatic coverage becomes eligible for GBP health coverage upon completion of the health insurance waiting period [established in §1551.1055, Insurance Code,] and upon application to participate in the GBP Program, subject to the provisions of §81.7(a)(2) [§81.7(b)] of this chapter (relating to Enrollment and Participation). A rehired part-time employee[, reelected part-time officer, or reappointed part-time officer] of the state of Texas, including a new part-time employee, each with existing, current, and continuous GBP health coverage as of the date the employee begins active duty or is qualified for and begins to hold office, who is not eligible for automatic coverage is eligible for coverage without a waiting period provided there has been no break in coverage.

(B) [(4)] A [However, a] part-time employee of an institution of higher education is [and the employee's eligible dependents are] eligible for GBP health coverage on the first day that a part-time employee performs services as a part-time employee of an institution of higher education only if:

(i) [(A)] the full amount of insurance required contributions [premiums] are paid for the part-time employee's coverage from the first date of employment through the completion of the health insurance waiting period [defined in §1551.1055(a), Insurance Code];

(ii) [(B)] any insurance required contributions [premiums] paid as provided in clause (i) of this subparagraph [(A) of this paragraph] shall not be paid using money appropriated from the general revenue fund; and

(iii) [(C)] any institution of higher education electing to pay any portion of the insurance required contribution [premium] for any part-time employee as described in this subparagraph [subsection] or in §1551.101(e)(2) of the Act, [Insurance Code,] must do so for all eligible similarly situated part-time employees.

(C) [(2)] An institution of higher education is also not prohibited from contributing a portion or all of the insurance required contribution [required premium] for certain part-time employees described by §1551.101(e)(2) of the Act, [Insurance Code,] only if:

(i) [(A)] the insurance required contributions [premiums not paid by the general revenue fund are] paid by the institution of higher education shall not be paid with funds that are [not] appropriated from the general revenue fund;

(ii) [(B)] any institution of higher education electing to pay the insurance required contributions [premiums] for any part-time employee as described in §1551.101(e)(2) of the Act, [Insurance Code,] must do so for all eligible part-time employees described therein; and

(iii) [(C)] any insurance required contributions [premiums] paid as provided in clause (i) of this subparagraph [(A)

of this paragraph] must be paid from the first date of the part-time employee's initial enrollment.

(b) [(e)] Retirees.

(1) A retiree who is at least 65 years of age with a minimum of 10 years eligible service credit or a retiree whose age and eligible service credit equals or exceeds 80 with a minimum of 10 years eligible service credit, is eligible for GBP health coverage on the day he/she [he or she] becomes an annuitant provided the individual retires directly from state service. If the individual does not retire directly from state service as described in §1551.1055(b) of the Act, [Insurance Code,] eligibility for GBP health coverage begins on the first day of the calendar month following 60 [90] days after the date of retirement.

(2) A retiree who is less than 65 years of age with a minimum of 10 years eligible service credit is eligible for GBP health coverage with the applicable state contribution on the first day of the calendar month following the date on which the individual reaches 65 years of age, subject to meeting the required health insurance waiting period [provided in §1551.1055(b)], if applicable.

(3) ORP Retirees.

(A) A participant in the ORP is eligible for GBP health coverage on the day he/she receives or is eligible to receive an annuity under the ORP program or would have been eligible to receive an annuity had his/her membership been in TRS rather than the ORP, and meets the age, length-of-service, any applicable health insurance waiting period, and other requirements as provided in this subsection.

(B) A participant in the ORP is eligible for additional coverage and plans, which include optional coverage in the GBP, as long as he/she receives or is eligible to receive an annuity under the ORP program or would have been eligible to receive an annuity had his/her membership been in TRS rather than the ORP.

(4) [(3)] Retirees eligible for interim insurance. A retiree with at least 10 [ten] years of eligible service credit who is not eligible for a state contribution for GBP health coverage at the time of retirement is eligible for dental and vision coverage and, except as provided in paragraph (5) [(4)] of this subsection, optional life insurance and dependent life insurance at the time of retirement. A retiree described by this paragraph and by paragraph (2) of this subsection, is eligible for GBP health coverage under the provisions described in [Texas Insurance Code,] §1551.323 of the Act, upon payment of the total cost, as determined by the Board of Trustees. For purposes of §1551.323, the total cost shall be determined by the Board of Trustees based on an actuarial determination, as recommended by ERS' [the system's] consulting actuary for insurance, of the estimated total claims costs for individuals eligible for interim insurance pursuant to §1551.323 of the Act[, Insurance Code]. If an individual who is eligible for this interim insurance is also eligible for COBRA coverage, then COBRA coverage should be exhausted, if possible, before [applying for] the interim insurance begins as described by this subsection.

(5) [(4)] A retiree is eligible for optional life insurance and dependent life insurance coverage if the retiree was enrolled in such coverage on the day before becoming an annuitant. Except as provided in paragraph (6) [(5)] of this subsection, a retiree may not increase the amount of life insurance for which the retiree was enrolled on the day before becoming an annuitant, but may cancel life insurance coverage at any time. Canceled life insurance coverage [coverages] may never be reinstated. A retiree is not eligible for disability or AD&D coverage.

(6) [(5)] A retiree who is not enrolled in [minimum] retiree optional life insurance or dependent life insurance coverage is eligible to apply for minimum retiree optional life insurance or dependent life insurance [such] coverage. Submission of evidence of insurability ac-

ceptable to ERS [the system] shall be required for enrollment in such coverage.

(7) [(6)] A retiree who was not enrolled in dependent life insurance coverage on the day before becoming an annuitant becomes eligible for dependent life insurance coverage of a newly acquired dependent on the first day of the month following the date on which the individual becomes a dependent of the retiree.

(8) [(7)] A retiree who returns to work for an employer [a department] may continue coverage [coverages] for which he/she [he] is eligible as a retiree, or, subject to subsection (a) [or (b)] of this section, elect to participate in the GBP [Program] as a full-time or part-time employee. Time spent in an eligible position as a return to work retiree may not be used to meet eligibility requirements for retiree health insurance coverage. A return to work retiree who elected active employee coverage will be re-enrolled in retiree coverage for which he/she is eligible and may elect new retiree coverage for which he/she is eligible at the time of separation from active duty [may elect retiree coverages for which he is eligible at the time of separation from department service].

(9) [(8)] A retiree whose extended life insurance benefits are terminated for reasons other than termination pursuant to §1551.351 of the Act is eligible for retiree life insurance coverage on the first day of the month following the extended life insurance benefits termination date.

(c) [(d)] Dependents of employees and retirees.

(1) The dependents of an employee/retiree [employee or retiree] are eligible for coverage on the same day that the employee/retiree [employee or retiree] becomes eligible. Except as otherwise provided in this paragraph, a newly acquired dependent is eligible for coverage on the first day of the month following the date on which the individual becomes a dependent of a covered employee/retiree [employee or retiree]. The employee/retiree [employee or retiree] must be enrolled for a particular coverage before the employee's/retiree's [employee's or retiree's] dependents are eligible for that type of coverage. An eligible child for whom a covered employee/retiree [employee or retiree] is court-ordered [court ordered] to provide medical support becomes eligible for GBP health coverage upon receipt by the employer [department] of a valid court order. A newborn natural child is eligible automatically on the date of birth. A newly adopted child is eligible automatically on the date of placement for adoption.

(2) Except as otherwise provided in this paragraph, double coverage is not permitted for any participant in the GBP [Program].

(A) A participant may not be simultaneously covered by basic or optional term life insurance as an employee/retiree [employee or retiree] and dependent term life insurance as a dependent. A family member who is covered as an employee/retiree [employee or retiree] is not eligible to be covered as a dependent in the GBP [Program]. Except as provided in subparagraph (B) of this paragraph, a dependent may not be covered by more than one employee/retiree [employee or retiree] for the same coverage.

(B) A child who is an eligible dependent of two employees/retirees [participants] in the GBP [Program] may be enrolled in dependent life insurance coverage and accidental death and dismemberment coverage by both employees/retirees, if otherwise eligible [participants].

(d) [(e)] Former COBRA unmarried children.

(1) A former COBRA unmarried child is eligible to continue the GBP health, dental and vision [and dental] insurance coverage

[coverages] in which the child was enrolled upon expiration of the child's continuation coverage under COBRA.

(2) A former COBRA unmarried child continuing health insurance coverage under the provisions of this subsection is eligible for dental and vision insurance coverage if such coverage was not in effect upon the expiration of the child's continuation coverage under COBRA.

(3) A former COBRA unmarried child is eligible to enroll a newly acquired dependent child within 30 days of the child's date of birth or placement for adoption. Otherwise, he/she cannot enroll any other dependents in GBP health coverage.

(e) [(f)] Surviving dependents.

(1) The surviving spouse of a deceased retiree or [the surviving spouse of] an active employee is eligible to continue coverage in the GBP health, dental and vision [and dental benefits] plans in which the surviving spouse was enrolled on the day of death of the employee/retiree provided, however, the deceased active employee must have had at least 10 years of service credit, including at least 3 years on August 31, 2001 or at least 10 years after August 31, 2001 of service as an eligible employee with an employer [a Program participating department], at the time of death. A deceased active employee described by §1551.114 of the Act[, Insurance Code,] must have had at least 10 years of eligible service credit, as determined by ERS, before his/her [his or her] surviving spouse is eligible to continue coverage. A surviving spouse who is also an annuitant or employee [a state retiree or state employee] shall not be eligible for surviving spouse benefits as long as he/she [he or she] is eligible for coverage as an employee/retiree [employee or retiree]. Participants continuing coverage as surviving spouses are not eligible for life insurance coverage [coverages].

(2) The dependent child [Dependent children] of a deceased retiree or an active employee [or retiree are] eligible to continue coverage in the GBP health, dental and vision [and dental benefits] plans in which the dependent children were enrolled on the day of death of the employee/retiree provided, however, the deceased active employee must have had, at the time of death, at least 10 years of service credit, including at least 3 years on August 31, 2001 or at least 10 years after August 31, 2001 of service as an eligible employee with an employer [a Program participating department], as long as the surviving spouse is eligible and continues to participate in the GBP [Program]. A deceased active employee described by §1551.114 of the Act[, Insurance Code,] must have had at least 10 years of eligible service credit, as determined by ERS, before his/her [his or her] dependent children are eligible to continue coverage. Dependent children of deceased employees/retirees [employees or retirees] will be considered as dependents of the deceased employee's/retiree's [employee's or retiree's] surviving spouse for purposes of the GBP [Program]. Participants continuing coverage as surviving dependents are not eligible for life insurance coverage.

(3) If a retiree or active employee [an active employee/retiree] does not have a spouse covered in the GBP [Program] at the time of his/her [his or her] death, dependent children of the deceased retiree or active employee [employee/retiree] are eligible to continue coverage in the GBP health, dental and vision [and dental benefits] plans in which the dependent children were enrolled on the day of death of the employee/retiree provided, however, the deceased active employee must have had at least 10 years of service credit, including at least 3 years on August 31, 2001 or at least 10 years after August 31, 2001 of service as an eligible employee with an employer [a Program participating department], at the time of death. A deceased retiree or active employee described by §1551.114 of the Act[, Insurance Code,] must have had at least 10 years of eligible service credit, as determined by

ERS, before his/her [his or her] dependent children are eligible to continue coverage. A surviving dependent child may continue such coverage until the dependent child becomes ineligible as defined in §81.1 of this chapter (relating to Definitions). Participants continuing coverage as surviving dependents are not eligible for life insurance coverage.

(4) A person who is the surviving spouse or dependent of a member [of an individual described in §1551.155(a), Insurance Code,] may secure GBP [group] health coverage if the individual was eligible to participate in the GBP [group benefits program] under §§1551.101, 1551.102 or 1551.155(a) of the Act [§1551.101 or §1551.102, Insurance Code], but was not participating at the time of the individual's death.

(5) A person who is a surviving dependent of an annuitant may secure group health coverage after the death of the annuitant if the annuitant was eligible to participate in the group benefits program of a retirement system named in Chapter 1551, Insurance Code, but was not participating at the time of the individual's death.]

(5) [(6)] A surviving spouse or dependent seeking group coverage under paragraphs (1) - (4) [(5)] of this subsection must apply for coverage not later than the 30th day after the date on which the individual who was eligible to participate in the GBP [group benefits program] dies; and shall pay for coverage at the group rate for other participants.

(6) [(7)] A surviving spouse or an eligible dependent child of a paid law enforcement officer employed by the state or a custodial employee of the institutional division of the Texas Department of Criminal Justice who suffers a death in the line of duty as provided by Chapter 615, Government Code, shall be eligible for coverage in the GBP [Program] as provided in subparagraphs (A) - (D) of this paragraph.

(A) Coverage for a surviving spouse under this paragraph shall be at the same rate as the employee-/retiree-only coverage [employee- or retiree-only coverage], and the surviving spouse shall be entitled to the benefit of the state contribution applied to employee-/retiree-only coverage [employee- or retiree-only coverage].

(B) Coverage for a surviving spouse with children shall be at the same rate as the employee-/retiree-with-children [employee- or retiree-with-children] coverage, and the survivors shall be entitled to receive the benefit of the state contribution applied to coverage for an employee-/retiree-with-children [employee or retiree with children].

(C) Where there is no surviving spouse, a surviving child eligible for coverage under this paragraph shall be entitled to the benefit of the state contribution for employee-/retiree-only coverage [employee- or retiree-only coverage].

(D) In order for a surviving spouse or children to receive coverage in the GBP [Program] under this paragraph, they must pay the balance, if any, of all contributions due after applying the state contribution to such coverage. Any out-of-pocket insurance required contributions [premiums] due from the survivor may be deducted by ERS from the survivor's annuity payment, if any, or must be paid to ERS by the survivor through electronic bank deduction or direct payment. The applicable state contributions will be paid to ERS by the employer [state agency or department] that employed the deceased law enforcement officer or custodial employee.

(7) [(8)] A surviving spouse and eligible dependents, and a surviving dependent child, continuing GBP health [insurance] coverage under the provisions of this subsection are eligible for dental and vision insurance coverage if such coverage was not in effect on the date of death of the deceased employee/retiree [employee or retiree]. Any

insurance required contributions are the sole responsibility of the surviving spouse and dependents.

[(e) Retiree under ORP.]

[(1) A member of the ORP is eligible for health coverage on the day he or she receives or is eligible to receive an annuity under the ORP program or would have been eligible to receive an annuity had his or her membership been in the Teacher Retirement System rather than the ORP, and meets the age, length-of-service, and other requirements as provided in subsection (e) of this section.]

[(2) A member of the ORP is eligible for additional coverages and plans which include optional and voluntary coverages in the Program as long as he or she receives or is eligible to receive an annuity under the ORP program or would have been eligible to receive an annuity had his or her membership been in the Teacher Retirement System rather than the ORP.]

(f) [(h)] Disability retiree [retirement]. An ORP participant who applies and [applicant who] is approved for disability retirement is entitled to retiree insurance coverage [coverages] as provided in §81.7(a)(3) [§81.7(e)] of this chapter. An ORP participant authorized by the Act with at least 10 years of eligible service credit, and granted ORP disabled retiree status in the GBP [Program], as established by ERS [the disability test used by the system], is eligible to participate in the GBP [Program]. Initial or continued eligibility for insurance coverage for an ORP disabled retiree will be determined by ERS [the system] under the following provisions.

(1) An ORP participant is eligible for ORP disabled retiree status in the GBP [Program] if the ORP participant is not otherwise eligible to participate in the GBP [Program] as an employee/retiree [employee or retiree] and is certified by a licensed physician designated by ERS [the system] as disabled as provided in paragraph (2) of this subsection. An ORP participant may apply for disabled retiree status in the GBP [Program] by filing a written application for ORP disabled retiree status in the GBP [Program] or having an application filed with ERS [the system] by the ORP participant's spouse, employer, or legal representative. In addition to an application for ORP disabled retiree status in the GBP [Program], an ORP participant must file with ERS [the system] the results of a medical examination of the ORP participant. After an ORP participant applies for ORP disabled retiree status in the GBP, ERS [Program, the system] may require the ORP participant to submit additional information about the disability. ERS [The system] will prescribe forms for the information required by this section.

(2) If a licensed physician designated by ERS [the system] finds that the ORP participant is mentally or physically disabled from the further performance of duty and that the disability is probably permanent, the physician will certify the disability. The executive director is authorized to approve ORP disabled retiree status in the GBP [Program] after a certification of disability is made. Once each year during the first five years after an ORP participant enrolls in the GBP [Program] as an ORP disabled retiree, and once in each three-year period after that, ERS [the system] may require an ORP disabled retiree to undergo a medical examination by a physician ERS [the system] designates. If an ORP disabled retiree refuses to submit to a medical examination as provided by this section, ERS [the system] will suspend the ORP disabled retiree's enrollment in the GBP [Program] until the ORP disabled retiree submits to an examination. ERS [The system] will terminate the ORP disabled retiree's coverage in the GBP [Program] and notify the ORP participant in writing if:

(A) ERS [the system] concurs with a certification issued by the designated physician which finds that an ORP disabled retiree is

no longer mentally or physically disabled from the further performance of duty; or

(B) an ORP disabled retiree refuses for more than one year to submit to a required medical examination.

(3) The effective date of coverage for an ORP disabled retiree in the GBP [Program] is the first of the month following the date the application for ORP disabled retiree status in the GBP is approved by ERS [Program is received by the system], or the first of the month following the date employment is terminated, whichever is later.

(g) [(†)] Former members of the Legislature. A former member of the Legislature authorized by §1551.108(1) of the Act to continue to participate in the GBP [Program] is eligible for the coverage, other than disability income insurance coverage, in effect on the day before the member leaves office.

(h) [(†)] Former employees of the Legislature. A former employee of the Legislature authorized by §1551.108(2) of the Act to continue to participate in the GBP [Program] is eligible for the coverage, other than disability income insurance coverage, in effect on the day before the employee terminates employment.

(i) Former board members. Subject to the limitations of this subsection, a former member of a board or commission or of the governing body of an institution of higher education, as both are described in §1551.109 of the Act, is eligible to continue the coverage, other than disability income insurance coverage, in effect on the day before the member leaves office if no lapse in coverage occurs after the end of the term of office. Life insurance coverage may not exceed Election II.

(j) [(†)] Continuation of GBP health, dental and vision coverage [and dental coverages] only for certain spouses and dependent children of employee/retirees, and for certain terminating employees, their spouses, and dependent children (as provided by COBRA [the Consolidated Omnibus Budget Reconciliation Act, Public Law 99-272]).

(1) The surviving spouse and/or dependent child/children of a deceased employee/retiree [employee or retiree] who are not eligible to continue coverage under the provisions of the Act [Insurance Code] or subsection (e) [(†)] of this section, who are not entitled to benefits under the Social Security Act, Title XVIII, and who are not covered under any other group health plan, [or who were covered by a plan that subjects them to a preexisting conditions limitation or exclusion that was not satisfied by the service credit provisions of Public Law 104-91 Health Insurance Portability and Accountability Act (HIPAA);] may continue for up to 36 months the GBP health, dental and vision coverage [and dental coverages] only that were in effect immediately prior to the date of death of the employee/retiree. A formal election must be made to continue coverage by the surviving spouse and/or the dependent child/children. The formal election must be postmarked or received by ERS [the system] within 60 days of the date of notice contained in the notice of right to continue coverage form or by the date coverage terminated, whichever is later.

(2) An employee whose employment has been terminated voluntarily or involuntarily (other than for gross misconduct), whose work hours have been reduced such that the employee is no longer eligible for the GBP [Program] as an employee, or whose coverage has ended following the maximum period of LWOP [leave without pay] as provided for in §81.7(g)(2)(A) [§81.7(m)(2)(A)] of this chapter, except for those persons not eligible pursuant to §81.11(f) [§81.11(d)] of this chapter (relating to Cancellation of Coverage and Sanctions [Termination of Coverage]), and/or his/her [his or her] spouse and/or dependent child/children who are not eligible to continue coverage under the provisions of the Act [Insurance Code] or subsection (f), (g) or (h) [or (†)] of this section, who are not entitled to benefits under the

Social Security Act, Title XVIII, who are not covered under any other group health plan, [or who were covered by a plan that subjects them to a preexisting conditions limitation or exclusion that was not satisfied by the service credit provisions of Public Law 104-91 (HIPAA);] may continue for up to 18 months the GBP health, dental and vision coverage [and dental coverages] only without the basic term life that were in effect immediately prior to the date of the loss of coverage. A formal election must be made to continue coverage by the employee and/or his/her [his or her] spouse and/or dependent child/children. The formal election must be postmarked or received by ERS [the system] within 60 days of the date of notice contained in the notice of right to continue coverage form or by the date coverage terminated, whichever is later.

(3) If an employee, spouse, or dependent child is determined by the Social Security Administration to have been disabled before or during the first 60 days of continuation coverage, all covered individuals may continue GBP health, dental and vision coverage [and dental coverages] extended up to an additional 11 months, for a total of 29 months. Notification of the Social Security Administration's determination must be received by ERS [the system] before the end of the original 18 months of continuation coverage. Continuation coverage will be canceled the month that begins more than 30 days after the date the Social Security Administration determines that the participant is no longer disabled.

(4) A spouse who is divorced from an employee/retiree and/or the spouse's dependent child/children who are not otherwise eligible to continue coverage under the provisions of the Act [Insurance Code] or subsection (c) [(†)] of this section, who are not entitled to benefits under the Social Security Act, Title XVIII, who are not covered under any other group health plan, [or who are covered by a plan that subjects them to a preexisting conditions limitation or exclusion that was not satisfied by the service credit provisions of Public Law 104-92 (HIPAA);] may continue for up to 36 months the GBP health, dental and vision coverage [and dental coverages] only that were in effect immediately prior to the date the divorce decree is signed. The employee/retiree or the divorced spouse or the divorced spouse's dependent child/children must notify ERS [the system] through the [employing department or retiree] benefits coordinator of the divorce within 60 days from the date the divorce decree is signed. A formal election must be made to continue coverage by the divorced spouse and/or the dependent child/children. The formal election must be postmarked or received by ERS [the system] within 60 days of the date of notice contained in the notice of right to continue coverage form or by the date coverage is terminated, whichever is later.

[(5) A dependent child under 26 years of age who marries, who is not entitled to benefits under the Social Security Act, Title XVIII, who is not covered under any other group health plan, or who are covered by a plan that subjects the child to a preexisting conditions limitation or exclusion that was not satisfied by the service credit provisions of Public Law 104-91 (HIPAA); may continue for up to 36 months the health and dental coverages only that were in effect immediately prior to the date of the marriage. The married child or the employee/retiree must notify the system through the employing department or retiree benefits coordinator of the marriage within 60 days from the date of the marriage. A formal election must be made by the married child to continue coverage. The formal election must be postmarked or received by the system within 60 days of the date of notice contained in the notice of right to continue coverage form or by the date coverage is terminated, whichever is later.]

(5) [(6)] A dependent child who has attained 26 years of age, who is not otherwise eligible to continue coverage indefinitely under the provisions of the Act [Insurance Code] or subsection (c) [(†)]

of this section, who is not entitled to benefits under the Social Security Act, Title XVIII, who is not covered under any other group health plan, [or who is covered by a plan that subjects the child to a preexisting conditions limitation or exclusion that was not satisfied by the service credit provisions of Public Law 104-91 (HIPAA);] may continue for up to 36 months the GBP health, dental and vision coverage [and dental coverages] only that were in effect immediately prior to the date of the child's 26th birthday. The child or employee/retiree must notify ERS [the system] through the [employing department or retiree] benefits coordinator within 60 days of the child's 26th birthday. A formal election must be made by the 26-year-old child to continue coverage. The formal election must be postmarked or received by ERS [the system] within 60 days of the date of notice contained in the notice of right to continue coverage form or by the date coverage is terminated, whichever is later.

(6) [(7)] Extension of continuation of coverage for certain spouses and/or dependent child/children of former employees who are continuing coverage under the provisions of paragraph (2) of this subsection is governed by the following provisions.

(A) The surviving spouse and/or dependent child/children of a deceased former employee whose death occurred during the period of continuation coverage, who satisfy the provisions of paragraph (1) of this subsection and who notify ERS [the Employees Retirement System of Texas] within 60 days of the date of death of the former employee are entitled to a total of 36 months of continuation coverage.

(B) A spouse who is divorced from a former employee during the period of continuation coverage and/or the divorced spouse's dependent child/children who satisfy the provisions of paragraph (4) of this subsection are entitled to a total of 36 months of continuation coverage.

[(C) A dependent child under 26 years of age who marries during the period of continuation coverage and who satisfies the provisions of paragraph (5) of this subsection is entitled to a total of 36 months of continuation coverage.]

(C) [(D)] A dependent child who attains the age of 26 years during the period of continuation coverage and who satisfies the provisions of paragraph (5) [(6)] of this subsection is entitled to a total of 36 months of continuation coverage.

(D) [(E)] An employee, spouse, or dependent child determined by the Social Security Administration to be disabled at the time of termination of the employee's employment and who satisfies the provisions of paragraph (3) of this subsection is entitled to not more than [to a total of] 29 months of continuation coverage.

(E) [(F)] No person shall be allowed to continue GBP health, dental and vision coverage [and dental coverages] under the provisions of this subsection for more than 36 months.

(7) [(8)] A person who continues benefits under the provisions of paragraphs (1) - (6) [(7)] of this subsection may change coverage levels or plans during the continuation period on the same basis as an employee/retiree participant, provided, however, that GBP health coverage [and dental coverages] which is [are] canceled during the continuation period may not be reestablished.

(8) [(9)] In all situations deemed applicable by ERS [the Employees Retirement System of Texas] where state or federal laws or regulations mandate specific terms or provisions which are omitted or conflict with specific terms or provisions of the plan documents or ERS' [group contracts or trustees'] rules, the appropriate plan documents [contracts] and rules shall be interpreted and administered to comply with such laws or regulations.

[(1) Former board members: Subject to the limitations of this subsection, a former member of a board or commission or of the governing body of an institution of higher education, as both are described in §1551.109, Insurance Code, is eligible to continue the coverage, other than disability income insurance coverage, in effect on the day before the member leaves office if no lapse in coverage occurs after the end of the term of office. Life insurance coverage may not exceed Election II.]

§81.7. Enrollment and Participation.

(a) Enrollment Categories.

(1) [(a)] Full-time employees and their dependents.

(A) [(1)] A new employee:

(i) [(A)] who is not subject to the health insurance waiting period and is eligible under the Act and as provided for in §81.5(a)(1) [§81.5(a)] of this chapter (relating to Eligibility) for automatic insurance coverage, shall be enrolled in the basic plan [of health and life insurance] unless the employee completes an enrollment form to elect other coverage [coverages] or to waive GBP health coverage as provided in §81.8 of this chapter (relating to Waiver of Health Coverage). Coverage of an employee under the basic plan, and other coverage [coverages] selected as provided in this paragraph, becomes [become] effective on the date on which the employee begins active duty.

(ii) [(B)] who is subject to the health insurance waiting period and is eligible under the Act and as provided for in §81.5(a)(1) [§81.5(a)] of this chapter for automatic insurance coverage, shall be enrolled in the basic plan [of health and life insurance] beginning on the first day of the calendar month following 60 [90] days of employment unless, before this date, the employee completes an enrollment form to elect other coverage [coverages] or to waive GBP health coverage as provided in §81.8 of this chapter.

(iii) [(2)] who has [A new employee with] existing, current, and continuous GBP health coverage as of the date the employee begins active duty is not subject to the health insurance waiting period [established in §1551.1055, Insurance Code,] and is eligible to enroll as a new employee in health insurance and additional coverage [coverages] and plans which include optional coverage [and voluntary coverages] by completing an enrollment form before the first day of the calendar month after the date the employee begins active duty. Health and additional coverage [coverages] selected before the first day of the calendar month after the date the employee begins active duty are effective the first day of the following month.

(B) [(3)] Dependent enrollment and optional coverage [coverages]:

(i) [(A)] To enroll eligible dependents, to elect to enroll in an approved HMO, and to elect additional coverage [coverages] and plans which include optional coverage [and voluntary coverages], an employee not subject to the health insurance waiting period shall complete an enrollment form within 30 days after the date on which the employee begins active duty. Coverage [Coverages] selected within 30 days after the date on which the employee begins active duty becomes [become] effective on the first day of the month following the date on which the enrollment form is completed. An enrollment form completed after the initial period for enrollment as provided in this paragraph is subject to the provisions of subsection (d) [(4)] of this section.

(ii) [(B)] To enroll eligible dependents or to elect to enroll in an approved HMO, an employee subject to the health insurance waiting period shall complete an enrollment form before the first day of the month following 60 [90] days of employment. Coverage [Coverages] selected before the first day of the month following 60

[90] days of employment ~~becomes~~ [become] effective on the first day of the month following ~~60~~ [90] days of employment. An employee completing an enrollment form after the initial period for enrollment as provided in this paragraph is subject to the provisions of subsection (d) [(†)] of this section. The provisions of subsection (a)(1)(A)(ii) of this section [~~paragraph (2) of this subsection~~] apply to the election of additional coverage [~~eoverages~~] and plans, which include optional coverage [~~and voluntary coverages~~], for an employee subject to the health insurance waiting period.

(C) [(4)] Except as otherwise provided in this section, an employee may not change coverage [~~during a contract year~~].

(D) [(5)] An eligible employee who enrolls in the GBP [Program] is eligible to participate in premium conversion and shall be automatically enrolled in the premium conversion plan. The employee shall be automatically enrolled in the plan for subsequent plan years as long as the employee remains on active duty.

(E) [(6)] Coverage for a newly eligible dependent, other than a dependent referred to in subparagraph (F) or (H) of this paragraph [(7) or (9) of this subsection], will be effective on the first day of the month following the date the person becomes a dependent if an enrollment form is completed on or within 30 days after the date the person first becomes a dependent. If the enrollment form is completed and signed after the initial period for enrollment as provided in this paragraph, the enrollment form will be governed by the rules in subsection (d) [(†)] of this section.

(F) [(7)] A member's newborn natural child will be covered immediately and automatically for 30 days from the date of birth in the health plan in effect for the employee/retiree [~~employee or retiree~~]. A member's newly adopted child will be covered immediately and automatically from the date of placement for adoption for 30 days in the health plan in effect for the employee/retiree [~~employee or retiree~~]. To continue coverage for more than 30 days after the date of birth or placement for adoption, an enrollment form for GBP health coverage must be submitted by the member within 30 days after the date of birth or placement for adoption.

(G) [(8)] The effective date of a newborn natural child's life and AD&D coverage [~~insurance~~] will be the date of birth, if the child is born alive, as certified by an attending physician. The effective date of a newly adopted child's life and AD&D coverage [~~insurance~~] will be the date of placement for adoption. The effective date of all other eligible dependents' life and AD&D coverage [~~insurance eoverages~~] will be as stated in subparagraph (E) of this paragraph [(6) of this subsection].

(H) [(9)] GBP health [~~Health insurance~~] coverage of a member's [~~an~~] eligible child for whom a covered employee/retiree [~~employee or retiree~~] is court-ordered to provide medical support becomes effective on the date on which the member's benefits coordinator [~~department~~] receives a valid copy of the qualified medical child support [~~court~~] order.

(I) [(10)] The effective date of GBP health [~~HealthSelect of Texas~~] coverage for an employee's/retiree's [~~employee's or retiree's~~] dependent, other than a newborn natural child or newly adopted child, will be as stated in subparagraph (E) of this paragraph [(6) of this subsection].

(J) [(11)] For purposes of this section, an enrollment form is completed when all information necessary to effect an enrollment has been transmitted to ERS [~~the system~~] in the form and manner prescribed by ERS [~~the system~~].

(2) [(b)] Part-time employees. A part-time employee or other employee who is not automatically covered must complete an

application/enrollment form provided by ERS [~~the Employees Retirement System of Texas~~] authorizing necessary deductions for insurance required contributions [~~premium payments~~] for elected coverage. All other rules for enrollment stated in paragraph (1) of this subsection [(a) of this section], other than the rule as to automatic coverage, apply to such employee:

(A) [(4)] If the employee is not subject to a health insurance waiting period, this form must be submitted to ERS either through ERS Online or [~~the Employees Retirement System of Texas~~] through his/her benefits coordinator [~~his or her employing department~~] on, or within 30 days after, the date on which the employee begins active duty.

(B) [(2)] If the employee is subject to a health insurance waiting period, this form must be submitted to ERS either through ERS Online or [~~the Employees Retirement System of Texas~~] through his/her benefits coordinator [~~his or her employing department~~] before the first day of the month following ~~60~~ [90] days of employment.

(C) [(3)] If the employee has existing, current, and continuous GBP health coverage as of the date the employee begins active duty, the employee is not subject to the health insurance waiting period [~~established in §1551.1055, Insurance Code~~] and is eligible to enroll as a new employee in health insurance and additional coverage [~~eoverages~~] and plans which include optional coverage [~~and voluntary eoverages~~] by completing an enrollment form before the first day of the calendar month after the date the employee begins active duty. Health and additional coverage [~~eoverages~~] selected before the first day of the calendar month after the date the employee begins active duty are effective the first day of the following month.

(3) [(e)] Retirees and their dependents.

(A) [(4)] Provided the insurance required contributions [~~required premiums~~] are paid or deducted, an employee's GBP health, dental, vision and term life insurance coverage (including eligible dependent coverage [~~eoverages~~]) may be continued upon retirement as provided in §81.5(b) [~~§81.5(e)~~] of this chapter. The life insurance will be reduced to the maximum amount which the retiree is permitted to retain under the insurance plan [~~contract~~] as a retiree. All other coverage [~~eoverages~~] in force for an [~~the~~] active employee, but not available to a retiree, will automatically be discontinued concurrently with the commencement of retirement status. Except as provided in subparagraph (E) of this paragraph [~~subsection (a)(6) of this section~~], if a retiree retires directly from active duty [~~department service~~] and is not covered as an active employee on the day before becoming an annuitant, the retiree may enroll [~~will be enrolled~~] in the basic plan.

(B) [(2)] A retiree may enroll in GBP health, dental, vision and life insurance coverage [~~eoverages~~] for which the retiree is eligible as provided in §81.5(b) [~~§81.5(e)~~] of this chapter, including dependent coverage [~~eoverages~~], by completing an enrollment form as specified in clauses (i) - (iii) of this subparagraph [~~subparagraphs (A) - (C) of this paragraph~~]. For the purposes of this subparagraph [~~paragraph~~], the effective date of retirement of a retiree who is eligible to receive, but who has not yet received [~~is not actually receiving~~], an annuity is the date on which ERS [~~the system~~] receives written notice of the retirement. An application/enrollment form received after the initial period for enrollment as provided in this subparagraph [~~paragraph~~], is subject to the provisions of subsection (d) [(†)] of this section.

(i) [(A)] A retiree who is not subject to the health insurance waiting period on the effective date of retirement as provided in §81.5(b) [~~§81.5(e)~~] of this chapter, may enroll in GBP health, dental, vision and life insurance coverage [~~eoverages~~] or waive GBP health coverage as provided in §81.8 of this chapter for which the retiree is eligible, including dependent coverage, by completing an enrollment

form or waiver of coverage as applicable before, on, or within 30 days after, the retiree's effective date of retirement.

(ii) [(B)] A retiree who is subject to the health insurance waiting period on the effective date of retirement as provided in §81.5(b) [§81.5(e)] of this chapter, may enroll in GBP health coverage or waive GBP health coverage as provided in §81.8 of this chapter for which the retiree is eligible, including dependent coverage, by completing an enrollment form or waiver of coverage as applicable, before the first day of the calendar month following 60 [90] days after the date of retirement or before the first day of the calendar month after the retiree's 65th birthday, whichever is later as appropriate. The effective date for such coverage [coverages] shall be the first day of the calendar month following 60 [90] days after the date of retirement or the first day of the calendar month following the retiree's 65th birthday, whichever is later as appropriate.

(iii) [(C)] A retiree who is ineligible for health insurance on the effective date of retirement as provided in §81.5(b) [§81.5(e)] of this chapter, may enroll in GBP health coverage or waive GBP health coverage as provided in §81.8 of this chapter for which the retiree is eligible, including dependent coverage, by completing an enrollment form or waiver of coverage as applicable, before the first day of the calendar month after the retiree's 65th birthday. The effective date for such coverage [coverages] shall be the first day of the calendar month following 60 [90] days after the date of retirement or the first day of the calendar month following the retiree's 65th birthday, whichever is later.

(C) [(3)] A retiree who becomes eligible for minimum retiree optional life insurance coverage or dependent life insurance coverage as provided in §81.5(b)(6) [§81.5(e)(5)] of this chapter, may apply for approval of such coverage by providing evidence of insurability acceptable to ERS [the system].

(D) [(4)] Enrollments in and applications to change coverage become effective as provided in subparagraph (B) of this paragraph [(2) of this subsection] unless other coverage is [coverages are] in effect at that time. If other coverage is [coverages are] in effect at that time, coverage or waiver of coverage becomes effective on the first day of the month following the date of approval of retirement by ERS [the Employees Retirement System of Texas]; or, if cancellation of the other coverage [coverages] preceded the date of approval of retirement, the first day of the month following the date the other coverage was [coverages were] canceled.

[(5) All other enrollment rules stated in subsections (a), (h), and (m) of this section apply to retirees.]

(E) [(6)] A retiree who seeks enrollment in GBP health coverage [coverages] after turning age 65 or is retired and enrolled in a health [the basic] plan and turns age 65 will be automatically enrolled in the Medicare Advantage Plan unless the retiree opts out of the Medicare Advantage Plan and enrolls in other coverage by completing an enrollment form as specified in subparagraph (B)(i) - (iii) of this paragraph [(2)(A) - (C) of this subsection]. If the retiree is determined to be ineligible for Medicare coverage, then he/she will be returned to the coverage in place immediately before turning 65.

(F) [(7)] A [ERS may determine that a] Medicare-eligible retiree who seeks enrollment in GBP health coverage [coverages] or is retired and enrolled in a health [the basic] plan and becomes eligible for Medicare will [may] be automatically enrolled in HealthSelect Medicare Rx. A retiree who declines HealthSelect Medicare Rx loses all GBP prescription drug coverage. If the retiree is determined to be ineligible for Medicare coverage, then he/she will be returned to the coverage in place immediately before turning 65.

(4) [(d)] Medicare-eligible Dependents.

(A) [(1)] A dependent as defined in §81.1 [§81.1(1)(A) - (I) and (12)(A) - (D)] of this chapter (relating to Definitions) who becomes eligible for Medicare-primary [Medicare primary] coverage as specified in §81.1 [§81.1(23)] of this chapter, either through disability, [or] age, or other requirements as set forth by CMS [or its successor agency], will be automatically enrolled in the Medicare Advantage Plan unless the retiree and his/her dependents opt out of the Medicare Advantage Plan and enroll in other coverage by completing an enrollment form as specified in paragraph (3)(B)(i) - (iii) of this subsection [(e)(2)(A) - (C) of this section]. If the dependent is determined to be ineligible for Medicare coverage, then he/she will be returned to the coverage in place immediately before turning 65.

(B) [(2)] A [ERS may determine that a] Medicare-eligible dependent eligible for GBP health coverage will [coverages under the GBP may] be automatically enrolled in HealthSelect Medicare Rx. A Medicare-eligible dependent who declines HealthSelect Medicare Rx loses all GBP prescription drug coverage. If the dependent is determined to be ineligible for Medicare coverage, then he/she will be returned to the coverage in place immediately before turning 65.

(5) [(e)] Surviving dependents.

(A) [(1)] Provided that the insurance required contributions [required premiums] are paid or deducted, the health, [and] dental, and vision insurance coverage [coverages] of a surviving dependent may be continued on the death of the deceased employee/retiree [employee or retiree] if the dependent is eligible for such coverage as provided by §81.5(e) [§81.5(f)] of this chapter.

(B) [(2)] A surviving spouse who is receiving an annuity shall make insurance required contribution [premium] payments by deductions from the annuity as provided in subsection (h)(7) of this section [§81.3(b)(2)(A) of this chapter (relating to Administration)]. A surviving spouse who is not receiving an annuity may make payments as provided in subsection (h)(7) of this section [§81.3(b)(2)(B) of this chapter].

(C) A Medicare-eligible surviving dependent eligible for GBP health coverage will be automatically enrolled in the Medicare Advantage Plan unless the surviving dependent opts out of the Medicare Advantage Plan and enrolls in other coverage.

(D) [(3)] A [ERS may determine that a] Medicare-eligible surviving dependent eligible for GBP health coverage will [coverages under the GBP may] be automatically enrolled in HealthSelect Medicare Rx. A Medicare-eligible surviving dependent who declines HealthSelect Medicare Rx loses all GBP prescription drug coverage.

(6) [(f)] Former COBRA unmarried children. A former COBRA unmarried child must provide an application to continue GBP health, [and] dental and vision insurance coverage within 30 days after the date the notice of eligibility is mailed by ERS [the system]. Coverage becomes effective on the first day of the month following the month in which continuation coverage ends. Insurance required contribution [Premium] payments must [may] be made as provided in subsection (h)(1)(A) [§81.3(b)(2)(B)] of this section [chapter].

(b) [(g)] Premium conversion plans.

(1) An eligible employee participating in the GBP [Program] is deemed to have elected to participate in the premium conversion plan and to pay insurance required contributions [premium expenses] with pre-tax dollars as long as the employee remains on active duty. The plan is intended to be qualified under the Internal Revenue Code, §79 and §106.

(2) Maximum benefit available. Subject to the limitations set forth in these rules and in the plan, to avoid discrimination, the maximum amount of flexible benefit dollars which a participant may receive in any plan year for insurance required contributions [premium expenses] under this section shall be the amount required to pay the participant's portion of the insurance required contributions [premiums] for coverage under each type of insurance included in the plan.

(c) [(h)] Special rules for additional coverage [coverages] and plans which include optional coverage [and voluntary coverages].

(1) Only an employee/retiree [employee or retiree] or a former officer or employee specifically authorized to join the GBP [Program] may apply for additional coverage [coverages] and plans. An employee/retiree may apply for or elect additional coverage [coverages] and plans for which he/she is eligible without concurrent enrollment in GBP health coverage provided by the GBP [Program]. Additional coverage [coverages] and plans, as determined by the Board of Trustees [board], may include:

- (A) dental coverage;
- (B) optional term life;
- (C) dependent term life;
- (D) short- and long-term disability;
- (E) voluntary accidental death and dismemberment;
- (F) long-term care; [or]
- (G) health care and dependent care reimbursement;[-]
- (H) commuter spending account;
- (I) vision;
- (J) limited purpose flexible spending account; or
- (K) health savings account.

(2) An eligible member [participant] in the GBP [Program] and eligible dependents may participate in an approved HMO if they reside in the approved service area of the HMO and are otherwise eligible under the terms of the contract with the HMO.

(3) An eligible member [participant] in the GBP [Program] electing additional coverage [coverages] and plans and/or Consumer Directed HealthSelect, HMO or Medicare Advantage coverage in lieu of the basic plan [of insurance] is obligated for the full payment of insurance required contributions [premiums]. If the insurance required contributions [premiums] are not paid, all coverage [coverages] not fully funded by the state contribution will be canceled. A person eligible for [entitled to] the state contribution will retain member-only GBP [member only] health coverage as a member provided the state contribution is sufficient to cover the insurance required contribution [premium] for such coverage. If the state contribution is not sufficient for member-only [member only] coverage in the health plan selected by the member employee/retiree, the member employee/retiree [employee or retiree, the employee or retiree] will be enrolled in the basic plan or the Medicare Advantage Plan, as applicable, except as provided for in subsection (g)(2)(B) [(m)(2)(B)] of this section.

(4) An eligible member [participant] in the GBP [Program] enrolled in an HMO and the HMO's [whose] contract is not renewed for the next fiscal year will be eligible to make one of the following elections:

(A) change to another approved HMO for which the member [participant] is eligible by completing an enrollment form during the annual enrollment period. The effective date of the change in coverage will be September 1;

[(B) enroll in HealthSelect of Texas by completing an enrollment form during the annual enrollment period; if the participant is eligible to enroll in another approved HMO. The effective date of the change in coverage for the eligible participant shall be September 1. Eligible dependents may also be enrolled. The effective date of coverage for dependents may be either September 1 or the first day of the month following the date approval is received by the department;]

(B) [(C)] enroll in HealthSelect of Texas, Consumer Directed HealthSelect, or a Medicare Advantage Plan (if eligible) by completing an enrollment form during the annual enrollment period. [Eligible dependents may also be enrolled.] The effective date of the change in coverage will be September 1; or

(C) [(D)] if the member [participant] does not make one of the elections, as defined in subparagraphs (A) or (B) [- (C)] of this paragraph, the member [participant] and covered eligible dependents will automatically be enrolled in the basic plan or the Medicare Advantage Plan, as applicable.

(5) A member [An employee, retiree, or other eligible program participant] enrolled in an HMO whose contract with ERS is terminated during the fiscal year or that [which] fails to maintain compliance with the terms of its contract, as determined by ERS, [with the Employees Retirement System of Texas] will be eligible to make one of the following elections:

(A) change to another approved HMO for which the member [participant] is eligible. The effective date of the change in coverage will be determined by ERS; or [the board;]

(B) enroll in HealthSelect of Texas, Consumer Directed HealthSelect, or a Medicare Advantage Plan (if eligible) [provided the participant is not eligible to enroll in another approved HMO]. The effective date of the change in coverage will be determined by ERS. [the board; or]

[(C) if a participant is eligible to enroll in another HMO, the board may allow the participant to enroll in HealthSelect of Texas. The effective date of the change in coverage will be determined by the board.]

(d) [(i)] Changes in coverage after the initial period for enrollment.

(1) Changes for a qualifying life event.

(A) Subject to the provisions of paragraphs (3) and (4) of this subsection, a member [participant] shall be allowed to change coverage during a plan year within thirty (30) days of a qualifying life event that occurs as provided in this paragraph if the change in coverage is consistent with the qualifying life event.

(B) A qualifying life event occurs when a participant experiences one of the following changes:

- (i) change in marital status;
- (ii) change in dependent status;
- (iii) change in employment status;
- (iv) change of address that results in loss of benefits eligibility;
- (v) change in Medicare or Medicaid status, or CHIP [Children's Health Insurance program (CHIP)] status;
- (vi) significant cost of benefit or coverage change imposed by a third party provider; or
- (vii) change in coverage ordered by a court.

(C) A member [participant] who loses benefits eligibility as a result of a change of address shall change coverage as provided in paragraphs (6) - (9) of this subsection.

(D) A member [participant] may apply to change coverage on, or within 30 days after, the date of the qualifying life event, provided, however, a change in election due to CHIP or Medicaid status under subparagraph (B) of this paragraph may be submitted on, or within 60 days after, the change in CHIP or Medicaid status.

(E) Except as otherwise provided in subsection (a)(1)(F) and (H) [(a)(7) and (9)] of this section, the change in coverage is effective on the first day of the month following the date on which the enrollment form is completed.

(F) Documentation may be required [The plan administrator may require documentation] in support of the qualifying life event.

(G) Following a qualifying life event, a member may change applicable coverage, drop or add an eligible dependent if the change is consistent with the qualifying life event.

(2) Effects of change in cost of benefits to the premium conversion plan. There shall be an automatic adjustment in the amount of premium conversion plan dollars used to purchase optional benefits in the event of a change, for whatever reason, during an applicable period of coverage, of the cost of providing such optional benefit to the extent permitted by applicable law and regulation. The automatic adjustment shall be equal to the increase or decrease in such cost. A participant shall be deemed by virtue of participation in the plan to have consented to the automatic adjustment.

(3) An eligible member [participant] who wishes to add or increase optional coverage after the initial period for enrollment must make application for approval by providing evidence of insurability acceptable to ERS, if required [the system]. Unless not in compliance with paragraph (1) of this subsection, coverage will become effective on the first day of the month following the date approval is received by ERS [the employee's benefits coordinator or by the system], if the applicant is a retiree or an individual in a direct pay status. If the applicant is an employee whose coverage was canceled while the employee was on LWOP [in a leave without pay status], the approved change in coverage will become effective on the date the employee returns to active duty if the employee returns to active duty within 30 days of the approval letter. If the date the employee returns to active duty is more than 30 days after the date on the approval letter, the approval is null and void; and a new application shall be required. An employee/retiree [employee or retiree] may withdraw the application at any time prior to the effective date of coverage by submitting a written notice of withdrawal.

(4) The evidence of insurability provision applies only to:

(A) employees who wish to enroll in Elections III or IV optional term life insurance, except as otherwise provided in subsection (f) [(h)] of this section;

(B) employees who wish to enroll in or increase optional term life insurance, dependent life insurance, or disability income insurance after the initial period for enrollment;

(C) employees enrolled in the GBP [Program] whose coverage was waived, dropped or canceled, except as otherwise provided in subsection (f) [(h)] of this section; and

(D) retirees who wish to enroll in minimum optional life insurance [coverage] or dependent life insurance [coverage] as provided in subsection (a)(3)(C) [(e)(3)] of this section.

(5) An employee/retiree [employee or retiree] who wishes to add eligible dependents to the employee's/retiree's [employee's or retiree's] HMO coverage may do so:

(A) during the annual enrollment period [(coverage will become effective on September 1)]; or

(B) upon the occurrence of a qualifying life event as provided in paragraph (1) of this subsection.

(6) A member [participant] who is enrolled in an approved HMO and who permanently moves out of the HMO service area shall make one of the following elections, to become effective on the first day of the month following the date on which the member [participant] moves out of the HMO service area:

(A) enroll in another approved HMO for which the member [participant] and all covered dependents are eligible; or

(B) if the member [participant] and all covered dependents are not eligible to enroll in an approved HMO; either:

(i) enroll in HealthSelect of Texas or Consumer Directed HealthSelect; or

(ii) enroll in an approved HMO if the member [participant] is eligible, and drop any ineligible covered dependent, unless not in compliance with §81.11(c)(3) [§81.11(a)(2)] of this chapter (relating to Cancellation [Termination] of Coverage and Sanctions).

(7) When a covered dependent of a member [participant] permanently moves out of the member's [participant's] HMO service area, the member [participant] shall make one of the following elections, to become effective on the first day of the month following the date on which the dependent moves out of the HMO service area:

(A) drop the ineligible dependent, unless not in compliance with §81.11(c)(3) [§81.11(a)(2)] of this chapter;

(B) enroll in an approved HMO if the member [participant] and all covered dependents are eligible; or

(C) enroll in HealthSelect of Texas or Consumer Directed HealthSelect, provided the eligible member [participant] and all dependents enroll in the same health plan [HealthSelect] at that time.

(8) An eligible member [participant] will be allowed an annual opportunity to make changes in coverage.

(A) Subject to other requirements of this section, a member [participant] will be allowed to:

(i) change or enroll themselves and any eligible dependents in an eligible health, dental or vision plan [from one HMO to another HMO];

(ii) change between HealthSelect of Texas and an HMO;

(iii) apply for coverage in HealthSelect, if eligible;

(iv) select in-area or out-of-area coverage in HealthSelect of Texas based on county of residence or county of work;

(v) enroll in a dental plan;

(vi) change dental plans;

(vii) enroll eligible dependents in an HMO or dental coverage;

(viii) apply for dependent coverage in HealthSelect of Texas, if the participant is enrolled in HealthSelect of Texas;

(ii) ~~[(ix)]~~ enroll themselves and their eligible dependents in an eligible health ~~[HMO and in a]~~ dental or vision plan from a waived or canceled status;

(iii) ~~[(x)]~~ add, decrease or cancel eligible coverage, unless prohibited by §81.11(c)(3) ~~[(§81-11(a)(2))]~~ of this chapter;

(iv) ~~[(xi)]~~ apply for coverage as provided in paragraph (3) of this subsection; and

(v) ~~[(xii)]~~ waive any or all GBP ~~[health]~~ coverage including health as provided in §81.8 of this chapter.

(B) Surviving dependents and former COBRA unmarried children are not eligible to add dependents to coverage through annual enrollment. A ~~[for the provisions in subparagraph (A)(iv), (vii), (viii), (ix), (xi) or (xii) of this paragraph, except that a]~~ surviving dependent or former COBRA unmarried child may enroll an eligible dependent in dental or vision insurance coverage if the dependent is enrolled in health insurance coverage.

(C) Annual enrollment opportunities will be scheduled each year at times announced by ERS. ~~[Such opportunity will be scheduled prior to September 1 of each year at times announced by the system. Coverage selected during the annual enrollment period will be effective September 1.]~~

(9) A participant who is a retiree or a surviving dependent, or who is in a direct pay status, may decrease or cancel any coverage at any time unless such coverage is health insurance coverage ordered by a court as provided in §81.5(c) ~~[(§81-5(d))]~~ of this chapter.

~~[(10) Following a qualifying life event, a participant may enroll in, or add an eligible dependent in, HealthSelect of Texas.]~~

(10) ~~[(11)]~~ A member ~~[participant]~~ and his/her dependents who are enrolled in the Medicare Advantage Plan may collectively enroll ~~[apply for coverage]~~ in HealthSelect of Texas, Consumer Directed HealthSelect or an HMO.

(A) Such opportunity will be scheduled on at least an annual basis each year, at times announced by ERS ~~[the system]~~.

(B) Additional opportunities will occur each month prior to an annual enrollment period. Coverage selected during these opportunities will be effective on the first of the month following processing by CMS.

(11) ~~[(12)]~~ If a member ~~[participant]~~ drops coverage for his/her ~~[his or her]~~ dependent because the dependent gained other coverage effective the first day of a month, then the effective date of the qualifying life event can be either the last day of the month preceding the gained coverage or on the first day of the month in which the gained coverage is effective.

~~[(j) Preexisting conditions exclusion. The preexisting conditions exclusion shall apply to employees who enroll in disability coverage. The exclusion for benefit payments shall not apply after the first six consecutive months that the employee has been actively at work or after the employee's disability coverage has been continuously in force for 12 months for a preexisting condition, as defined in §81-1 of this chapter (relating to Definitions). The preexisting conditions exclusion will not apply to a medical condition resulting from congenital or birth defects.]~~

(c) ~~[(k)]~~ Special provisions relating to term life benefits

(1) An employee or annuitant who is enrolled in the group term life insurance plan may file a claim for an accelerated life benefit for himself or his covered dependent in accordance with the terms of the plan in effect at that time. An accelerated life benefit paid will be

deducted from the amount that would otherwise be payable under the plan.

(2) An employee or annuitant who is enrolled in the group term life insurance plan may make, in conjunction with receipt of a vatical settlement, an irrevocable beneficiary designation in accordance with the terms of the plan in effect at that time.

(f) ~~[(H)]~~ Re-enrollment in the GBP ~~[Program]~~.

(1) The provisions of subsection (a)(1) of this section shall apply to the enrollment of an employee who terminates employment and returns to active duty within the same fiscal ~~[contract]~~ year, who transfers from one employer ~~[department]~~ to another, or who returns to active duty after a period of LWOP ~~[leave without pay]~~ during which coverage is canceled.

(2) An employee to whom paragraph (1) of this subsection applies shall be subject to the same requirements as a newly hired employee to re-enroll in the coverage ~~[coverages]~~ in which the employee was previously enrolled. Provided that all applicable preexisting conditions exclusions were satisfied on the date of termination, transfer, or cancellation, no new preexisting conditions exclusions will apply. If not, any remaining period of preexisting conditions exclusions must be satisfied upon re-enrollment.

(3) If an employee is a member of the Texas National Guard or any of the reserve components of the United States armed forces, and the employee's coverage is ~~[coverages are]~~ canceled during a period of LWOP ~~[leave without pay]~~ or upon termination of employment as the result of an assignment to active military duty, the period of active military duty shall be applied toward satisfaction of any period of preexisting conditions exclusions remaining upon the employee's return to active employment.

(g) ~~[(m)]~~ Continuing coverage in special circumstances.

(1) Continuation of coverage ~~[coverages]~~ for terminating employees. A terminating employee is eligible to continue all coverage ~~[coverages]~~ through the last day of the month in which employment is terminated.

(2) Continuation of coverage ~~[coverages]~~ for employees on LWOP ~~[in a leave without pay]~~ status.

(A) An employee in LWOP ~~[a leave without pay]~~ status may continue the coverage ~~[coverages]~~ in effect on the date the employee entered that status for the period of leave, but not more than 12 months. The employee must pay insurance required contributions ~~[premiums]~~ directly as provided in subsection (h)(1)(A) of this section ~~[(§81-3(b)(2)(B)(1) of this chapter)]~~.

(B) An employee whose LWOP ~~[leave without pay]~~ is a result of the Family and Medical Leave Act of 1993 will continue to receive the state contribution during such period of LWOP ~~[leave without pay]~~. The employee must pay insurance required contributions ~~[premiums]~~ directly as defined in subsection (h)(1)(A) of this section ~~[(§81-3(b)(2)(B)(1) of this chapter)]~~. Failure to make the payment of insurance required contributions ~~[required payment of premiums]~~ by the due date will result in the cancellation of all coverage ~~[coverages]~~ except for member-only ~~[member only]~~ health and basic life coverage. The employee will continue in the health plan in which he/she ~~[he or she]~~ was enrolled immediately prior to the cancellation of all other coverage. ~~[coverages. If a premium beyond the state contribution for member only health and basic life coverage is owed, the employee must make the required payment of premiums directly to the employing department upon return to active duty.]~~

(3) Continuation of coverage ~~[coverages]~~ for a former member or employee of the Legislature. Provided that the insurance

required contributions [required premiums] are paid, the GBP health, dental, vision and life insurance coverage [coverages] of a former member or employee of the Legislature may be continued on conclusion of the term of office or employment.

(4) Continuation coverage for a former board member. Provided that the insurance required contributions are paid, the GBP health, dental, vision and life insurance coverage of a former member of a board or commission, or of the governing body of an institution of higher education, as both are described in §1551.109 of the Act, may be continued on conclusion of service if no lapse in coverage occurs after the term of office. Life insurance will be reduced to the maximum amount for which the former board member is eligible.

(5) [(4)] Continuation of coverage [coverages] for a former judge. A former state of Texas judge, who is eligible for judicial assignments and who does not serve on judicial assignments during a period of one calendar month or longer, may continue the coverage that was [coverages that were] in effect during the calendar month immediately prior to the month in which the former judge did not serve on judicial assignments. This coverage [These coverages] may continue for no more than 12 continuous months during which the former judge does not serve on judicial assignments as long as, during the period, the former judge continues to be eligible for assignment.

(6) [(5)] Continuation of [health and dental] coverage for a surviving spouse and/or dependent child/children of a deceased employee/retiree [employee or retiree]. The surviving spouse and/or dependent child/children of a deceased employee/retiree, who, in accordance with §81.5(j)(1) [§81.5(k)(1)] of this chapter, elects to continue coverage may do so by submitting the required election notification and enrollment forms to ERS [the system]. The enrollment form, including all insurance required contributions [premiums] due for the election/enrollment period, must be postmarked or received by ERS [the system] on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the employee/retiree dies, provided all [group] insurance required contributions [premiums] due for the month in which the employee/retiree died and for the election/enrollment period have been paid in full.

(7) [(6)] Continuation of [health and dental] coverage for a covered employee whose employment has been terminated, voluntarily or involuntarily (other than for gross misconduct), whose work hours have been reduced such that the employee is no longer eligible for the GBP [Program] as an employee, or whose coverage has ended following the maximum period of LWOP [leave without pay] as provided in paragraph (2)(A) of this subsection. An employee, his/her [his or her] spouse and/or dependent child/children, who, in accordance with §81.5(j)(2) [§81.5(k)(2)] of this chapter, elect [elects] to continue GBP health, dental and vision coverage [and dental coverages] may do so by submitting the required election notification and enrollment forms to ERS [the system]. The enrollment form, including all insurance required contributions [premiums] due for the election/enrollment period, must be postmarked or received by ERS [the system] on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the employee's coverage ends, provided all [group] insurance required contributions [premiums] due for the month in which the coverage ends and for the election/enrollment period have been paid in full.

(8) [(7)] Continuation of [health and dental] coverage for a spouse who is divorced from a member [an employee/retiree] and/or the spouse's dependent child/children. The divorced spouse and/or the spouse's dependent child/children [not provided for by §81.5(a) of this chapter] of an employee/retiree who, in accordance

with §81.5(j)(4) [§81.5(k)(4)] of this chapter, elect [elects] to continue coverage may do so by submitting the required election notification and enrollment forms to ERS [the system]. The enrollment form, including all insurance required contributions [premiums] due for the election/enrollment period, must be postmarked or received by ERS [the system] on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the divorce decree is signed, provided all [group] insurance required contributions [premiums] due for the month in which the divorce decree is signed and for the election/enrollment period have been paid in full.

[(8) Continuation of health and dental coverage for a dependent child under 26 years of age who marries. A dependent child under 26 years of age who marries and who, in accordance with §81.5(k)(5) of this chapter, elects to continue coverage may do so by submitting the required election notification and enrollment forms to the system. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the system on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the dependent child's marriage occurred, provided all group insurance premiums due for the month in which the dependent child's marriage occurred and for the election/enrollment period have been paid in full.]

(9) Continuation of [health and dental] coverage for a dependent child who has attained 26 years of age. A 26-year-old dependent child (not provided for by §81.5(c) [§81.5(d)] of this chapter) of a member [an employee/retiree] who, in accordance with §81.5(j)(5) [§81.5(k)(6)] of this chapter, elects to continue coverage may do so by submitting the required election notification and enrollment forms to ERS [the system]. The enrollment form, including all insurance required contributions [premiums] due for the election/enrollment period, must be postmarked or received by ERS [the system] on or before the date indicated on the continuation of coverage enrollment form. Continuing coverage will begin on the first day of the month following the month in which the dependent child of the member [employee/retiree] attains 26 years of age, provided all [group] insurance required contributions [premiums] due for the month in which the dependent child attained age 26 and for the election/enrollment period have been paid in full.

(10) Extension of continuation of coverage [health and dental coverages] for certain dependents [spouses and/or dependent child/children] of former employees who are continuing coverage under the provisions of paragraph (6) of this subsection.

(A) The surviving dependent [spouse and/or dependent child/children] of a deceased former employee, who, in accordance with §81.5(j)(6)(A) [§81.5(k)(7)(A)] of this chapter, elects to extend continuation coverage may do so by submitting the required election notification and enrollment forms to ERS [the Employees Retirement System of Texas]. The enrollment form, including all insurance required contributions [premiums] due for the election/enrollment period, must be postmarked or received by ERS [the Employees Retirement System of Texas] on or before the date indicated on the continuation enrollment form. The election/enrollment period begins on the first day of the month following the month in which the former employee died.

(B) A spouse who is divorced from a former employee and/or the divorced spouse's dependent child/children, who, in accordance with §81.5(j)(6)(B) [§81.5(k)(7)(B)] of this chapter, elects to extend continuation coverage may do so by submitting the required election notification and enrollment forms to ERS [the Employees Retirement System of Texas]. The enrollment form, including all insurance

required contributions [premiums] due for the election/enrollment period, must be postmarked or received by ERS [the Employees Retirement System of Texas] on or before the date indicated on the continuation enrollment form. The election/enrollment period begins on the first day of the month following the month in which the divorce decree was signed.

~~[(C)]~~ A dependent child under 26 years of age who marries, who, in accordance with §81.5(k)(7)(C) of this chapter, elects to extend continuation coverage may do so by submitting the required election notification and enrollment forms to the Employees Retirement System of Texas. The enrollment form, including all premiums due for the election/enrollment period, must be postmarked or received by the Employees Retirement System of Texas on or before the date indicated on the continuation enrollment form. The election/enrollment period begins on the first day of the month following the month in which the dependent child marries.}]

~~(C)~~ ~~[(D)]~~ A dependent child who has attained 26 years of age, who, in accordance with §81.5(j)(6)(C) [§81.5(k)(7)(D)] of this chapter, elects to extend continuation coverage may do so by submitting the required election notification and enrollment forms to ERS [the Employees Retirement System of Texas]. The enrollment form, including all insurance required contributions [premiums] due for the election/enrollment period, must be postmarked or received by ERS [the Employees Retirement System of Texas] on or before the date indicated on the continuation enrollment form. The election/enrollment period begins on the first day of the month following the month in which the dependent child attained age 26.

(11) Continuation coverage defined. Continuation coverage as provided for in paragraphs (6) [(5)] - (10) of this subsection means the continuation of only GBP health, dental and vision coverage which meets [and dental coverage benefits which meet] the following requirements.

(A) Type of benefit coverage. The coverage shall consist of only the GBP health, dental and vision coverage [and dental coverages], which, as of the time the coverage is being provided, are identical to the GBP health, dental and vision coverage [and dental coverages] provided for a similarly situated person for whom a cessation of coverage event has not occurred.

(B) Period of coverage. The coverage shall extend for at least the period beginning on the first day of the month following the date of the cessation of coverage event and ending not earlier than the earliest of the following:

(i) in the case of loss of coverage due to termination of an employee's employment for other than gross misconduct, reduction in work hours, or end of maximum period of LWOP [leave without pay], the last day of the 18th calendar month of the continuation period;

(ii) in the case of loss of coverage due to termination of an employee's employment for other than gross misconduct, reduction in work hours, or end of maximum period of LWOP [leave without pay], if the employee, spouse, or dependent child has been certified by the Social Security Administration as being disabled as provided in §81.5(j)(3) [§81.5(k)(3)] of this chapter, up to the last day of the 29th calendar month of the continuation period;

(iii) in any case other than loss of coverage due to termination of an employee's employment for other than gross misconduct, reduction in work hours, or end of maximum period of LWOP [leave without pay], the last day of the 36th calendar month of the continuation period;

(iv) the date on which the employer ceases to provide any group health plan to any employee/retiree;

(v) the date on which coverage ceases under the plan due to failure to make timely payment of any insurance required contribution [premium required] as provided in subsection (h) of this section [§81.3(b)(2)(B)(ii) and (iii) of this chapter];

(vi) the date on which the participant, after the date of election, becomes covered under any other group health plan under which the participant is not subject to a preexisting conditions limitation or exclusion; or

~~[(vii)]~~ the date on which the participant, covered under any other group health plan that subjects him or her to a preexisting conditions limitation or exclusion that was not satisfied by the service credit provisions of Public Law 104-91 (HIPAA), is no longer subject to the preexisting conditions limitation or exclusion in the other plan;}]

~~(vii)~~ [(viii)] the date on which the participant, after the date of election, becomes entitled to benefits under the Social Security Act, Title XVIII.

(C) Insurance required contribution costs. [Premium requirements.} The insurance required contribution [premium] for a participant during the continuation coverage period will be 102% of the employee's/retiree's GBP health, dental and vision coverage [health and dental coverages only] rate and is payable as provided in subsection (h) of this section [§81.3(b)(2)(B)(ii) of this chapter].

(i) The insurance required contribution [premium] for a participant eligible for 36 months of coverage will be 102% of the employee's/retiree's GBP health, dental and vision coverage rate [and dental coverages only rate for the 19th through 36th months of coverage] and is payable as provided in subsection (h)(1)(A) of this section [§81.3(b)(2)(B)(ii) of this chapter].

(ii) The insurance required contribution [premium] for a participant eligible for 29 months of coverage will increase to [be] 150% of the employee's/retiree's GBP health, dental and vision coverage [and dental coverages only] rate for the 19th through 29th months of coverage and is payable as provided in subsection (h)(1)(A) of this section [§81.3(b)(2)(B)(iii) of this chapter].

(D) No requirement of insurability. No evidence of insurability is required for a participant who elects to continue GBP health [(medical)] coverage under the provisions of §81.5(j)(1) - (6) [§81.5(k)(1) - (6)] of this chapter.

(E) Conversion option. An option to enroll under the conversion plan available to employees/retirees is also available to a participant who continues GBP coverage [health and dental coverages] for the maximum period as provided in subparagraph (B)(i) - (iii) of this paragraph. The conversion notice will be provided to a participant during the 180-day period immediately preceding the end of the continuation period.

~~[(12)]~~ Continuation coverage for a former board member. Provided that the required premiums are paid, the health, dental, and life insurance coverages of a former member of a board or commission, or of the governing body of an institution of higher education, as both are described in §1551.109, Insurance Code, may be continued on conclusion of service if no lapse in coverage occurs after the term of office. Life insurance will be reduced to the maximum amount for which the former member is eligible.}]

(h) Payment of Insurance Required Contributions.

(1) A member whose monthly cost of coverage is greater than the combined amount contributed by the state or employer for the member's coverage must pay a monthly contribution in an amount that exceeds the combined monthly contributions of the state or the employer. A member shall pay his/her monthly insurance required con-

tributions through deductions from monthly compensation or annuity payments or by direct payment, as provided in this paragraph.

(A) A member who is not receiving a monthly compensation or an annuity payment, or is receiving a monthly compensation or annuity payment that is less than the member's monthly insurance required contribution, shall pay his/her monthly insurance required contribution under this subparagraph.

(i) An employee whose monthly compensation is less than the employee's monthly insurance required contribution shall pay his/her monthly insurance required contribution through his/her employer. A non-salaried board member of an employer shall pay his/her monthly insurance required contributions through the employer for which he/she sits as a board member.

(ii) A retiree whose monthly annuity payment is less than the retiree's monthly insurance required contribution shall pay his/her monthly insurance required contributions directly to ERS.

(B) If the member does not comply with subparagraph (A) of this subsection by the due date required, ERS will cancel all coverage not fully funded by the state contribution. If the state contribution is sufficient to cover the required insurance contribution for such coverage, the member will retain member-only health and basic life coverage. If the state contribution is not sufficient to cover the member-only coverage in the health plan selected, the member will be enrolled in the basic plan except as provided for in paragraph (2)(B) of this subsection.

(2) An institution of higher education may contribute a portion or all of the insurance required contribution for its part-time employees described by §1551.101(e)(2) of the Act, if:

(A) the institution of higher education pays the contribution with funds that are not appropriated from the general revenue fund;

(B) the institution of higher education electing to pay the contribution for its part-time employees does so for all similarly situated eligible part-time employees; and

(C) the contribution paid as provided in this paragraph is paid beginning on the first day of the month following the part-time employee's completion of any applicable waiting period.

(3) A participant who continues GBP health, dental and vision coverage under COBRA as provided in §81.5(j) of this chapter (relating to Eligibility) must pay his/her monthly insurance contributions on the first day of each month covered.

(A) A participant's monthly insurance required contribution is 102% of the monthly amount charged for other participants in the same coverage category and in the same plan. All insurance required contributions due for the election/enrollment period must be postmarked or received by ERS on or before the date indicated on the continuation of coverage enrollment form. Subsequent insurance required contributions are due on the first day of each month of the participant's coverage and must be postmarked or received by ERS within 30 days of the due date to avoid cancellation of coverage.

(B) A participant's monthly insurance required contribution for continuing coverage as provided in §81.5(j)(3) of this chapter is increased after the 18th month of coverage to 150% of the monthly amount charged for other participants in the same coverage category and in the same plan. The participant's monthly insurance required contribution is due on the first day of each month covered, and must be postmarked or received by ERS within 30 days of the due date.

(4) The full cost for GBP health, dental and vision coverage is required to be paid for a member's unmarried child who is over 26 years of age, whose coverage under COBRA expired, and who has reinstated coverage in the GBP pursuant to §1551.158 of the Act. No state contribution is paid for this coverage.

(5) Survivors of a paid law enforcement officer employed by the state or a custodial employee of the institutional division of the Texas Department of Criminal Justice who suffers a death in the line of duty as provided by Chapter 615, Government Code, are eligible for GBP coverage as provided in subparagraphs (A) - (C) of this paragraph.

(A) The insurance required contribution due under this paragraph for a surviving spouse's GBP coverage is the same amount as a member-only contribution. The state contribution applicable to member-only coverage is applied to the surviving spouse's contribution for the coverage.

(B) The insurance required contribution due under this paragraph for GBP coverage for a surviving spouse with dependent children is the same amount as the member-with-children contribution. The state contribution applicable to member-with-children coverage is applied to the contribution of the surviving spouse with dependent children for the coverage.

(C) The insurance required contribution due under this paragraph for a surviving dependent child's GBP coverage, when there is no surviving spouse, is the same amount as member-only contribution. The state contribution applicable to member-only coverage is applied to the surviving dependent child's contribution for the coverage.

(D) The surviving spouse or surviving dependent child must timely pay his/her insurance required contributions for the GBP coverage. The survivor's contribution must be either deducted by ERS from the survivor's annuity payment, if any, or submitted to ERS via direct payment. Any applicable state contribution will be paid directly to ERS by the employer that employed the deceased law enforcement officer or custodial employee.

(6) If a retiree whose eligibility for health insurance is based on §§1551.102(i), 1551.111(e) or 1551.112(c) of the Act, obtains interim health insurance as provided in §1551.323 of the Act, the retiree must pay the total contribution for such coverage for as long as the retiree wants the coverage or until the first day of the month following the retiree's 65th birthday. The amount of contribution shall be determined by the Board of Trustees based on an actuarial determination, as recommended by ERS' consulting actuary for insurance, of the estimated total claims costs for individuals eligible for such coverage. If a retiree who is eligible for coverage under this paragraph is also eligible for COBRA coverage, then COBRA coverage should be exhausted, if possible, before applying for the coverage under this paragraph.

(7) A member's surviving spouse or surviving dependent who is receiving an annuity shall authorize deductions for insurance required contributions from the annuity as provided in paragraph (1) of this subsection. A member's surviving spouse or surviving dependent who is not receiving an annuity may make payments as provided in paragraph (1)(A) of this subsection.

(i) The amount of state contribution for certain retirees is determined in accordance with §1551.3196 of the Act.

(1) An individual is grandfathered at the time of retirement and not subject to §1551.3196 of the Act, if on or before September 1, 2014, the individual has served in one or more positions for at least five years for which the individual was eligible to participate in the GBP as an employee.

(2) Records of ERS shall be used to determine whether or not an individual meets the grandfathering requirements specified in paragraph (1) of this subsection. ERS may, in its sole discretion, require an individual to provide additional documentation satisfactory to ERS that the individual meets the grandfathering requirements specified in paragraph (1) of this subsection.

§81.8. *Waiver of Health Coverage.*

(a) Eligibility for waiver. An ~~[individual]~~ eligible member ~~[to participate in the Program]~~ may elect to waive GBP health coverage by ~~[in]~~ the method and form specified by ~~ERS [the System]~~:

- (1) during the initial period of eligibility;
- (2) after a qualifying life event; or
- (3) during annual enrollment.

(b) Enrollment ~~[Re-enrollment]~~ in GBP health coverage after waiver. An eligible member who previously waived GBP health coverage, may enroll in GBP health coverage subject to the provisions of §81.7 of this chapter (relating to Enrollment and Participation) ~~[individual who has waived health coverage is subject to the eligibility and enrollment provisions of this chapter, should the individual elect to apply for health coverage in the Program].~~

(c) Incentive Credit based on a waiver.

(1) An eligible member, except for a survivor under Chapter 615, Texas Government Code ~~[employee or retiree eligible to participate in the Program and]~~ who waives GBP health coverage is ~~[may be]~~ eligible for an incentive credit in lieu of the state contribution up to the amount specified in the General Appropriations Act if the member ~~[individual]~~:

(A) would otherwise have been eligible for ~~[to receive]~~ the state contribution to be made on his/her behalf; and

(B) demonstrates, in a manner specified by ERS, that the member has other health coverage ~~[the System, coverage by another health benefit plan with]~~ substantially equivalent to the GBP health coverage ~~[coverage to the basic plan].~~

(2) The incentive credit may be applied only toward the cost of certain dental plans or AD&D coverage offered within the GBP ~~[eligible optional coverage, as determined by the System].~~

~~[(3) Notwithstanding any other provisions of this chapter, optional coverage is not considered voluntary coverage for purposes of the incentive credit in lieu of the state contribution.]~~

§81.9. *Grievance Procedures [Procedure].*

(a) Grievance procedures regarding the denial of claims by administering firms for HealthSelect of Texas, Consumer Directed HealthSelect and the Dental Choice Plans are set forth in the Master Benefit Plan Documents for those plans. Internal and external reviews of claims are subject to federal statutes and rules and §1551.356, of the Act.

(b) The review procedures for a participant in an HMO, dental health maintenance organization, vision plan, or a Medicare Advantage Plan who is denied payment of insurance benefits, or otherwise receives an adverse decision, are set forth in the applicable plan documents. Those decisions are not appealable to ERS.

(c) Grievance procedures regarding the denial of a claim, denial of eligibility for coverage other than dependent eligibility, or other adverse decisions by a carrier or an administering firm for all GBP coverage other than those subject to subsections (a) and (b) are set forth in this subsection. A participant must request the carrier or administering

firm to reconsider the denial or other adverse decision prior to seeking grievance review by ERS. Any additional documentation in support of the claim may be submitted to the carrier or administering firm with the request for reconsideration. If the claim is again denied, the claim, accompanied by all related documents and copies of correspondence with the carrier or administering firm, may be submitted by the participant to the executive director for review. A request for grievance review must be filed with ERS by the participant in writing within 90 days from the date the carrier or administering firm formally denies the claim, or provides notice of other adverse decision, and mails notice of the denial and grievance right of appeal to the participant.

~~[(a) Except for persons enrolled in an HMO, a Medicare Advantage Plan or other fully insured plan as determined by ERS, any person participating in the Group Benefits Program insurance program who is denied payment of insurance benefits, or otherwise receives an adverse decision, may request the carrier or administering firm to reconsider the claim. Any additional documentation in support of the claim may be submitted with the request for reconsideration. If the claim is again denied, the claim, accompanied by all related documents and copies of correspondence with the insurance carrier or administering firm, may be submitted by the person to the executive director of the Employees Retirement System of Texas or the executive director's designee for review. A request for grievance must be filed by the person in writing within 90 days from the date the insurance carrier or administering firm formally denies the claim, or provides notice of other adverse decision, and mails notice of this denial and grievance right of appeal to the person.]~~

~~[(b) Any participant with a grievance regarding eligibility or other matters involving the Program may submit a written request to the executive director or the executive director's designee to make a determination on the matter in dispute.]~~

~~[(d) [(e)] When the executive director [or the executive director's designee] reviews any matter arising under this section, information available to ERS will be considered. When the executive director [or the executive director's designee] completes the review and makes a determination [decision], all parties involved will be notified in writing of the decision.~~

~~[(d) Any participant aggrieved by the executive director's or the executive director's designee's decision may appeal the decision to the Board's designee provided the decision grants a right of appeal.]~~

(e) To the extent allowed by statute, appeals of ERS' determination ~~[Appeals of the Board's designee's decision]~~ will be conducted under the provisions of Chapter 67 of this title (relating to Hearings on Disputed Claims) and the Act ~~[Chapter 1551, Insurance Code]~~. A notice of appeal ~~[to the Board's designee]~~ must be in writing and filed with ERS within 30 days from the date ~~ERS' determination [the executive director's or the executive director's designee's decision]~~ is served on the participant ~~[in accordance with §67.7 of this title (relating to Filing and Service of Documents and Pleadings)].~~

(f) Matters initiated or referred to ERS concerning misrepresentations or fraud are not subject to grievance procedures under this rule.

§81.11. *Cancellation [Termination] of Coverage and Sanctions.*

(a) A participant's coverage will end on the earliest of:

(1) the last day of the month in which insurance required contributions for a participant's coverage are paid in full;

(2) the last day of the month in which a participant becomes ineligible for coverage;

(3) the last day of the month, or other date as specified by ERS, in which ERS instructs the relevant carriers and administering firms to end a participant's coverage; or

(4) the effective date of a participant's expulsion from participation in the GBP or specific coverage plans as provided under §1551.351 of the Act.

(b) In addition to the dates described in subsection (a) of this section, an employee's coverage will end on the earliest of:

(1) the last day of the month in which the employee's employment ends; or

(2) the last day of the month in which the employee retires, unless the employee is eligible for coverage as a retiree.

(c) In addition to the dates described in subsection (a) of this section, a dependent's coverage will end:

(1) on the last day of the month in which the employment or retirement of the member who enrolled the dependent ends;

(2) on the last day of the month in which the dependent ceases to be an eligible dependent as defined in §81.1 of this chapter (relating to Definitions); or

(3) for qualified medical child support court-ordered dependent GBP health coverage only:

(A) on the last day of the month in which the dependent ceases to be an eligible dependent as defined in §81.1 of this chapter; or

(B) the court order is invalidated or terminates.

(d) Cancellation of coverage for a surviving spouse or surviving dependent of a deceased member.

(1) If a surviving spouse or surviving dependent of a deceased member becomes an employee eligible for GBP coverage, the coverage based on the status of surviving spouse or surviving dependent will be cancelled as of the eligibility date of the employee coverage. If the surviving spouse ceases to be an employee, the surviving spouse may re-enroll in GBP coverage based on the status of surviving spouse. If the surviving dependent ceases to be an employee, the surviving dependent may re-enroll in GBP coverage based on the status of surviving dependent for as long as he/she is an eligible dependent.

(2) If a surviving spouse or surviving dependent of a deceased member cancels coverage that was based on the status of surviving spouse or surviving dependent, he/she may not re-enroll in GBP coverage, except as provided in paragraph (1) of this subsection.

(e) Required notice when a dependent loses eligibility for coverage. A member is required to notify his/her benefits coordinator or ERS in writing within 31 days from the date the member's dependent loses eligibility for coverage. If the member fails to comply with this notification requirement, the member and dependent may be subject to sanctions pursuant to §1551.351 of the Act and subsection (f) of this section.

~~[(a) Cancellation of coverage.]~~

~~[(1) Coverage will continue through the last day of the month in which coverage is canceled. Coverage canceled by a surviving spouse or dependent of a deceased retiree may never be reinstated, except as provided in paragraph (4) of this subsection.]~~

~~[(2) Court ordered health coverage for a dependent cannot be canceled unless the dependent is no longer eligible as a dependent as defined in §81.1 of this chapter (relating to Definitions), the court order is no longer valid, or comparable coverage has been obtained.]~~

~~[(3) Coverage for a dependent, who marries or attains age 26, shall be canceled as of the last day of the month following the date of marriage or attainment of age 26, as the case may be.]~~

~~[(4) Surviving spouse and eligible dependent coverage for a person who becomes a state employee shall be canceled as of the effective date of coverage as an active employee. Surviving spouse and eligible dependent coverage may be reinstated when the surviving spouse terminates employment with the state.]~~

~~[(5) Coverage shall be canceled for non-payment of premium if a premium is not paid within 30 days of the date payment is due. Coverage will be canceled effective the last day of the month for which timely payment was made.]~~

~~[(b) Termination of employment. Coverages for an employee who terminates employment and his or her dependents shall continue through the last day of the month in which employment is terminated.]~~

~~[(c) Loss of dependent eligibility. In the event that an employee's or annuitant's enrolled dependent loses eligibility for continued participation in the Program, the employee/annuitant shall notify his benefit coordinator or ERS in writing no later than thirty (30) days from the day the dependent loses his eligibility. A failure to disclose a loss of dependent eligibility required by this rule may result in sanctions being imposed on the employee/annuitant pursuant to §1551.351, Insurance Code and subsection (d) of this section.]~~

~~(f) [(4)] Sanctions for Insurance Program Violations.~~

~~(1) ERS [The Employees Retirement System of Texas] may rescind any insurance coverage or impose one or more sanctions described by the Act [Insurance Code, Chapter 1551] against any person, including, but not limited to, any current or former participant, employee, annuitant, dependent or insurance claimant who commits any of the violations enumerated in the Act [the Insurance Code, Chapter 1551].~~

~~(2) Any person with a grievance regarding eligibility, payment of a claim or other matters for which an appeal is permitted involving the GBP [Program] may submit a written request to the executive director to make a determination on the matter in dispute. Any person who disputes a rescission of coverage, a denial of benefits or sanctions imposed in connection with a determination made under the Act [Insurance Code, Chapter 1551], may appeal the determination in accordance with §81.9 of this chapter (relating to Grievance Procedures [Procedure]). A timely appeal of a determination made pursuant to the Act [Insurance Code, Chapter 1551] shall not stay the imposition of sanctions. At the time such a determination is made pursuant to the Act [Insurance Code, Chapter 1551], no further claims will be paid until the ERS decision is final. Upon final agency action, all eligible claims, if any, will be processed subject to any offsets for overpayments.~~

~~(3) Any hearing provided pursuant to this section shall be a contested case under Government Code, Chapter 2001, and be conducted in the manner prescribed by law and by Chapter 67 of this title (relating to Hearings on Disputed Claims).~~

~~(4) Any person expelled from the GBP [Texas Employees Group Benefits Program] may not be insured under any benefits plan offered by the GBP [Program] for a period determined by ERS [the Employees Retirement System of Texas].~~

~~(5) If a person's insurance coverage is rescinded, it may be rescinded to the date of the inception of the coverage or from the date of the prohibited conduct as found in the determination made in accordance with the Act [Insurance Code, Chapter 1551].~~

(6) ERS [The Employees Retirement System of Texas] also may deny any claim filed to obtain benefits from the insurance coverage in a manner prohibited under the Act [Insurance Code, Chapter 1554].

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 23, 2016.

TRD-201603194

Paula A. Jones

Deputy Executive Director and General Counsel

Employees Retirement System of Texas

Earliest possible date of adoption: August 7, 2016

For further information, please call: (877) 275-4377



CHAPTER 85. FLEXIBLE BENEFITS

34 TAC §85.4

The Employees Retirement System of Texas (ERS) proposes an amendment to 34 Texas Administrative Code (TAC) Chapter 85 concerning Flexible Benefits, §85.4 (Separate Plans).

Section 85.4(c) is proposed to be amended to update a numerical reference to the subsection regarding the Insurance Premium Conversion Plan described in Chapter 81. The reference needs to be updated to conform with proposed amendments to Chapter 81.

Ms. Paula A. Jones, Deputy Executive Director and General Counsel, has determined that for the first five-year period the rules are in effect, there will be no fiscal implication for state or local government as a result of enforcing or administering the rules. To Ms. Jones' knowledge, there are no known anticipated economic costs to persons who are required to comply with the rules as proposed, and, to her knowledge, small businesses should not be affected.

Ms. Jones also 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 rules include the reasons stated above, and also better serve and benefit state employees by permitting tax-advantaged reimbursement of dental and vision expenses, and preventing employees participating in the CDHP from being ineligible for contributions to an HSA.

Comments on the proposed rule amendment may be submitted to Paula A. Jones, Deputy Executive Director and General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207 or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is August 8, 2016, at 10:00 a.m.

The amendments are proposed under the Texas Insurance Code, §1551.052, which provides authorization for the ERS Board of Trustees to adopt rules necessary to carry out its statutory duties and responsibilities and under §1551.068, Texas Insurance Code, which authorizes the ERS Board of Trustees to modify, amend, or interpret rules to the extent necessary to comply with any applicable federal law.

No other statutes are affected by the proposed amendment.

§85.4. *Separate Plans.*

(a) Dependent care reimbursement plan--A separate plan under the Code, §129, adopted by the board of trustees, and designed to

provide payment or reimbursement for dependent care expenses as described in §85.5(c) of this title (relating to Benefits). The following sections of this chapter constitute the plan: §§85.1, 85.3(a), 85.5(a), 85.5(c), 85.7, 85.9, 85.11, 85.12, 85.13, 85.15, 85.17, and 85.19.

(b) Health care reimbursement plan--A separate plan, under the Code, §105, adopted by the board of trustees, and designed to provide health care expense reimbursement as described in §85.5(b) of this title (relating to Benefits). The following sections of this chapter constitute the plan: §§85.1, 85.3(b), 85.5(a), 85.5(b), 85.7, 85.9, 85.11, 85.12, 85.13, 85.15, 85.17, and 85.19.

(c) Insurance Premium Conversion Plan--A separate plan under §105(b) of the Code designed to provide insurance premium conversion as described in §81.7 [§81.7(f)]. The Insurance Premium Conversion Plan is intended to comply with the Internal Revenue Code, §79 and §106.

(d) Qualified transportation benefit plan--A separate plan under the Code, §132, approved by the board of trustees, and designed to provide payment or reimbursement for certain transportation expenses. The qualified transportation benefit plan is governed by a plan document as executed and approved by the Executive Director, and as amended hereafter. A copy of the plan document may be obtained from the Employees Retirement System of Texas on request.

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

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Paula A. Jones

Deputy Executive Director and General Counsel

Employees Retirement System of Texas

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For further information, please call: (877) 275-4377



PART 5. TEXAS COUNTY AND DISTRICT RETIREMENT SYSTEM

CHAPTER 101. PRACTICE AND PROCEDURE REGARDING CLAIMS

34 TAC §101.6

The Texas County and District Retirement System ("TCDRS") proposes an amendment to rule, §101.6. The proposed amendment to §101.6 would provide that the first annuity payment is payable beginning on the last day of the first month following the effective date of retirement. The proposed amendment codifies the current practice which has been in place for several decades.

Ann McGeehan, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. McGeehan has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the proposed amendment will be clear plan language defining when the first annuity payment is payable. There will be no costs to small businesses. There are

no anticipated economic costs to persons who are required to comply with the new rule as proposed.

Comments on the proposed amendment may be submitted to Ann McGeehan, General Counsel, TCDRS, P.O. Box 2034, Austin, Texas 78768-2034, faxed to (512) 328-8887, or submitted electronically to legaldept@tcdrs.org.

The amendment is proposed under the Government Code, §845.102, which authorizes the TCDRS board of trustees to adopt rules for the efficient administration of the system.

No other statutes, articles, or codes are affected by this proposed amendment.

§101.6. Time for Filing of Retirement Applications and First Annuity Payment.

(a) An application for retirement must be signed and dated by the member or the member's authorized representative and must specify an effective retirement date on which the member had satisfied all requirements for retirement as such requirements existed on the effective retirement date.

(b) The date specified as the effective date for retirement must be the last day of a calendar month falling within the period that is no more than six months before the date the system receives the retirement application and may not precede the first anniversary of the effective date of participation of the subdivision.

(c) A member must have terminated from employment on or before the effective retirement date designated on the application. If the member is applying for:

(1) service retirement, the date specified as the effective date of retirement with respect to a subdivision may not be a date preceding the termination of the member's employment with the subdivision from which the member wishes to retire.

(2) disability retirement, the date specified as the effective date of retirement may not be prior to the later of the date the member terminated employment with all participating subdivisions or the date the member became disabled.

(d) If the specified effective retirement date is prior to the date the system receives the retirement application, the retirement annuity shall be calculated under the plan provisions in effect on the effective retirement date but with the options selected and beneficiaries designated incident to the application. All unpaid annuity payments attributable to the period from the effective date of retirement through the date the retirement application is processed by the system will be accumulated and paid, without interest, as a single sum.

(e) An annuity approved by the system is payable beginning on the last day of the first month following the effective date of retirement.

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

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Ann McGeehan

General Counsel

Texas County and District Retirement System

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For further information, please call: (512) 328-8889 x247



CHAPTER 105. CREDITABLE SERVICE

34 TAC §105.5

The Texas County and District Retirement System ("TCDRS") proposes an amendment to rule, §105.5. Section 842.125 of the Texas Government Code requires that employers must correct errors that cause a member to receive more or less credited service, service credit, or benefits than the member is entitled to receive. The current rule requires that employers submit a hard copy correction of error application, which is reviewed by TCDRS staff. TCDRS staff then communicates to the employer what adjustments and payments are required, and the employer sends in any required payment.

Under the proposed amendment, for any corrections that involve incorrect member contributions, the employers will be able to submit corrections directly online. The employer will enter the amount of the incorrect member contribution, and system will calculate the required employer contribution and if any prior year interest is owed on the account. The member contribution is determined according to the employee deposit rate in effect at the time that the error occurred. The employer contribution rate is determined according to the employer contribution rate in effect at the time that the employer makes the correction. The employer submits the correction payment online similar to the process the employer follows for submitting monthly contributions.

The proposed amendment deletes references to a paper application, and also removes obsolete language.

Ann McGeehan, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the proposed amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. McGeehan has also determined that for each year of the first five years the proposed amendment is in effect the public benefit anticipated as a result of administering the rule will be to streamline the correction of error process. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the new rule as proposed.

Comments on the proposed amendment may be submitted to Ann McGeehan, General Counsel, TCDRS, P.O. Box 2034, Austin, Texas 78768-2034, faxed to (512) 328-8887, or submitted electronically to legaldept@tcdrs.org.

The amendment is proposed under the Government Code, §845.102, which authorizes the TCDRS board of trustees to adopt rules for the efficient administration of the system.

No other statutes, articles, or codes are affected by this proposed amendment.

§105.5. Correction of Errors by Employers: Record Adjustments

(a) The sponsoring employer is responsible for the correction of an error arising from an act or omission of the employer that results in a person contributing more or less than the correct amount to the system or receiving more or less credited service, service credit or benefits than the person is rightfully entitled to receive under the system.

(b) If the error involves member contributions, the [The] employer may initiate the correction process directly via the employer portal on the retirement system website as follows: [by filing an application with the system for an adjustment to the person's record. The

application must adequately describe the error and set forth the terms of the adjustment to be made to the person's record-]

(1) The employer must provide identifying information for the affected member or members, the time period during which the error occurred, and the amount of the correction to member contributions submitted by the employer. The member contributions are determined according to the employee deposit rate in effect at the time that the error occurred.

(2) The employer will also submit an employer contribution based on the sum total of the member contributions made in connection with the correction and the employer contribution rate in effect at the time that the correction is made by the employer. If the correction results in a decrease to a member's contributions, then there is no adjustment to the employer contribution associated with that decrease.

(3) If the error being corrected occurred in a prior year in which the retirement system has already allocated interest to the member's individual account, then the employer is responsible for any additional allocated interest. Once the employer submits payment for the member and employer portions of the correction, TCDRS will calculate whether any interest is owed, and will transfer the appropriate amount from the employer's subdivision accumulation fund to the member's individual account. If the interest owed is more than 1% of the employer's required contribution for that month, then the interest payment may not be transferred from the subdivision accumulation fund, and the employer must make a separate interest payment directly to the system for the full amount of allocated interest.

[(e) A person seeking an adjustment to a record based on an act or omission of the subdivision must apply to the sponsoring employer for a correction of the error. The system will not receive applications for record adjustments from any person other than an employer. If the system receives information relating to a possible error from a person other than an employer, the system shall forward the information to the appropriate employer.]

[(d) If the director is provided with satisfactory evidence of the error, the director may at his discretion accept the application and order an adjustment to the person's record in accordance with the terms set forth in the application provided:]

[(1) The terms of the adjustment on the face of the application would not grant the person a right, status or benefit not otherwise available under Texas Government Code, Title 8, Subtitle F;]

[(2) The terms of the adjustment are reasonable and can be feasibly implemented and administered by the system; and]

[(3) The terms of the adjustment can be implemented without causing financial instability with respect to the employer's participation in the system or causing a reduction in the accrued benefit of any other member or annuitant of the employer.]

[(e) In this section the term "record" means all information and amounts relating to the person and the person's beneficiary and includes information and amounts relating to the person's individual account, contributions, deposits, credited service, service credit and benefits.]

[(f) In this section the term "individual account" means the separate account maintained for a member consisting of the member's contributions, deposits and accumulated interest credited to the account for the benefit of the member.]

[(g) In this section the term "credited service" means months of service recognized for purposes of retirement eligibility.]

[(h) In this section the term "service credit" means the monetary credits granted to a member who performs service for a participating employer.]

[(i) In this section the term "filed" means received by the system.]

[(j) In this section the term "accepted" means approved by the system for making adjustments to a person's record in accordance with the terms of the application.]

[(k) The application of a sponsoring employer under this section may be filed at any time.]

[(l) All applications filed under this section with the system must be certified by the sponsoring employer before the application may be accepted.]

[(m) Depending on the nature of adjustment requested pursuant to this section, the director may require that the application must be approved by the governing board of the employer or by the county judge or chief operating officer of the employer before it may be accepted by the system.

[(n) If the terms of the adjustment as set forth on the application specify a change to the person's months of credited service, that adjustment will be made upon acceptance of the application and receipt by the system of the amount that would have been contributed by the member for those specified months. The system will not accept any payments due under this section from any person other than an employer.]

[(o) If the terms of the adjustment as set forth on the application specify a change to the person's individual account balance, service credit or benefit, that adjustment may not be made until the system receives any payment necessary to implement the terms of the adjustment. The system will not accept any payments due under this section from any person other than an employer.]

[(p) With respect to certain errors that are the subject of an adjustment under this section, the sponsoring employer may request the system to provide a description of what the person's record would show if no error had occurred. This description may include changes to amounts of employee contributions, accumulated interest, prior service credit, current service credit, multiple matching credit, retirement benefits, or retirement eligibility dates. Evidence showing dates of service and the compensation that was paid to the member by the employer for such service should be submitted to the system in order that the system may accurately determine any changes.]

[(q) The application may specify adjustments in any amounts that do not exceed the changes to the person's record determined as if there had been no error.]

[(r) An application for an adjustment is not an application for retirement; however, a retirement application may be filed simultaneously with an application for adjustment. An adjustment to a person's prior service credit may not be made if the application is filed more than five years after the date the person became a member of the sponsoring employer.]

[(s) Adjustments to service credits or benefits shall be considered as part of, and funded in the same manner as, any other pension liabilities of the employer.

(e) A person seeking an adjustment to a record based on an act or omission of the subdivision must apply to the sponsoring employer for a correction of the error. The system will not receive applications for record adjustments from any person other than an employer. If the system receives information relating to a possible error from a person

other than an employer, the system shall forward the information to the appropriate employer.

~~{(t) The director may implement the terms of the proposed adjustment to the extent that the funding of the pension liabilities attributable to the adjustments proposed by the employer do not cause financial instability with respect to the employer's participation in the system or cause a reduction in accrued benefits of any other members or annuitants. This may include partial implementation or implementation of the adjustments in stages.}~~

(f) The following words and terms, when used in this section, shall have the following meanings:

(1) "Record" means all information and amounts relating to the person and the person's beneficiary and includes information and amounts relating to the person's individual account, contributions, deposits, credited service, service credit and benefits.

(2) "Individual account" means the separate account maintained for a member consisting of the member's contributions, deposits and accumulated interest credited to the account for the benefit of the member.

(3) "Credited service" means months of service recognized for purposes of retirement eligibility.

(4) "Service credit" means the monetary credits granted to a member who performs service for a participating employer.

(5) "Filed" means received by the system.

(6) "Accepted" means approved by the system for making adjustments to a person's record in accordance with the terms of the application.

(7) "Employer portal" means the online application maintained by the retirement system in which employers administer their plan, report payroll information, and make contributions.

(8) "Employer" means a subdivision participating in the retirement system.

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

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TRD-201603241

Ann McGeehan

General Counsel

Texas County and District Retirement System

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For further information, please call: (512) 328-8889 x247



34 TAC §105.7

The Texas County and District Retirement System ("TCDRS") proposes a new rule, §105.7. Section 843.201 of the Texas Government Code provides that the TCDRS Board of Trustees may adopt rules to authorize the governing body of a participating subdivision to adopt service credit for employees that performed service for a public hospital, utility, or other public facility or governmental function during a time the facility was operated or function was performed by a unit of government other than the current participating subdivision and before the current participating subdivision took over the facility or governmental function.

The new rule as proposed would authorize the governing body of a participating subdivision to authorize credited service (time only) for service performed by employees of a governmental entity that was subsequently merged, converted, or otherwise transferred into the participating subdivision or transferred the employment of the employees to the participating subdivision.

A member would be eligible for the above credited service only if they were employed by a governmental entity on the date that the governmental entity was merged, converted or otherwise transferred into the participating subdivision or the date that such member's employment was transferred to the participating subdivision. In addition, the proposed rule would clarify that a member, who was eligible for proportionate service under Chapter 803 of the Texas Government Code, would not be eligible for any additional credited service under the new rule.

Ann McGeehan, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. McGeehan has also determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of administering the new rule would be to provide participating subdivisions the ability to award credited service to certain employees for certain service performed before they were employed by the participating subdivision. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the new rule as proposed.

Comments on the proposed new rule may be submitted to Ann McGeehan, General Counsel, TCDRS, P.O. Box 2034, Austin, Texas 78768-2034, faxed to (512) 328-8887, or submitted electronically to legaldept@tcdrs.org.

The new rule is proposed under the Government Code, §843.201, which authorizes the TCDRS Board of Trustees to adopt rules concerning service credit for certain public employment.

No other statutes, articles, or codes are affected by this proposed new rule.

§105.7. Service Credit for Certain Public Employment.

(a) A participating subdivision may by order authorize the establishment of credited service for service performed by employees of a governmental entity that subsequently:

(1) was merged, converted, or otherwise transferred into the participating subdivision; or

(2) transferred the employment of the employees to the participating subdivision.

(b) A member eligible for credited service under this section pursuant to an order adopted under Subsection (a) is one who was employed by a governmental entity on the date that the governmental entity was merged, converted or otherwise transferred into the participating subdivision or the date that such member's employment was transferred to the participating subdivision.

(c) If a member is eligible for proportionate service under Chapter 803 of the Texas Government Code for the service for the governmental entity described by Subsection (a), then no additional credited service is available under 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.

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Ann McGeehan

General Counsel

Texas County and District Retirement System

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 328-8889 x247



34 TAC §105.8

The Texas County and District Retirement System ("TCDRS") proposes a new rule, §105.8. Under the proposed rule, all participating subdivisions would be required to submit the date of a member's termination of employment. New §105.8 would provide that employers should submit the termination date to TC-DRS no later than 15 days after the member's termination of employment or as soon as practicable.

Ann McGeehan, General Counsel of the Texas County and District Retirement System, has determined that for the first five-year period the new rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Ms. McGeehan has also determined that for each year of the first five years the new rule is in effect the public benefit anticipated as a result of administering the rule will be to improve the accuracy and integrity of member data. There will be no costs to small businesses. There are no anticipated economic costs to persons who are required to comply with the new rule as proposed.

Comments on the proposed new rule may be submitted to Ann McGeehan, General Counsel, TC-DRS, P.O. Box 2034, Austin, Texas 78768-2034, faxed to (512) 328-8887, or submitted electronically to legaldept@tcdrs.org.

The new rule is proposed under the Government Code, §845.102, which authorizes the TC-DRS board of trustees to adopt rules for the efficient administration of the system.

No other statutes, articles, or codes are affected by this proposed new rule.

§105.8. Employee Termination Date.

A participating subdivision must submit the date of termination of employment for each member who is enrolled in the retirement system. The termination date should be submitted to the retirement system within 15 days of the member's termination of employment, or as soon as practicable.

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 27, 2016.

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Ann McGeehan

General Counsel

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 163. COMMUNITY JUSTICE ASSISTANCE DIVISION STANDARDS

37 TAC §163.39

The Texas Board of Criminal Justice proposes amendments to §163.39, concerning Residential Services. The amendments are proposed in conjunction with a proposed rule review of §163.39 as published in other sections of the *Texas Register*. The proposed amendments are necessary to add clarity, conform the rule to current practice, and update formatting.

Jerry McGinty, Chief Financial Officer for the Texas Department of Criminal Justice, has determined that for each year of the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. McGinty has also determined that for each year of the first five year period, there will not be an economic impact on persons required to comply with the rule. There will not be an adverse economic impact on small or micro businesses. Therefore, no regulatory flexibility analysis is required. The anticipated public benefit, as a result of enforcing the rule, will be to conform the rule to updated health care regulations and standards.

Comments should be directed to Sharon Felfe Howell, General Counsel, Texas Department of Criminal Justice, P.O. Box 4004, Huntsville, Texas 77342, Sharon.Howell@tdcj.texas.gov. Written comments from the general public must be received within 30 days of the publication of this rule in the *Texas Register*.

The amendments are proposed under Texas Government Code §492.013, §509.003.

Cross Reference to Statutes: None.

§163.39. Residential Services.

(a) General Administration.

(1) Purpose. Residential facilities and contract residential beds funded by the Texas Department of Criminal Justice - Community Justice Assistance Division (TDCJ CJAD [~~TDCJ-CJAD~~]) shall provide the courts with a sentencing alternative for the purpose of:

(A) Providing residential placement of [Confining] offenders [placed] on community supervision and others who are eligible in accordance with statutes;

(B) Providing sanctions, services, and programs to modify criminal behavior, deter criminal activity, protect the public, [and] restore victims of crime, and provide offenders with resources to lead productive lives;

(C) Strengthening and expanding the options [that are] available to judges to impose alternatives other than imprisonment for offenders [who violate court-ordered conditions of community supervision]; and

(D) Reducing the offender's likelihood of a [subsequent arrest, recidivism and] technical violation or subsequent arrest, and recidivism [violations].

(2) Feasibility Studies. A judicial district interested in establishing a residential community corrections facility [Community Corrections Facility] (CCF) shall first conduct and prepare a feasibility study in accordance with the TDCJ CJAD [TDCJ-CJAD] Feasibility Study Guidelines-Community Corrections Facility. The product and results of such feasibility study shall be submitted to the TDCJ CJAD supervision and corrections department [TDCJ-CJAD]. After the receipt by the TDCJ CJAD [TDCJ-CJAD] of the initial feasibility study related to a proposed CCF, the community supervision and corrections department [Community Supervision and Corrections Department] (CSCD) may be required to provide supplemental information or additional materials for further review and consideration.

(3) Notice of Construction or Operation of a CCF.

(A) If a CSCD or private vendor operating under a contract with a CSCD or judicial district proposes to construct or operate a CCF within 1,000 feet of a residential area, a primary or secondary school, property designated as a public park or public recreation area by the state or a political subdivision of the state, or a church, synagogue, or other place of worship, the CSCD shall prominently post an outdoor sign at the proposed location of the facility. The sign shall be at least 24 by 36 inches in size written in lettering at least two [(2)] inches in size. The sign shall state that a correctional or rehabilitation facility is intended to be located on the premises, and provide the name and business address of the CSCD. The municipality or county in which the CCF is to be located may require the sign to be both in English and a language other than English, if it is likely that a substantial number of the residents in the area speak a language other than English as their familiar language.

(B) The CSCD shall provide notice of the proposed location of the facility to the commissioners court of the county or [and/or] governing body of the municipality where the facility is intended to be located no [not] later than 60 days before the CSCD begins construction or operation of the facility. The notice shall contain the following:

(i) A statement of the entity's intent to construct or operate a correctional or rehabilitation facility in an area;

(ii) A description of the proposed location of the facility; and

(iii) A statement that Texas Local Government Code §§244.001-.026[; Chapter 244] governs the procedure for notice of and consent to the facility.

(4) Public Meetings. A CSCD or private vendor having a contract with a CSCD or judicial district shall not establish a CCF unless the [community justice council serving the] CSCD has held a public meeting before the action is taken. In addition, a CSCD may not expend funds provided by the TDCJ CJAD [TDCJ-CJAD] to lease or purchase real property, construct buildings, or use a facility or real property acquired or improved with state funds for a CCF unless the [community justice council serving the] CSCD has held a public meeting before the action is taken. The public meeting shall be held at a site as close as practicable to the location at which the proposed action is to be taken. The meeting shall not be held on a Saturday, Sunday, or legal holiday. The meeting shall begin after 6:00 p.m. More than 30 days before the date of the meeting, the department that the facility is to serve, or a vendor proposing to operate a facility, at a minimum shall:

(A) Publish by advertisement a notice that is no [not] less than three and one-half [a half (3 1/2)] inches by five [(5)] inches of the date, hour, place, and subject of the hearing as required in subsection (a)(4) of this rule in three [(3)] consecutive issues of a newspaper

of, or in newspapers that collectively have, general circulation in the county in which the proposed facility is to be located. The notice shall specifically state the address of the facility or property on which a proposed action is to be taken and provide a description of the proposed action.

(B) Mail a copy of the notice to each police chief, sheriff, city council member, mayor, county commissioner, county judge, school board member, state representative, and state senator who serves or represents the area[, unless the proposed facility has been previously authorized to operate at a particular location by a community justice council].

(5) Maximum Resident Capacity and Facility Utilization. The maximum resident capacity of a CCF shall be defined as the total number of residents who can be housed at the facility at any given time as delineated by the operating agency in the most current community justice plan and approved by the TDCJ CJAD [TDCJ-CJAD] director. CCFs funded through TDCJ CJAD [TDCJ-CJAD] shall reach 90% [90 percent] capacity within the first six [(6)] months of operation and maintain a minimum of 90% [90 percent] thereafter, using appropriate and eligible placements only. Any revisions to the maximum and minimum resident capacities for the CCF shall be subject to [the] approval by the TDCJ CJAD [TDCJ-CJAD] through the community justice plan amendment process.

(6) Contract Residential Services. Business entities, agencies, or persons contracting with CSCDs or judicial districts for residential services shall comply with all applicable competitive bidding and other laws and regulations. CSCDs or judicial districts contracting with business entities, agencies, or persons for residential services shall comply with any applicable competitive bidding and other laws and regulations. The CSCD director shall monitor, audit, and inspect the performance and compliance of the service provider and vendor with the terms and conditions of the contract with the CSCD and with applicable laws and regulations.

(7) Mission Statement. The CSCD director and facility director shall prepare and maintain a mission statement that describes the general purposes and overall goals of the facility's programs.

(b) Personnel.

(1) Screening for Tuberculosis (TB) Infection. The CSCD director or facility director shall ensure that as soon as practicable but no [not] later than seven [(7)] calendar days of assuming any duties within a CCF, all staff undergo a screening for TB infection. Follow-up screening for TB infection shall be conducted on all staff, at a minimum, once every year from the anniversary date of the initial screening. The results of all screenings shall be maintained on file.

(2) Required Personnel.

(A) Each facility with an employment component shall have a designated employment coordinator whose duties and responsibilities include assisting residents in obtaining and [r]maintaining employment. The employment coordinator shall be responsible for addressing other employment issues for residents such as résumé development, interviewing skills and [r]techniques, and appropriate dress for job interviews.

(B) Every facility shall have a designated staff member whose duties and responsibilities include facilitating or ensuring the required cognitive and other facility programs are accomplished.

(3) Criminal Histories and Arrest Records. Prior to employment and on at least an annual or more frequent basis thereafter, criminal histories and arrest records shall be obtained from both the Texas Department of Public Safety (DPS) and National Crime Informa-

tion Center [NCIC] on each of the CCF's employees, contract vendor staff, if applicable, [~~if applicable~~] and volunteers. This requirement shall apply to both vendor contracts [~~contract~~] and the CSCD operated CCFs. Upon verification that no new conviction(s) have occurred, an entry documenting such shall be made in the personnel file. The criminal history document and/or other arrest record documentation shall then be destroyed. Employees who have access to criminal histories must meet DPS [the Texas Department of Public Safety (DPS)] criteria for accessing the Texas Law Enforcement Telecommunication System [~~TLETS~~] operated by the DPS or files containing a copy of an employee's or resident's criminal history.

(4) Residential Officer Certification. Governed by §163.33(f) of this title.

(5) Residential Personnel Training. Initial Training Requirements and Defensive Driving are governed by §163.33(j) of this title. Training Requirements for Monitoring Self-Administration of Medications are set forth in subsection (n)(10) of this rule.

(c) Building, Safety, Sanitation, and Health Codes.

(1) Compliance. The CSCD director and facility director shall ensure that the facility's construction, maintenance, and operations complies with all applicable state, federal, and local laws, building codes, and regulations related to safety, sanitation, and health. Records of compliance inspections, audits, or written reports by internal and external sources shall be kept on file for examination and review by the TDCJ CJAD [~~TDCJ-CJAD~~] and other governmental agencies and authorities from program inception forward. The CSCD director and facility director shall promptly notify the TDCJ CJAD [~~TDCJ-CJAD~~] in writing of any circumstances wherein the facility or its operations do not maintain such compliance.

(2) Water Supply. The CSCD director or designee shall ensure that the facility's potable water source and supply is sanitary and approved by an independent, qualified agency or individual in compliance with the applicable governmental laws and regulations.

(3) Sanitation. The facility shall conform to the applicable sanitation and health regulations and codes.

(4) Waste. The liquid and solid wastes related to the facility shall be collected, stored, and disposed of in accordance with a plan approved by the regulatory authority, agency, or department.

(5) Physical Plant. The facility's buildings, including the improvements, fixtures, electric and heating, and air conditioning, shall conform to all applicable building codes of federal, state, and local laws, ordinances, regulations, and minimum guidelines established by the TDCJ CJAD [~~TDCJ-CJAD~~] for physical plants and facilities housing residents.

(6) Fires. The facility, its furnishings, fire protection equipment, and alarm system shall comply with the regulations of the fire authority having jurisdiction. Fire drills are to be conducted at least quarterly. There shall be a written evacuation plan to be used in the event of a fire. The plan is to be certified by an independent qualified governmental agency or department or individual trained in the application of national and state fire safety codes. Such plan shall be reviewed annually, updated if necessary, and reissued to the local fire jurisdiction. The facility shall conduct fire inspections at least quarterly or at intervals approved by the fire authority having jurisdiction. Fire safety equipment located at the facility shall be tested as specified by the manufacturer or the fire authority, whichever is more frequent. An annual inspection of the facility shall be conducted by the fire authority having jurisdiction or other qualified person(s).

(7) Emergency Plan. There shall be a written emergency plan for the facility and its operations, which includes an evacuation plan, to be used in the event of a major flood, storm, or other emergencies. This plan shall be reviewed annually and updated, if necessary. Evacuation drills shall be conducted at least three [~~3~~] times yearly. Each shift at least yearly shall conduct an evacuation drill when the majority of residents are present. All facility personnel shall be trained in the implementation of the written emergency plan. The evacuation plan shall specify preferred evacuation routes, subsequent dispositions, [~~and~~] temporary housing of residents, and provisions for access to medical care or hospital transportation for injured residents and [~~for~~] staff. The facility's emergency plan shall be distributed to local authorities such as law enforcement, state police, and civil defense, [~~etc.~~] to keep them informed of their roles in the event of an emergency. The emergency plan shall include the following:

(A) Location of buildings and [~~room~~] floor plans [~~plan~~];

(B) Use of exit signs and directional arrows that are easily seen and read; and

(C) Location(s) of publicly posted plan.

(d) Separate Offender Housing. The CSCD director and facility director shall ensure that a facility that is part of or attached to a detention facility or a correctional institution shall house CCF [~~facility~~] residents separately from the offenders incarcerated in the detention facility. At no time shall the CCF residents [~~offenders~~] be co-mingled with these incarcerated offenders.

(e) Program and Service Areas.

(1) Space and Furnishings. The facility shall have space and furnishings to accommodate activities such as group meetings, private counseling, classroom activities, visitation, and recreation.

(2) Housekeeping and Maintenance. The CSCD director and facility director shall ensure the facility is clean and in good repair, and housekeeping and maintenance plan is in effect.

(3) Other Physical Environment and Facilities Issues. In each facility:

(A) Space shall be provided for janitor closets which are equipped with cleaning implements;

(B) There shall be storage areas in the facility for clothing, bedding, and cleaning supplies;

(C) There shall be clean, usable bedding, linens, and towels for new residents with provision for exchange or laundering on at least a weekly basis;

(D) On an emergency or indigent basis, the facility shall provide personal hygiene articles;

(E) There shall be adequate control of vermin and pests;

(F) There shall be timely trash and garbage removal; and

(G) Sanitation and safety inspections of all internal and external areas and equipment shall be performed and documented on a routine basis to protect the health and safety of all residents, staff, and visitors.

(f) Supervision.

(1) Operations Manual. An operations manual shall be prepared for and used by each CCF which shall contain information and specify procedures and policies for resident census, contraband, supervision, physical plant inspection, and emergency procedures, includ-

ing detailed implementation instructions. The operations manual shall be accessible to all employees and volunteers. The operations manual shall include, at a minimum, the matters set forth in the Guidelines for the Policies and Procedures of the TDCJ CJAD [~~TDCJ-CJAD~~] Funded Residential Facilities. The operations manual shall be submitted to the TDCJ CJAD [~~TDCJ-CJAD~~] director for review and approval. The manual shall be approved by the TDCJ CJAD [~~TDCJ-CJAD~~] director at least 60 days prior to the acceptance of any residents into the facility. The CSCD director and facility director shall ensure that the operations manual is reviewed at least every two (2) years, and new or revised policies and procedures are made available, including all changes, to designated staff and volunteers prior to implementation. This manual shall be submitted to the TDCJ CJAD [~~TDCJ-CJAD~~] upon request or for auditing purposes.

(2) Staffing Availability. The CSCD director and facility director shall ensure that the facility has the staff needed to provide coverage of designated security posts, surveillance of residents, and to perform ancillary functions. The facility shall have at least one ~~(+)~~ staff member on duty that is the same gender as the resident population.

(3) Activity Log. The CSCD director and facility director shall ensure that CCF staff maintain an activity log and prepare shift reports that record, at a minimum, emergency situations, unusual situations and incidents, and all absences of residents from a facility.

(4) Use of Force. The CSCD director and facility director shall ensure that a CCF has written policies, procedures, and practices that restrict the use of physical force to instances of self-protection, protection of residents or others, or prevention of property damage. In no event shall the use of physical force against a resident be justifiable as punishment. A written report shall be prepared following all uses of force, and promptly submitted to the CSCD director and facility director for review and follow-up. The application of restraining devices, aerosol sprays, and chemical agents~~;~~ etc.] shall only be accomplished by an individual who is properly trained in the use of such devices and only in an emergency situation for self-protection, protection of others, or other circumstances as described previously.

(5) Use of Firearms. The CSCD director and facility director shall ensure that the possession of firearms by staff is banned and the use of firearms is prohibited in or on facility property except in the execution of official duties by certified peace officers or other duly licensed law enforcement personnel.

(6) Access to Facility. The facility shall be secured to prevent unrestricted access by the general public or others without proper authorization.

(7) Control of Contraband and ~~[/]~~ Searches. All facilities shall incorporate into the facility operations manual a list of authorized items offenders are allowed to possess while a resident of the facility. All incoming residents shall receive a copy of this list during the intake or ~~[/]~~orientation process, along with a written explanation of the provisions of Texas Penal Code §38.114~~;~~ Section 38.114], which states that any resident found to possess any item not provided by, or authorized by the facility director, or any item authorized or provided by the facility that has been altered to accommodate a use other than the originally intended use, may be charged with a Class C misdemeanor. Any employee or volunteer who provides contraband to a resident of a CCF may be charged with a Class B misdemeanor. There shall also be policies defining facility shakedowns, strip searches, and pat searches of residents to control contraband and provide for its disposal.

(8) Levels of Security. The CSCD director and facility director shall ensure that appropriate levels of security are maintained for the population served by the facility at all times. These levels of

security shall create, at [as] a minimum, a monitored and structured environment in which a resident's interior and exterior movements and activities can be supervised by specific destination and time. At the discretion of the facility director or designee, residents may be granted exterior movements. Exterior movements include, but are not limited to, employment programs, community service restitution, support and ~~[/]~~treatment programs, and programmatic incentives. The following minimum requirements shall be met for all exterior movements:

(A) The facility director or designee approves the exterior movement;

(B) A staff member orally advises the resident of the conditions and limitations of the exterior movement;

(C) The resident acknowledges in writing an understanding of the conditions and limitations of the exterior movement; and

(D) Exterior movements involving programmatic incentives may only be granted if the following additional requirements are met:

(i) The resident meets all established requirements for the programmatic incentive, as determined by the supervisor of the program, and submits a written request for the exterior movement;

(ii) The requested absence will not exceed 72 hours unless there are unusual circumstances;

(iii) The resident provides an itinerary for the absence including method of travel, departure and arrival times, and locations during the exterior movement;

(iv) The facility director or designee approves the itinerary and establishes the conditions of the exterior movement involving programmatic incentives; and

(v) A staff member shall make random announced or unannounced personal or telephone contacts with the resident to verify the location of the resident during the exterior movement.

(9) Emergency Furloughs. At the discretion of the facility director or designee, a resident may be granted an emergency furlough for the purpose of allowing a resident to attend a funeral, visit a critically [seriously] ill person, obtain medical treatment, or attend to other exceptional business. Emergency furloughs may only be granted if the following conditions are met:

(A) The resident submits a written request for the emergency furlough;

(B) The facility director or designee verifies through an independent source including, but not limited to a physician, Red Cross representative, minister, rabbi, priest, or other spiritual leader that the presence of the resident is appropriate;

(C) The resident provides a proposed itinerary including method of travel, departure and arrival times, and locations during the emergency furlough;

(D) The requested absence shall not exceed 72 hours unless there are unusual circumstances;

(E) The court of original jurisdiction approves the travel if the resident will depart the state [State] of Texas;

(F) The facility director or designee approves the itinerary and establishes the conditions of the emergency furlough; and

(G) The facility director or designee provides by email [e-mail] or fax the approved itinerary to the CSCD director and ~~[of]~~ the

court of the original or [^]sending jurisdiction prior to the date that the emergency furlough is approved to begin.

(10) Supervision Process. Governed by §163.5(c) of this title.

(11) The CCF shall ensure that Spanish language assistance and the translation of selected documents are provided for Spanish-speaking residents who cannot speak or read English.

(g) Resident Abuse, Neglect, and Exploitation. The facility shall protect the residents from abuse, neglect, and exploitation. In accordance with the Prison Rape Elimination Act, 28 C.F.R. §115.31 [of 2003 (Public Law 108-79)], all CCFs shall establish a zero tolerance standard for the incidence of sexual abuse and sexual harassment [sexual assault]. Each facility shall make prevention of offender sexual abuse and sexual harassment [sexual assault] a top priority. The CCFs shall have policies and procedures in accordance with national standards published by the attorney general [Attorney General] of the United States. These policies and procedures shall include, but not be limited to the following:

(1) Detection, prevention, reduction, and punishment of offender sexual assault;

(2) Standardized definitions to record accurate data regarding the incidence of offender sexual assault; and

(3) A disciplinary process for facility staff who fail to take appropriate action to detect, prevent, and reduce sexual assaults, to punish residents guilty of sexual assault, and to protect the Eighth Amendment rights of all facility residents.

(h) Rules and Discipline. There shall be documentation of program rule violations and the disciplinary process.

(1) Rules of Conduct. All incoming residents and staff shall receive written rules of conduct which specify acts prohibited within the facility and penalties that can be imposed for various degrees of violation.

(2) Limitations of Corrective Actions. Specific limits on corrective actions and summary punishment shall be established and strictly adhered to in an effort to reduce the potential of staff participating in abusive behavior towards participants. Limits shall include:

(A) No physical contact by staff shall be made on a resident;

(B) No profane [profanity], sexual, or racial comments shall be directed at residents by staff;

(C) Residents shall not be used to impose corrective actions on other residents;

(D) The severity of the corrective action shall be commensurate with the severity of the infraction; and

(E) The duration of corrective action shall be limited to the minimum time necessary to achieve effectiveness.

(3) Grievance Procedure. A grievance procedure shall be available to all residents in a CCF. The grievance procedure shall include at least one [(+)] level of appeal and shall be evaluated at least annually to determine its efficiency and effectiveness.

(4) Spanish translations of the disciplinary rules and procedures shall be provided for Spanish-speaking residents who cannot speak or read English.

(i) Incident Notification. Within 24 hours of occurrence, the CSCD director and facility director shall notify and report by telephone or fax all serious or unusual events pertaining to the facility's

operations and staff to the district judge [who sits on the Community Justice Council] or, if applicable, the judge designated to perform administrative duties for the district courts trying criminal cases, the TDCJ Emergency Action Center (EAC) in Huntsville, Texas (phone number [Phone Number] (936) 437-6600; fax number [Fax Number] (936) 437-8996), and if applicable, the CSCD director of the original or [^]sending jurisdiction if the incident involves a resident from that sending jurisdiction. The TDCJ EAC [TDCJ-EAC] shall notify [be responsible for notifying] the TDCJ CJAD [TDCJ-CJAD] director and appropriate CJAD management staff. Such serious and unusual events for this purpose shall include, but are not limited to, the following:

(1) The death of a resident or staff member while at the facility;

(2) Any incident which results in life threatening or serious bodily injury to a resident or staff member while at the facility or on assignment, [(including emergency furloughs or programmatic incentives)] away from the facility;

(3) Major disturbance or riot at the facility or in its vicinity; and

(4) Any incident involving serious misconduct by facility staff, which may result in the filing of criminal charges or civil action;

(5) Any incidence of absconding by a resident convicted of an offense as identified in Title 5 of the Texas Penal Code (Title 5) and placed in the facility for such offense; and

(6) Any incidence of absconding by a resident who is suspected of committing a felony offense during the course of absconding from the facility or within 24 hours after leaving the facility.

(j) Residents' Rights. Residents shall be granted access to courts and any attorney licensed in the United States or a legal aid society (an organization providing legal services to residents or other persons) contacting the resident in order to provide legal services. Such contacts include, but are not limited to: confidential telephone communications, uncensored correspondence, and confidential visits.

(k) Resident Eligibility. A CSCD or other governmental entity that operates a residential facility, contracts for the operation of a residential facility, or contracts for beds or [^]services shall define a specific target population of medium to high risk/needs offenders to be served. Placement of offenders in a CCF shall only be by an order of the court, which may include a pretrial [pre-trial] agreement signed by the judge presiding over an established drug court. Applicable screening shall be conducted to include screening for substance abuse, medical and mental health issues, and [shall meet] minimum eligibility criteria as outlined in this rule.

(1) CCFs shall accept only those offenders who meet the target population criteria as defined by the facility and are physically and mentally capable of participating in any program offered at the facility, if participation in the program is required of all residents in the facility. Exceptions to this requirement:

(A) Placement is prohibited by statute;

(B) The offender matches the profile of offenders historically committed to county jail or [^]prison from the jurisdiction; or the offender has high risk/needs, who, if supervised at a lower supervision level would have an increased likelihood of violating the conditions of community supervision; [and]

(C) The local jurisdiction may house offenders convicted under Title 5 and in accordance with statute, in the CCF if Title 5 offenders are included in the facility's program proposal within the community justice plan [that is submitted by the jurisdiction's

community justice council and] approved by the local judiciary. In currently operating facilities where the jurisdiction desires to add Title 5 offenders to the target population, a public meeting shall be held, in accordance with the law and TDCJ CJAD [~~TDCJ-CJAD~~] standards and policy, to advise the public of the types of offenders and [^]offenses who will potentially be placed in the facility. Public support shall be considered by the TDCJ CJAD [~~TDCJ-CJAD~~] for final approval of the change in offender population to be targeted. If a jurisdiction has documentation that this requirement was previously met, it can provide that documentation to the TDCJ CJAD [~~TDCJ-CJAD~~] for review and possible exemption from having an additional public meeting. If a facility is approved to house Title 5 offenders, the CSCD director and the facility director shall comply with all applicable provisions contained in [the] Texas Government Code[;] §76.016, Victim Notification[; the] Texas Code of Criminal Procedure art. 56.01-93 [~~TCCP~~] Chapter 56], Rights of Crime Victims; and Texas Code of Criminal Procedure [~~TCCP~~] art. 42.21, Notice of Release of Family Violence Offenders; and[-]

(D) Prior to or within 30 [~~ten 40~~] days after admission to the facility, the offender shall undergo a screening process to include a substance abuse screening instrument to determine the offender's appropriateness for placement. The process shall be documented and maintained in the supervision case file. Should the offender not meet the facility defined eligibility criteria, the offender may be referred back to the court of original jurisdiction.

(2) Courtesy Supervision. CCFs shall, on a space available basis, accept eligible adult offenders needing the residential services on courtesy supervision from other jurisdictions. CSCDs that manage CCFs are responsible for the direct supervision of all residents in the CCF while in [the] residential placement.

(l) Denying Admission or Continued Placement. If an offender is placed into a CCF, [as a condition of community supervision] and by statute or standard [the offender] is an inappropriate placement, [by statute or standard] or does not meet eligibility criteria of the TDCJ CJAD approved facility [as approved by the TDCJ-CJAD], the CSCD or facility director shall notify, in writing, the court of original jurisdiction [of these circumstances]. If a CCF facility has reached capacity at the time of the eligible offender's placement to that facility, such offender may be placed on a waiting list for that facility and returned to the court of original jurisdiction for further instructions or an alternative sanction.

(m) Food Service. The food preparation and dining area shall provide space for meal service based on the population size and need.

(1) Dietary Allowances. Meals shall be approved and reviewed annually by a registered dietician, licensed nutritionist, registered nurse with a minimum of a Bachelor of Science degree in nursing, physician assistant, or physician to ensure that the meals meet the nationally recommended allowances for basic nutrition.

(2) Special Diets. Each facility shall provide special diets as prescribed by appropriate medical or dental personnel.

(3) Food Service Management. Food service operations shall be supervised by a staff member who is experienced in institutional food preparation or mass food management. Food services staff, including residents assigned to work in the facility kitchen, shall meet all requirements established by [the] local health authorities.

(4) Exclusion as Discipline. The use of food as a disciplinary measure is prohibited.

(5) Meal Requirements. The CSCD director or facility director shall ensure that at least three [~~3~~] meals, [(including two [(2)] hot meals,)] are provided during each 24-hour period. Variations may

be allowed based on weekend and holiday food service demands, or in the event of emergency or security situations, provided basic nutritional goals are met.

(n) Health Care.

(1) Access to Care.

(A) Residents shall have unimpeded access to health care and to a system for processing complaints regarding health care.

(B) The facility shall have a designated health authority with responsibility for health care pursuant to a written agreement, contract, or job description. The health authority may be a physician, health administrator, or health agency. In the event that the designated health authority is a free community health clinic, [(one which provides services to everyone in the community regardless of ability to pay)], then the CCF is not required to enter into a written contract or agreement. A copy of the mission statement of the free community health clinic and a copy of the criteria for admission shall be on file in lieu of a contract between the two [(2)] agencies.

(C) Each CCF shall have a policy defining the level, if any, of financial responsibility to be incurred by the resident who receives the medical or dental services.

(2) Emergency Health Care.

(A) Twenty-four hour emergency health care shall be provided for residents, to include arrangements for the following:

(i) On site emergency first aid and crisis intervention;

(ii) Emergency evacuation of the resident from the facility;

(iii) Use of an emergency vehicle;

(iv) Use of one [(1)] or more designated hospital emergency rooms or other appropriate health facilities;

(v) Emergency on-call services from a physician, advanced practice nurse, [or] physician assistant, [a] dentist, and a mental health professional when the emergency health facility is not located in a nearby community; and

(vi) Security procedures providing for the immediate transfer of residents, when appropriate.

(B) A training program for direct care personnel shall be established by a recognized health authority in cooperation with the facility director that includes the following:

(i) Signs, symptoms, and action required in potential emergency situations;

(ii) Administration of first aid and cardiopulmonary resuscitation [(CPR)];

(iii) Methods of obtaining assistance;

(iv) Signs and symptoms of mental illness, retardation, and chemical dependency; and

(v) Procedures for patient transfers to appropriate medical facilities or health-care providers.

(C) First aid kits shall be available in designated areas of the facility. Contents and locations shall be approved by the health authority.

(3) Health Screening and Medical Examinations. Medical, dental, and mental health screening shall be performed by [health-trained or] qualified health-care personnel on all offenders within 10

working [~~ten~~ (10)] days prior to or after admission to the facility. The purpose of the screening is to determine if the offender has any disease, illness, or condition that precludes admission. The health screening shall include the following:

(A) Questionnaires for health screening shall be established to document inquiries into and observations of the following:

(i) Current illness and health problems, including sexually transmitted [~~venereal diseases~~] and other infectious diseases;

(ii) Dental problems;

(iii) Mental health problems, including suicide attempts or ideation;

(iv) Use of alcohol and other drugs, which includes types of drugs used, mode of use, amounts used, frequency of use, date or time of last use, and a history of problems that may have occurred after ceasing use, [~~{~~for example, convulsions~~}~~]; and

(v) Other health problems designated by the responsible health authority.

~~[(vi) Tuberculosis (TB) screening of residents shall be completed within seven (7) calendar days of admission into the residential facility and repeated annually thereafter. If a resident was confined in a jail or other correctional facility immediately prior to admission to a CCF, a TB screening test that was completed no more than 30 days prior to transfer to a CCF may be accepted, provided that a TB questionnaire is completed and filed with the TB screening test results.]~~

(B) Observation by qualified health care [~~healthcare~~] personnel of:

(i) Behavior, which includes state of consciousness, mental status, appearance, conduct, tremor, and sweating;

(ii) Body deformities, ease of movement, and so forth; and

(iii) Conditions of skin, including trauma markings, bruises, lesions, jaundice, rashes, [~~and~~] infestations, and needle marks or other indications of drug abuse.

(C) Medical Examinations.

(i) A new resident admitted to the facility who was not transferred from a jail or other correctional facility shall have a medical history and physical examination completed within 10 working [~~ten~~ (10)] days prior to or after admission to the facility.

(ii) TB screening of residents shall be completed within seven [~~(7)~~] calendar days of admission into the residential facility and repeated annually thereafter. If a resident was confined in a jail or other correctional facility immediately prior to admission to a CCF, a TB screening test that was completed no more than 30 days prior to transfer to a residential facility may be accepted, provided that a TB questionnaire is completed and filed with the TB screening test results.

(iii) Medical examinations shall be conducted for any employee or resident suspected of having a communicable disease.

(4) Serious and Infectious Diseases.

(A) The facility shall provide for the management of serious and infectious diseases.

(B) The CCFs shall have policies and procedures to direct actions to be taken by employees concerning residents who have been diagnosed with human immunodeficiency virus (HIV), including, at a minimum, the following:

(i) When and where residents shall be tested;

(ii) Appropriate safeguards for staff and residents;

(iii) Staff and resident training;

(iv) Issues of confidentiality; and

(v) Counseling and support services.

(5) Dental Care. Access to dental care shall be made available to each resident.

(6) Medications--General Guidelines.

(A) Staff who dispense medication shall have the proper training and credentials [~~be properly credentialed and trained~~]. Staff who [~~that~~] supervise self-administration of medication shall be appropriately trained to perform the task.

(B) Policy and procedure shall direct the possession and use of controlled substances, prescribed medications, supplies, and over-the-counter (OTC) drugs. Prescribed medications shall be dispensed according to the directions of the prescribing physician, advanced practice nurse, or physician assistant.

(C) Each residential facility shall have a written policy in place that sets forth required procedural guidelines for the administration, documentation, storage, management, accountability of all resident medication, inventory, disposal of medications, handling medication errors, and adverse reactions.

(D) If medications are distributed by facility staff, records shall be maintained and audited monthly and shall include, but not be limited to the date, time, name of the resident receiving the medication, and the name of the staff distributing the medication.

(E) Each facility shall ensure that the phone number of a pharmacy and a comprehensive drug reference source is readily available to the staff.

(7) Medication Storage.

(A) Prescription and OTC medications shall be kept in locked storage and accessible only by [~~to~~] staff who are authorized to provide medication. Syringes, needles, and other medical supplies shall also be kept in locked storage.

(B) All controlled/scheduled medications [~~drugs~~] shall be stored under double lock and key.

(C) Each facility shall ensure that all medications, syringes, and needles are stored in the original container.

(D) Medications labeled as internal and external use only shall not be stored together in the same medication box or medication drawer.

(E) Sample prescription medications provided by physicians shall be stored with proper labeling information that includes the name of the medication; name of the prescribing physician, advanced practice nurse, or physician assistant; date prescribed; and dosage instructions.

(F) Medications that require refrigeration shall be stored in a refrigerator designated for medications only. A thermometer shall be maintained inside the refrigerator with the temperature checked and recorded daily on a temperature log.

(G) The facility shall have a written policy approved by the local medical authority that states the acceptable temperature range for the medication refrigerator, and a written policy for what actions shall be taken by staff in the event the refrigerator temperature is above or below the approved temperature range.

(H) [(G)] Medications that are discontinued, have expired dates, or are no longer in use shall be stored in a separate locked container or drawer until destroyed.

(I) [(H)] Facilities that allow residents to keep medications in the resident's possession shall have written guidelines specific for keep-on-person [(KOP)] medications. Staff shall ensure that authorized residents keep medication on their person or safely stored and inaccessible to other residents.

(8) Medication Inventory and Disposal.

(A) Facility staff shall conduct an inventory count of all controlled/scheduled [prescription] medications daily, [(at a minimum, once per 24-hour period)]. The count shall be conducted and witnessed by one [(1)] other staff member. Documentation of inventory counts shall be maintained for a minimum [period] of three [(3)] years.

(B) The facility shall conduct a monthly inventory of all prescription and OTC drugs provided to or purchased by the resident. The monthly audit shall be conducted by a staff member [person] who is not responsible for conducting the daily inventory counts.

(C) A monthly audit shall be conducted of all medication administration records to verify the accuracy of recorded information. The monthly audit of medication administration records shall be conducted by a staff member [person] who is not responsible for the documentation of medication administration records.

(D) When a discrepancy is noted between the medication administration record and the monthly inventory count, documentation explaining the reason for the discrepancy and action taken to correct it shall be recorded. In the event an inventory count reveals unaccounted for controlled/scheduled medication, an investigation shall be conducted and a summary report written detailing the steps taken to resolve the matter. Until the discrepancy is resolved, an inventory count shall be conducted three [(3)] times daily, [(after each shift)]. The summary report shall be maintained for a minimum [period] of three [(3)] years. If misapplication, misuse, or misappropriation of controlled/scheduled medication leads to an investigation by law enforcement, such information shall be reported pursuant to subsection (i) of this rule.

(E) Discontinued and outdated medications shall be removed from the current medication storage, stored in a separate locked container, and disposed of within 30 days. The drugs designated for disposal shall be recorded on a drug disposal form.

(F) Methods used for drug disposal shall prevent medication from being retrieved, salvaged, or used in any way. The disposal of drugs shall be conducted, documented, and the process witnessed by one [(1)] other staff member. The documentation shall include:

- (i) Name of the resident and date of disposal;
- (ii) Name and strength of the medication;
- (iii) Prescription number, sample, or OTC lot numbers;
- (iv) Amount disposed, reason for disposal, and the method of disposal; and
- (v) Signatures of the two [(2)] staff members who disposed of the drug and [that] witnessed the disposal.

(9) Administration of Medication for Non-Medical Model Facilities.

(A) Prescription medications shall be dispensed only by licensed nurses or other staff who are trained and have the appropriate

documented medication certification to dispense medications while under the supervision of a physician or registered nurse. Facilities that do not have licensed nurses or other credentialed staff to dispense medications, [(non-medical model facilities,)] shall implement the practice of self-administration of medications.

(B) If medications are dispensed through the practice of self-administration in a non-medical model program, staff trained by a qualified health professional to supervise residents in the self-administration of medications shall monitor the residents during the self-administration process.

(C) Each dose of prescription medication received by the resident shall be documented on the prescription medication administration record and maintained in the resident's medical file. The prescription medication record shall include:

- (i) Name of the resident receiving the medication;
- (ii) Drug allergies or the absence of known drug allergies;
- (iii) Name, strength of medication, and route of administration;
- (iv) Instructions for taking the medication, the amount taken, and the route of administration;
- (v) Date and time the medication was provided;
- (vi) Prescription number, [(or lot number for sample drugs,)] and the initial amount of medication received;
- (vii) Prescribing physician, advanced practice nurse or physician assistant, and the name of the pharmacy;
- (viii) Signature of the resident receiving the medication and the staff member [person] supervising the self-administration of medication;
- (ix) The remaining amount of medication after each dose dispensed; and
- (x) Comment section for recording a variance, discrepancy, or change.

(D) Each dose of OTC medication received by the resident shall be documented on the OTC medication administration record and maintained in the resident's medical file. The OTC drugs purchased by the resident or supplied for the resident in quantities larger than single dose packages shall be recorded on the OTC drug record. The OTC drug record shall include:

- (i) The resident's name;
- (ii) The name and strength of the medication dispensed;
- (iii) Drug allergies or the absence of known drug allergies;
- (iv) The dosage instructions and route of administration;
- (v) The initial amount received, OTC lot number, and the expiration date;
- (vi) The date and time the medication was dispensed;
- (vii) The amount dispensed and the ending count after each dose;
- (viii) Comment section for recording reason for OTC drug or other notations; and

(ix) The signature of the resident and the employee who supervised each dose dispensed.

(E) Facility Stock OTC Drugs. Multiple OTC stock drugs supplied in single dose packaging may be recorded on the same form. The medication drug record for facility stock OTC drugs shall include:

- (i) The resident's name;
- (ii) The name, strength, and route of administration;
- (iii) Drug allergies or the absence of known drug allergies;

(iv) The date, time, amount dispensed, and the lot number on the container;

(v) Comment section to record the reason the OTC drug was requested; and

(vi) The signature of the resident and the employee who supervised each dose dispensed.

(10) Training for Monitoring Self-Administration of Medications. All residential employees responsible for supervising residents in self-administration of medication, who do not have credentials [are not credentialed] to dispense medication, shall complete required training before performing this task.

(A) The initial training for new employees shall be four [(4)] hours in length.

(B) Employees shall complete a minimum of two [(2)] hours of review training annually thereafter.

(C) The training shall be provided by a physician, pharmacist, physician assistant, or registered nurse before supervising self-administration of medications. A licensed vocational nurse [(LVN)] or paramedic, [under supervision,] may teach the course from an established curriculum. Topics to be covered shall include:

- (i) Prescription labels;
- (ii) Medical abbreviations;
- (iii) Routes of administration;
- (iv) Use of drug reference materials;
- (v) Monitoring and [observing] insulin preparation and administration;

(vi) Storage, maintenance, handling, and destruction of medication;

(vii) Transferring information from prescription labels to the medication administration record and documentation requirements, including sample medications; and

(viii) Procedures for medication errors, adverse reactions, and side effects.

(11) Female Residents. If female residents are housed, access to pregnancy management services shall be available.

(12) Mental Health. Access to mental health services shall be available to residents.

(13) Suicide Prevention. Each facility shall have a written suicide prevention and intervention program reviewed and approved by a qualified medical or mental health professional. All staff with resident supervision responsibilities shall be trained in the implementation of the suicide prevention program.

(14) Personnel.

(A) If treatment is provided to residents by health care [health-care] personnel other than a physician, psychiatrist, dentist, psychologist, optometrist, podiatrist, or other independent provider, such treatment shall be performed pursuant to written standing or direct orders by personnel authorized by law to give such orders.

(B) If the facility provides medical treatment, personnel who provide health care [health-care] services to residents shall be qualified and appropriately licensed. Verification of current credentials and job descriptions shall be on file in the facility. Appropriate state and federal licensure, certification or registration requirements, and restrictions apply.

(15) Informed Consent.

(A) If the facility provides medical treatment, the facility shall ensure residents are provided information to make medical decisions with informed consent. All informed consent standards in the jurisdiction shall be observed and documented for resident care.

(B) If the facility provides medical treatment and a resident makes an informed decision to refuse any medical procedure or treatment, the facility shall ensure that written documentation of the resident's refusal is maintained in the resident's medical record.

(16) Participation in Research. Residents shall not participate in medical, pharmaceutical, or cosmetic experiments. This does not preclude individual treatment of a resident based on resident's need for a specific medical procedure that is not generally available.

(17) Notification. Individuals designated by the resident shall be notified in case of critical [serious] illness or injury.

(18) Health Records. If medical treatment is provided by the facility:

(A) Accurate [If medical treatment is provided by the facility, accurate] health records for residents shall be maintained separately and confidentially;[-]

(B) The [If medical treatment is provided by the facility, the] method of recording entries in the records, the form and format of the records, and the procedures for maintenance and safekeeping shall be approved by the health authority; and[-]

(C) For [If medical treatment is provided by the facility, for] the residents being transferred to other facilities, summaries or copies of the medical history record shall be forwarded to the receiving facility prior to or at arrival.

(o) Discharge From Residential Facilities.

(1) Victim Notification. The CSCD director and facility director shall ensure there are procedures, policies, and practices that comply with Texas Government Code §76.016, Texas Code of Criminal Procedure [TCCP] art. 42.21(a) and other applicable laws as to the notifications made to certain crime victims of offenders who are residents in its facilities or subject to its programs.

(2) Discharge. Discharge from residential facilities shall be based on the following criteria:

(A) The resident has made sufficient progress towards meeting the objectives of the supervision plan and program requirements;

(B) The resident has satisfied a sentence of confinement;

(C) The resident has satisfied a period of placement as a condition of community supervision or satisfied the conditions of a pre-

trial agreement signed by a judge presiding over an established drug court;

(D) The resident has demonstrated non-compliance with program criteria or court order;

(E) The resident manifests a non-emergency medical problem that prohibits participation in or [~~and/or~~] completion of the residential program requirements;

(F) The resident displays symptoms of a psychological disorder that prohibits participation in or [~~and/or~~] completion of the residential program requirements; or

(G) The resident is identified as inappropriate or ineligible for participation in the residential program as defined by facility eligibility criteria, statute, or standard.

(3) Discharge Report. The CSCD director and facility director shall ensure a report is prepared at the termination of program participation that reviews the resident's performance. A copy of the report shall be provided to the receiving CSCD community supervision officer [~~(CSO)~~].

(p) Basic Services and Programs.

(1) Each facility shall, at a minimum, provide programs in the following areas which shall include, but not be limited to:

(A) Education programs;

(B) Rehabilitation programs based on the mission of the facility;

(C) Community service restitution or [~~/~~]work detail;

(D) Recreational programs; and

(E) Cognitive based programs.

(2) Facilities serving other jurisdictions shall have a procedure in place designed to assist the resident in obtaining employment in the jurisdiction to which the resident will be released. At a minimum, an aftercare or [~~/~~]supervision plan shall be provided to the original jurisdiction and shall outline aftercare or [~~/~~]supervision strategies best designed to sustain progress.

(3) Each facility shall have a family support program designed to educate family members in the goals of the facility and resident, as well as to incorporate family assistance during and after residency.

(4) Each facility incorporating an employment component shall provide an initial programming phase of no [~~not~~] less than 30 days prior to work release. A longer period of programming shall be provided depending upon documented risk/needs assessment and [~~/or~~] program progress.

(q) Mail, Telephone, and Visitation. The CSCD director and facility director shall have written policies, procedures, and practices which govern the facility's mail, telephone, and visitation privileges for residents, including mail inspection, public phone use, and routine and special visits. The policies shall address compelling circumstances in which a resident's mail both incoming and outgoing may be opened, but not read, to inspect for contraband.

(r) Religious Programs.

(1) The CSCD director and facility director shall have written policies that govern religious programs for residents. The policies, procedures, and practices shall provide that residents have the opportunity to voluntarily practice the requirements of a resident's religious

faith, have access to worship and [~~/~~]religious services and the use or contact with community religious resources, when appropriate.

(2) Under Texas Civil Practice & Remedies Code §§110.001-.012, [~~Chapter 110,~~] a CSCD or CCF may not substantially burden a resident's free exercise of religion except with the least restrictive measures in furtherance of a compelling interest. Pursuant to Texas Government Code §76.018, there is a presumption that a policy or practice that applies to a resident in the custody of a CCF is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. The presumption may be rebutted with evidence provided by the resident.

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 24, 2016.

TRD-201603214

Sharon Howell

General Counsel

Texas Department of Criminal Justice

Earliest possible date of adoption: August 7, 2016

For further information, please call: (936) 437-6700



TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 3. RESPONSIBILITIES OF STATE FACILITIES

SUBCHAPTER E. DEATH OF AN INDIVIDUAL

40 TAC §3.501

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §3.501, in Chapter 3, Administrative Responsibilities of State Facilities.

BACKGROUND AND PURPOSE

The purpose of the amendment is to allow a physician assistant (PA) or an advanced practice registered nurse (APRN) to determine and pronounce the death of an individual at a facility under certain circumstances, as permitted by Texas Health and Safety Code, §671.001(d). Specifically, §671.001(d) provides that a PA or APRN may determine and pronounce death if permitted to do so by written policies of the facility providing services, unless an artificial means of life support precludes a determination that a person's spontaneous respiratory and circulatory functions have ceased. If a determination is precluded as described in §671.001(d), a physician must determine and pronounce death. Section 671.001(d) also requires the executive commissioner of HHSC to adopt rules governing the policies for physician assistants and advanced practice registered nurses determining and pronouncing death at certain facilities. The proposal authorizes an APRN, but not a registered nurse, to determine and pronounce death because additional education and experience are required to be an APRN.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §3.501 clarifies that the section applies to witnessing a death or discovering a deceased individual only at a facility, which is defined in §3.101 as a state supported living center or the intermediate care facility for individuals with an intellectual disability component of the Rio Grande State Center. The proposed amendment provides that, unless an individual is the subject of an out-of-hospital do-not-resuscitate order, an employee must initiate and continue cardio-pulmonary resuscitation (CPR) until emergency services personnel arrive and take over the care of the individual or a primary care provider (PCP) pronounces death or directs the CPR to cease. The proposed amendment requires a registered nurse who is notified that a person has witnessed the death of an individual or has discovered a deceased individual must notify a PCP, which is defined in §3.101 as a physician, an APRN, or a PA. The proposed amendment allows a PA or APRN to determine and pronounce the death of an individual unless an artificial means of life support precludes a determination that the individual's spontaneous respiratory and circulatory functions have ceased. If a determination is precluded as described, a physician must determine and pronounce death. The proposed amendment describes the information a registered nurse and PCP must document regarding a death witnessed or discovered at a facility. If the PCP who determines and pronounces death is not a physician, the amendment requires a physician to review and sign a form related to the death. The proposed amendment also makes minor grammatical clarifications.

FISCAL NOTE

David Cook, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendment will not have an adverse economic effect on small businesses or micro-businesses. The proposed amendments will not require additional resources and facilities are not small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Scott Schalchlin, DADS Assistant Commissioner for State Supported Living Centers, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is that the amendment will allow a PA or an APRN to pronounce the death of an individual at a facility under certain circumstances.

Mr. Schalchlin anticipates that there will not be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS 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 Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Eric Moorad at (512) 438-3169 in DADS SSLC/Quality Improvement. Written comments on the proposal may be submitted to

Texas Register Liaison, Legal Services-16R06, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 16R06" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §671.001, which provides that the HHSC executive commissioner shall adopt rules governing the policies for physician assistants and advanced practice registered nurses determining and pronouncing death at certain facilities.

The amendment implements Texas Government Code, §531.0055, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §671.001.

§3.501. *Discovery.*

(a) A person witnessing the death of an individual or discovering a deceased individual at a facility must immediately notify a registered nurse. An employee must take steps to preserve any evidence relating to the death or cause of death in accordance with DADS policy.

(b) Unless the individual is the subject of an out-of-hospital do-not-resuscitate order, an employee must initiate and continue cardiopulmonary resuscitation [must be initiated and continued] until: [a physician pronounces death or directs such treatment to cease.]

(1) emergency medical services (EMS) personnel arrive and take over the care of the individual; or

(2) a primary care provider (PCP) determines and pronounces death or directs the cardiopulmonary resuscitation to cease.

(c) A registered nurse must notify a PCP [~~the attending physician or physician on duty~~] and document the following information in the individual's record and on the appropriate form:

(1) the identity of the individual;

(2) [(+)] the date, time, and location of death or discovery of the deceased individual;

(3) [(2)] the name of the PCP [physician] notified, the time and date of notification, and the name of the registered nurse [staff member] who notified the PCP [physician];

(4) [(3)] the name of any person who witnessed the death or discovered the deceased individual; [and any information relating to the death or cause of death provided by that person; and]

(5) any information relating to the death provided by a person who witnessed the death or discovered the deceased individual; and

(6) [(4)] a detailed description of any treatment given or emergency procedures initiated immediately by the registered nurse, the EMS personnel, or an employee before death or upon discovery of the deceased individual and the individual's response to the treatment or procedures.

(d) A physician assistant or advance practice registered nurse may determine and pronounce the death of an individual unless an artificial means of life support precludes a determination that an individual's spontaneous respiratory and circulatory functions have ceased. If an artificial means of life support precludes a determination that functions have ceased, a physician must determine and pronounce death.

(e) [(d)] The PCP who determines and pronounces the death of the individual [notified physician] must document the following information in the individual's record and on the appropriate form:

[(1) the identity of the individual;]

(1) [(2)] the PCP's [physician's] findings upon examination[;] and pronouncement of death;

(2) [(3)] the [date, time, and] probable cause of death (if known);

(3) [(4)] whether the death occurred under unusual circumstances, the cause of death is unknown, or death occurred pursuant to treatment; and

(4) [(5)] a detailed description of any treatment given or emergency procedures initiated by the PCP or EMS personnel immediately before death or upon discovery of the deceased individual and the individual's response to the treatment or procedures.

(f) If the PCP who determines and pronounces death is not a physician, a physician must review and sign the appropriate form.

(g) [(e)] If the death was related to an injury, staff must complete required documentation in accordance with DADS policy.

(h) [(f)] Each death is investigated in accordance with state and federal law and DADS policy on incident management.

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 24, 2016.

TRD-201603229

Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 438-3169



CHAPTER 6. ICF/ID PROGRAMS-- CONTRACTING SUBCHAPTER H. DENTAL PROGRAM 40 TAC §§6.351, 6.352, 6.357, 6.370

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), the repeal of Subchapter H, Dental Program,

consisting of §§6.351, 6.352, 6.357, and 6.370, in Chapter 6, ICF/ID Programs--Contracting.

BACKGROUND AND PURPOSE

Chapter 6, Subchapter H, Dental Program is being repealed because DADS has no responsibility for administering dental benefits for individuals enrolled in the Intermediate Care Facilities for Individuals with an Intellectual Disability and Related Conditions (ICF/IID) Program; therefore, these rules are not needed.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §6.351 deletes a rule relating to program basis.

The proposed repeal of §6.352 deletes a rule relating to eligibility.

The proposed repeal of §6.357 deletes a rule relating to emergency services.

The proposed repeal of §6.370 deletes a rule relating to change to another provider.

FISCAL NOTE

David Cook, DADS Chief Financial Officer, has determined that, for the first five years after the repeals, there are no foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed repeals will have no adverse economic effect on small businesses or micro-businesses because there are no costs imposed on small businesses or micro-businesses by the repeals.

PUBLIC BENEFIT AND COSTS

Kristi Jordan, Deputy Commissioner, has determined that, for each year of the first five years after the repeals, the public benefit expected as a result of repealing the sections is the removal of unnecessary rules from the DADS rule base.

Ms. Jordan anticipates that there will not be an economic cost to persons who are affected by the repeals. The repeals will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS 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 Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Corliss Powell at (512) 438-2430 in DADS Center for Policy and Innovation. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-15R21, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the

last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 15R21" in the subject line.

STATUTORY AUTHORITY

The repeals are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §32.021, which provides that the HHSC executive commissioner shall adopt necessary rules for the proper and efficient operation of the medical assistance program; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The repeals implement Texas Government Code, §531.0055 and Texas Human Resources Code, §32.021 and §161.021.

§6.351. *Program Basis.*

§6.352. *Eligibility.*

§6.357. *Emergency Services.*

§6.370. *Change to Another 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.

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Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-2430



CHAPTER 9. INTELLECTUAL DISABILITY SERVICES--MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

SUBCHAPTER E. INTERMEDIATE CARE FACILITIES FOR INDIVIDUALS WITH AN INTELLECTUAL DISABILITY OR RELATED CONDITIONS (ICF/IID) PROGRAM--CONTRACTING

DIVISION 4. PROVIDER SERVICE REQUIREMENTS

40 TAC §9.230

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), new §9.230, in Subchapter E, Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions (ICF/IID) Program--Contracting, in Chapter 9, Intellectual Disability Services--Medicaid State Operating Agency Responsibilities.

BACKGROUND AND PURPOSE

The purpose of the proposed rule is to implement recommendations in the Sunset Advisory Commission's July 2015 report regarding "day habilitation facilities" in the ICF/IID Program. Specifically, the Sunset Advisory Commission recommended that an ICF/IID program provider, to help ensure the safety of individuals enrolled in the ICF/IID Program, include in a contract with a day habilitation facility requirements to conduct background checks on employees and volunteers, to have an emergency response plan, to conduct fire drills, to post abuse hotline information, and to follow an individual's service plan. The proposed rule states that it does not apply to an ICF/IID program provider that operates a campus-based facility, which means it does not apply to a state supported living center or the ICF/IID component of Rio Grande State Center. In addition, the proposed rule defines and uses the term "day habilitation center" instead of "day habilitation facility" because that is the term currently used by ICF/IID program providers for these settings.

The proposed rule also requires an ICF/IID program provider that directly operates a day habilitation center to conduct fire drills, post abuse hotline information, and have an emergency preparedness and response plan. An ICF/IID program provider is required by other rules to conduct background checks on its own employees and to provide active treatment in accordance with an individual's IPP, so those requirements are not included in the proposed rule.

SECTION-BY-SECTION SUMMARY

Proposed new §9.230 establishes that the section does not apply to an ICF/IID program provider that operates a campus-based facility. The proposed new rule defines the terms "day habilitation center" and "emergency preparedness and response plan." If a program provider operates a day habilitation center, the proposed rule requires the program provider (1) to conduct, at least once every 90 days, a fire drill during which individuals evacuate the day habilitation center; (2) to prominently post a notice of the requirement to report an allegation of abuse, neglect, or exploitation of an individual and how to report such an allegation to the DFPS toll free telephone number; and (3) to have an emergency preparedness and response plan. If a subcontractor of a program provider operates a day habilitation center, the proposed rule requires the program provider to have a written agreement with the subcontractor that requires the subcontractor (1) to conduct, at least once every 90 days, a fire drill during which individuals evacuate the day habilitation center; (2) to have an emergency preparedness and response plan; (3) to prominently post a notice of the requirement to report an allegation of abuse, neglect, or exploitation of an individual and how to report such an allegation to the DFPS toll free telephone number; (4) to search the nurse aide registry (NAR) and the employee misconduct registry (EMR) for an unlicensed applicant for employment, an unlicensed independent contractor, or an unlicensed volunteer who will have direct contact with an individual receiving active treatment in the day habilitation center to confirm that the person is not listed in either registry as unemployable; (5) to provide written information to the unlicensed applicant, independent contractor, or volunteer about the EMR; (6) to search the NAR and the EMR at least once every twelve months to confirm that the unlicensed employee, independent contractor, or volunteer is not listed in either registry as unemployable; (7) to conduct a criminal history check and verify that an unlicensed applicant's, independent contractor's, or volunteer's criminal history information does not

include a conviction that bars employment; and (8) to provide active treatment to the individual in accordance with the individual's IPP and keep a copy of the IPP in the day habilitation center. The proposed new rule also requires a program provider to monitor the subcontractor's compliance with the written agreement and maintain records of its monitoring of the subcontractor.

FISCAL NOTE

David Cook, DADS Chief Financial Officer, has determined that, for the first five years the proposed new section is in effect, enforcing or administering the new section does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new section will have an adverse economic effect on small businesses and micro-businesses, because contractors of an ICF/IID program provider will be required to obtain a criminal history report, at a cost of \$1 - \$2 per report, for an unlicensed applicant, independent contractor, or volunteer. There may also be costs associated with developing an emergency plan, conducting fire drills, and modifying written agreements with subcontractors. DADS estimates the number of small businesses and micro-businesses is less than 822, the approximate number of non-state operated ICF/IID program providers. DADS is unable to estimate the cost of compliance, but the cost is expected to be minimal.

The rules implement specific recommendations of the Sunset Advisory Commission and no alternatives were considered to minimize the effect on small and micro-businesses.

PUBLIC BENEFIT AND COSTS

Kristi Jordan, DADS Deputy Commissioner, has determined that, for each year of the first five years the new section is in effect, the public benefit expected as a result of enforcing the new section is to establish requirements to help ensure the safety of individuals in the ICF/IID Program who are receiving services in a day habilitation center.

Ms. Jordan anticipates that there will be an economic cost to persons who are required to comply with the new section to obtain criminal history reports, develop an emergency plan, conduct fire drills, and modify written agreements with subcontractors to add new requirements. DADS is unable to estimate these costs, but they are expected to be minimal. The new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS 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 Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sheryl Loera at (512) 438-3693 in DADS Long-Term Services and Support unit. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-16R04, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759;

or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 16R04" in the subject line.

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021 and §32.021.

§9.230. Requirements for a Day Habilitation Center.

(a) In this section, the term "program provider" does not include a program provider that operates a campus-based facility.

(b) In this section, the following terms have the following meanings.

(1) Day habilitation center--A building or a portion of a building:

(A) that is not located within a program provider's facility;

(B) that the program provider or a subcontractor of the program provider owns or leases; and

(C) in which active treatment is provided to an individual by the program provider or a subcontractor of the program provider.

(2) Emergency preparedness and response plan--A written plan that describes the actions that will be taken to protect individuals, including evacuation or sheltering-in-place, in the event of an emergency in a day habilitation center, such as a fire or other man-made or natural disaster.

(c) If a program provider operates a day habilitation center, the program provider must:

(1) conduct, at least once every 90 days, a fire drill during which individuals evacuate the day habilitation center;

(2) prominently post, in an area of the day habilitation center that is readily accessible to individuals, employees, contractors, volunteers, and visitors, a notice of the requirement to report an allegation of abuse, neglect, or exploitation of an individual and how to report

such an allegation to the Department of Family and Protective Services (DFPS) toll free telephone number at 1-800-647-7418; and

(3) have an emergency preparedness and response plan.

(d) If a subcontractor of a program provider operates a day habilitation center, the program provider must:

(1) have a written agreement with the subcontractor that requires the subcontractor:

(A) to conduct, at least once every 90 days, a fire drill during which individuals evacuate the day habilitation center;

(B) to have an emergency preparedness and response plan;

(C) to prominently post, in an area of the day habilitation center that is readily accessible to individuals, employees, contractors, volunteers, and visitors, a notice of the requirement to report an allegation of abuse, neglect, or exploitation of an individual and how to report such an allegation to the DFPS toll free telephone number at 1-800-647-7418;

(D) to search the nurse aide registry (NAR) and the employee misconduct registry (EMR), before the subcontractor hires an unlicensed applicant for employment, contracts with an unlicensed independent contractor, or uses an unlicensed volunteer who will have direct contact with an individual receiving active treatment in the day habilitation center, using the DADS Internet website to confirm that the unlicensed applicant, independent contractor, or volunteer is not listed in either registry as unemployable;

(E) to provide written information to the unlicensed applicant, independent contractor, or volunteer about the EMR that complies with the requirements of §93.3(c) of this title (relating to Employment and Registry Information);

(F) to search the NAR and the EMR at least once every twelve months using the DADS Internet website to confirm that the unlicensed employee, independent contractor, or volunteer is not listed in either registry as unemployable;

(G) to conduct a criminal history check and verify that the unlicensed applicant's, independent contractor's, or volunteer's criminal history information does not include a conviction that bars employment under the Texas Health and Safety Code §250.006, before the unlicensed applicant, independent contractor, or volunteer has direct contact with an individual receiving active treatment in the day habilitation center; and

(H) to provide active treatment to the individual in accordance with the individual's IPP and keep a copy of the IPP in the day habilitation center;

(2) monitor the subcontractor to ensure that the subcontractor is in compliance with the written agreement described in paragraph (1) of this subsection; and

(3) maintain records of its monitoring of the subcontractor.

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 23, 2016.
TRD-201603189

Lawrence Hornsby
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: August 7, 2016
For further information, please call: (512) 438-3693



SUBCHAPTER G. MEDICAID FAIR HEARINGS

40 TAC §9.301

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), the repeal of Subchapter G, Medicaid Fair Hearings, consisting of §9.301, in Chapter 9, Intellectual Disability Services--Medicaid State Operating Agency Responsibilities.

BACKGROUND AND PURPOSE

The purpose of the repeal is to remove rules from the DADS rule base because Medicaid fair hearings are addressed in HHSC rule at 1 TAC Chapter 357, Subchapter A, Uniform Fair Hearing Rules.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §9.301 deletes a rule relating to Medicaid fair hearings.

FISCAL NOTE

David Cook, DADS Chief Financial Officer, has determined that, for the first five years after the repeal, there are no foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed repeal will have no adverse economic effect on small businesses or micro-businesses because there are no costs imposed on small businesses or micro-businesses by the repeal.

PUBLIC BENEFIT AND COSTS

Kristi Jordan, Deputy Commissioner, has determined that, for each year of the first five years after the repeal, the public benefit expected as a result of repealing the section is the removal of an unnecessary rule from the DADS rule base.

Ms. Jordan anticipates that there will not be an economic cost to persons who are affected by the repeal. The repeal will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS 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 Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Corliss Powell at (512) 438-2430 in DADS Center for Policy and Innovation. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-15R21, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St.,

Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 15R21" in the subject line.

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §32.021, which provides that the HHSC executive commissioner shall adopt necessary rules for the proper and efficient operation of the medical assistance program; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The repeal implements Texas Government Code, §531.0055 and Texas Human Resources Code, §32.021 and §161.021.

§9.301. *Medicaid Fair Hearings.*

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 23, 2016.

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Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 438-2430



CHAPTER 15. LICENSING STANDARDS FOR PRESCRIBED PEDIATRIC EXTENDED CARE CENTERS

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§15.1, 15.5, 15.501, 15.1101, and 15.1302; and new §15.123, in Chapter 15, Licensing Standards for Prescribed Pediatric Extended Care Centers.

BACKGROUND AND PURPOSE

The proposed amendments and new section implement House Bill (H.B.) 2340, 84th Legislature, Regular Session, 2015, which amended Texas Health and Safety Code (THSC), Chapter 248A, governing prescribed pediatric extended care centers (PPECCs). The proposal allows an applicant for a license to operate a PPECC to obtain a temporary license. DADS grants a temporary license if an applicant meets the requirements of a Life Safety Code inspection and DADS approves the applicant's

written policies and procedures. With a temporary license, a PPECC may admit up to six minors before requesting an initial onsite health inspection. A temporary license expires six months after the date the license is granted unless DADS grants a one-time, 90-day extension. The proposal also implements amendments made by H.B. 2340 to THSC §248A.051, clarifying that an applicant for a PPECC license may not provide services until DADS issues a license, and THSC §248A.151, providing that a parent is not required to accompany a minor during the provision of services or during transportation of a minor to and from the PPECC. The proposal also adds the definitions of "license."

SECTION-BY-SECTION SUMMARY

The proposed amendment to §15.1 prohibits an applicant from providing services under the license for which an application has been filed until DADS issues the license. This clarification is consistent with amendments to THSC Chapter 248A made by H.B. 2340.

The proposed amendment to §15.5 adds a definition of "license" to clarify that the term includes the three types of licenses DADS may grant: an initial, a temporary, and a renewal license.

The proposed new §15.123 sets forth the process a license applicant must follow to obtain a temporary license. An applicant may request that DADS issue a temporary license while DADS reviews an application for an initial license. The applicant must submit a temporary license request in writing to the DADS, meet the requirements of a Life Safety Code inspection, and obtain approval from DADS of the applicant's written policies and procedures for the PPECC. If the applicant meets the requirements of §15.123, DADS issues a 90-day temporary license. DADS may grant one 90-day extension of the temporary license. After an applicant receives the temporary license, the license holder may admit no more than six minors to the PPECC until the temporary license expires or terminates. A temporary license holder must comply with all of the requirements of THSC Chapter 248A for maintaining a PPECC license. The new section implements amendments to THSC Chapter 248A made by H.B. 2340.

The proposed amendment to §15.501 clarifies that a minor's parent is not required to accompany the minor when the minor receives services in a PPECC. This clarification is consistent with amendments to THSC Chapter 248A made by H.B. 2340.

The proposed amendment to §15.1101 clarifies that a minor's parent is not required to accompany the minor when a PPECC transports or provides for the transport of a minor. This clarification is consistent with amendments to THSC Chapter 248A made by H.B. 2340.

The proposed amendment to §15.1302 corrects a statutory reference to reflect the authority under which abuse, neglect, and exploitation in a PPECC are investigated.

FISCAL NOTE

David Cook, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new section are in effect, enforcing or administering the amendments and new sections does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new section will not have an adverse economic effect on small busi-

ness and micro-business because there is no cost to comply with the amendments and new section.

PUBLIC BENEFIT AND COSTS

Mary T. Henderson, Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments and new section are in effect, the public benefit expected as a result of enforcing the amendments and new section is minors will have access to PPECC services while DADS reviews a license application.

Ms. Henderson anticipates that there will not be an economic cost to persons who are required to comply with the amendments and new section. The amendments and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS 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 Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Josie Esparza at (512) 438-4077 in DADS Regulatory Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-15R15, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 15R15" in the subject line.

SUBCHAPTER A. PURPOSE, SCOPE, LIMITATIONS, COMPLIANCE, AND DEFINITIONS

40 TAC §15.1, §15.5

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §248A.101, which provides that the HHSC executive commissioner shall adopt rules that are necessary to implement the chapter and to establish minimum standards for prescribed pediatric extended care centers.

The amendments implement Texas Government Code, §531.0055 and Texas Health and Safety Code, §248A.101.

§15.1. Purpose.

(a) The purpose of this chapter is to implement THSC Chapter 248A, which directs the executive commissioner of the Texas Health and Human Services Commission to adopt minimum standards that a person must meet to be licensed as a center.

(b) Except as provided by THSC §248A.002, a person may not own or operate a center unless the person holds a license issued by DADS under THSC Chapter 248A and this chapter.

(c) An applicant may not provide services under a license for which an application has been filed until DADS issues the license.

§15.5. Definitions.

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

(1) **Active Play**--Any physical activity from which a minor derives amusement, entertainment, enjoyment, or satisfaction by taking a participatory rather than a passive role. Active play includes various forms of activities, from the exploration of objects and toys to the structured play of formal games, sports, and hobbies.

(2) **Actual census**--The number of minors at a center at any given time.

(3) **Administration of medication**--The direct application of a medication to the body of a minor by any route. This includes removing an individual or unit dose from a previously dispensed, correctly labeled container, verifying it with the medication order, giving the correct medication and the correct dose to the correct minor at the correct time by the correct route, and accurately recording the time and dose given.

(4) **Administrator**--The person who is responsible for implementing and supervising the administrative policies and operations of a center and for administratively supervising the provision of services to minors and their parents on a day-to-day basis.

(5) **Adult minor**--A minor who is 18 years of age or older or is emancipated, and has not been adjudged incompetent.

(6) **Affiliate**--With respect to an applicant or license holder that is:

(A) a corporation--means an officer, director, or stockholder with direct ownership or disclosable interest of at least five percent, a subsidiary, or a parent company;

(B) a limited liability company--means an officer, member, or parent company;

(C) an individual--means:

(i) the individual's spouse;

(ii) each partnership and each partner thereof of which an individual or any affiliate of an individual is a partner; and

(iii) each corporation in which an individual is an officer, director, or stockholder with a direct ownership of at least five percent;

(D) a partnership--means a partner or a parent company of the partnership; and

(E) a group of co-owners under any other business arrangement means an officer, director, or the equivalent under the specific business arrangement or a parent company.

(7) **Applicant**--A person who applies for a license under THSC Chapter 248A and this chapter. The applicant is the person in whose name DADS issues the license.

(8) **Audiologist**--A person who has a valid license under Texas Occupations Code, Chapter 401, as an audiologist.

(9) **Basic services**--Include:

(A) the development, implementation, and monitoring of a comprehensive protocol of care that:

(i) is provided to a medically dependent or technologically dependent minor;

(ii) is developed in conjunction with the minor's parent; and

(iii) specifies the medical, nursing, psychosocial, therapeutic, and developmental services required by the minor; and

(B) the caregiver training needs of a medically dependent or technologically dependent minor's parent.

(10) Behavioral emergency--A situation that occurs after which preventative, or de-escalating techniques are attempted and determined to be ineffective and it is immediately necessary to restrain a minor to prevent immediate probable death or substantial bodily harm to the minor or to others because the minor is attempting serious bodily harm or immediate physical harm to the minor or to others.

(11) Business day--Any day except a national or state holiday listed in Texas Government Code §662.003(a) or (b). The term includes Saturday or Sunday if the center is open on that day.

(12) Center--A prescribed pediatric extended care center. A facility operated for profit or on a nonprofit basis that provides non-residential basic services to four or more medically dependent or technologically dependent minors who require the services of the facility and who are not related by blood, marriage, or adoption to the owner or operator of the facility.

(13) Chemical restraint--The use of any chemical, including pharmaceuticals, through topical application, oral administration, injection, or other means, to restrict the free movement of all or a portion of a minor's body for the purpose of modifying or controlling the minor's behavior and which is not a standard treatment for a minor's medical or psychosocial condition.

(14) Chief financial officer--An individual who is responsible for supervising and managing all financial activities for a center.

(15) Clinical note--A notation of a contact with a minor or a minor's family member that is written and dated by any staff providing services on behalf of a center and that describes signs and symptoms of the minor, and treatments and medications administered to the minor, including the minor's reaction or response, and any changes in physical, emotional, psychosocial, or spiritual condition of the minor during a given period of time.

(16) Commission--The Texas Health and Human Services Commission.

(17) Commissioner--The commissioner of the Department of Aging and Disability Services (DADS).

(18) Community disaster resources--A local, statewide, or nationwide emergency system that provides information and resources during a disaster, including weather information, transportation, evacuation and shelter information, disaster assistance and recovery efforts, evacuee and disaster victim resources, and resources for locating evacuated friends and relatives.

(19) Complaint--An allegation against a center or involving services provided at a center that involves a violation of this chapter or THSC Chapter 248A.

(20) Continuous face-to-face observation--Maintaining an in-person line of sight of a minor that is uninterrupted and free from distraction.

(21) Contractor--An individual providing services ordered by a prescribing physician on behalf of a center that the center would otherwise provide by its employees.

(22) Controlling person--A person who has the ability, acting alone or in concert with others, to directly or indirectly influence, direct, or cause the direction of the management of, expenditure of money for, or policies of a center or other person.

(A) A controlling person includes:

(i) a management company, landlord, or other business entity that operates or contracts with another person for the operation of a center;

(ii) any person who is a controlling person of a management company or other business entity that operates a center or that contracts with another person for the operation of a center; and

(iii) any other person who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of a center, is in a position of actual control of or authority with respect to the center, regardless of whether the person is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the center.

(B) Notwithstanding any other provision of this paragraph, a controlling person of a center or of a management company or other business entity described by subparagraph (A)(i) of this paragraph that is a publicly traded corporation or is controlled by a publicly traded corporation means an officer or director of the corporation. The term does not include a shareholder or lender of the publicly traded corporation.

(C) A controlling person described by subparagraph (A)(iii) of this paragraph does not include a person, including an employee, lender, secured creditor, or landlord, who does not exercise any formal or actual influence or control over the operation of the center.

(23) Conviction--An adjudication of guilt based on a finding of guilt, a plea of guilty, or a plea of nolo contendere.

(24) DADS--Department of Aging and Disability Services.

(25) Daily census--The number of minors served at a center during a center's hours of operation for a 24-hour period, starting at midnight.

(26) Day--A calendar day, unless otherwise specified in the text. A calendar day includes Saturday, Sunday, and a holiday.

(27) Dietitian--A person who has a valid license under the Licensed Dietitian Act, Texas Occupations Code, Chapter 701, as a licensed dietitian or provisional licensed dietitian, or who is registered as a dietitian by the Commission on Dietetic Registration of the American Dietetic Association.

(28) Emergency situation--An impending or actual situation that:

(A) interferes with normal activities of a center or minors at a center;

(B) may:

(i) cause injury or death to a minor or individual at the center; or

(ii) cause damage to the center's property;

(C) requires the center to respond immediately to mitigate or avoid injury, death, damage, or interference; and

(D) does not include a situation that arises from the medical condition of a minor such as cardiac arrest, obstructed airway, or cerebrovascular accident.

(29) Executive commissioner--The executive commissioner of the Texas Health and Human Services Commission.

(30) Functional assessment--An evaluation of a minor's abilities, wants, interests, and needs related to self-care, communication skills, social skills, motor skills, play with toys or objects, growth, and development appropriate for age.

(31) Health care provider--An individual or facility licensed, certified, or otherwise authorized to administer health care in the ordinary course of business or professional practice.

(32) Health care setting--A location at which licensed, certified, or otherwise regulated health care is administered.

(33) IDT--Interdisciplinary team. Individuals who work together to meet the medical, nursing, psychosocial, and developmental needs of a minor and a minor's parent's training needs.

(34) Inactive medical record--A record for a minor who was admitted by a center to receive services and was subsequently discharged by the center.

(35) Inspection--An on-site examination or audit of a center by DADS to determine compliance with THSC Chapter 248A and this chapter.

(36) Isolation--The involuntary confinement of a minor in a room of a center for the purposes of infection control, assessment, and observation away from other minors in a room at the center. When in isolation, a minor is physically prevented from contact with other minors.

(37) Joint training--Training provided by DADS to service providers and DADS inspectors on subjects that address the 10 most commonly cited violations of state law governing centers, as published in DADS annual reports. DADS determines the frequency of joint training.

(38) License--A license to operate a center issued by DADS under THSC Chapter 248A and this chapter. The term includes initial, renewal, and temporary licenses unless specifically stated otherwise.

(39) [(38)] Licensed assistant in speech-language pathology--A person who has a valid license under Texas Occupations Code, Chapter 401, as a licensed assistant in speech-language pathology and who provides speech language support services under the supervision of a licensed speech-language pathologist.

(40) [(39)] Licensed vocational nurse--LVN. A person who has a valid license under Texas Occupations Code, Chapter 301, as a licensed vocational nurse.

(41) [(40)] Life Safety Code--A publication of the National Fire Protection Association (NFPA), also known as NFPA 101, 2000 edition.

(42) [(41)] Local emergency management agencies--The local emergency management coordinator, fire, police, and emergency medical services.

(43) [(42)] Local emergency management coordinator--The person identified as the emergency management coordinator by the mayor or county judge for the geographical area in which a center is located.

(44) [(43)] Mechanical restraint--The use of any mechanical device, material, or equipment to restrict the free movement of all or a portion of a minor's body for the purpose of modifying or controlling the minor's behavior.

(45) [(44)] Medical director--A physician who has the qualifications described in §15.307 of this chapter (relating to Medical Director Qualifications and Conditions) and has the responsibilities described in §15.308 of this chapter (relating to Medical Director Responsibilities).

(46) [(45)] Medical record--A record composed first-hand for a minor who has or is receiving services at a center.

(47) [(46)] Medically dependent or technologically dependent--The condition of an individual who, because of an acute, chronic, or intermittent medically complex or fragile condition or disability, requires ongoing, technology-based skilled nursing care prescribed by a physician to avert death or further disability, or the routine use of a medical device to compensate for a deficit in a life-sustaining body function. The term does not include a controlled or occasional medical condition that does not require continuous nursing care, including asthma or diabetes, or a condition that requires an epinephrine injection.

(48) [(47)] Medication administration record--A record used to document the administration of a minor's medications and pharmaceuticals.

(49) [(48)] Medication list--A list that includes all prescriptions, over-the-counter pharmaceuticals, and supplements that a minor is prescribed or taking, including the dosage, preparation, frequency, and the method of administration.

(50) [(49)] Minor--An individual younger than 21 years of age who is medically dependent or technologically dependent.

(51) [(50)] Mitigation--An action taken to eliminate or reduce the probability of an emergency or public health emergency, or reduce an emergency's severity or consequences.

(52) [(51)] Nursing director--The individual responsible for supervising skilled services provided at a center and who has the qualifications described in §15.309 of this chapter (relating to the Nursing Director and Alternate Nursing Director Qualifications and Conditions).

(53) [(52)] Nutritional counseling--Advising and assisting an adult minor or a minor's parent or family on appropriate nutritional intake by integrating information from a nutrition assessment with information on food and other sources of nutrients and meal preparation consistent with cultural background and socioeconomic status, with the goal being health promotion, disease prevention, and nutrition education. The term includes:

(A) dialogue with an adult minor or a minor's parent to discuss current eating habits, exercise habits, food budget, and problems with food preparation;

(B) discussion of dietary needs to help an adult minor or the minor's parent understand why certain foods should be included or excluded from the minor's diet and to help with adjustment to the new or revised or existing diet plan;

(C) a personalized written diet plan as ordered by the minor's physician, to include instructions for implementation;

(D) providing the adult minor or the minor's parent with motivation to help them understand and appreciate the importance of the diet plan in getting and staying healthy; or

(E) working with the adult minor or the minor's parent by recommending ideas for meal planning, food budget planning, and appropriate food gifts.

(54) [(53)] Occupational therapist--A person who has a valid license under Texas Occupations Code, Chapter 454, as an occupational therapist.

(55) [(54)] Occupational therapy assistant--A person who has a valid license under Texas Occupations Code, Chapter 454, as an occupational therapy assistant who assists in the practice of occupational therapy under the general supervision of an occupational therapist.

(56) [(55)] Operating hours--The days of the week and the hours of day a center is open for services to a minor as identified in a center's written policy as required by §15.201 of this chapter (relating to Operating Hours).

(57) [(56)] Overnight--The hours between 9:00 p.m. and 5:00 a.m. during the days of the week a center operates.

(58) [(57)] Over-the-counter pharmaceuticals--A drug or formulary for which a physician's prescription is not needed for purchase or administration.

(59) [(58)] Parent--A person authorized by law to act on behalf of a minor with regard to a matter described in this chapter. The term includes:

- (A) a biological, adoptive, or foster parent;
- (B) a guardian;
- (C) a managing conservator; and
- (D) a non-parent decision-maker as authorized by Texas Family Code §32.001.

(60) [(59)] Parent company--A person, other than an individual, who has a direct 100 percent ownership interest in the owner of a center.

(61) [(60)] Person--An individual, firm, partnership, corporation, association, or joint stock association, and the legal successor thereof.

(62) [(61)] Person with a disclosable interest--A person who owns at least a five percent interest in any corporation, partnership, or other business entity that is required to be licensed under THSC Chapter 248A. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company, unless these entities participate in the management of the center.

(63) [(62)] Personal care services--Services required by a minor, including:

- (A) bathing;
- (B) maintaining personal hygiene;
- (C) routine hair and skin care;
- (D) grooming;
- (E) dressing;
- (F) feeding;
- (G) eating;
- (H) toileting;
- (I) maintaining continence;

(J) positioning;

(K) mobility and bed mobility;

(L) transfer and ambulation;

(M) range of motion;

(N) exercise; and

(O) use of durable medical equipment.

(64) [(63)] Pharmaceuticals--Of or pertaining to drugs, including over-the-counter drugs and those requiring a physician's prescription for purchase or administration.

(65) [(64)] Pharmacist--A person who is licensed to practice pharmacy under Texas Occupations Code, Chapter 558.

(66) [(65)] Pharmacy--A facility at which a prescription drug or medication order is received, processed, or dispensed as defined in Texas Occupations Code §551.003.

(67) [(66)] Physical restraint--The use of physical force, except for physical guidance or prompting of brief duration, that restricts the free movement of all or a portion of a minor's body for the purpose of modifying or controlling the minor's behavior.

(68) [(67)] Physical therapist--A person who has a valid license under Texas Occupations Code, Chapter 453, as a physical therapist.

(69) [(68)] Physical therapist assistant--A person who has a valid license under Texas Occupations Code, Chapter 453, as a physical therapist assistant and:

(A) who assists and is supervised by a physical therapist in the practice of physical therapy; and

(B) whose activities require an understanding of physical therapy.

(70) [(69)] Physician--A person who:

(A) has a valid license in Texas to practice medicine or osteopathy in accordance with Texas Occupations Code, Chapter 155;

(B) has a valid license in Arkansas, Louisiana, New Mexico, or Oklahoma to practice medicine, who is the treating physician of a minor, and orders services for the minor, in accordance with Texas Occupations Code, Chapter 151; or

(C) is a commissioned or contract physician or surgeon who serves in the United States uniformed services or Public Health Service if the person is not engaged in private practice, in accordance with Texas Occupations Code, Chapter 151.

(71) [(70)] Place of business--An office of a center where medical records are maintained and from which services are directed.

(72) [(71)] Plan of care--A protocol of care.

(73) [(72)] Positive intervention--An intervention that is based on or uses a minor's preferences as positive reinforcement, and focuses on positive outcomes and wellness for the minor.

(74) [(73)] Pre-licensing program training--Computer-based training, available on DADS website, designed to acquaint center staff with licensure standards.

(75) [(74)] Preparedness--Actions taken in anticipation of a disaster including a public health disaster.

(76) [(75)] Prescribing physician--A physician who is authorized to write and issue orders for services at a center.

(77) [(76)] Progress note--A dated and signed written notation summarizing facts about services provided to a minor and the minor's response during a given period of time.

(78) [(77)] Protective device--A mechanism or treatment, including sedation, that is:

(A) used:

(i) for body positioning;

(ii) to immobilize a minor during a medical, dental, diagnostic, or nursing procedure;

(iii) to permit wounds to heal; or

(iv) for a medical condition diagnosed by a physician; and

(B) not used as a restraint to modify or control behavior.

(79) [(78)] Protocol of care--A comprehensive, interdisciplinary plan of care that includes the medical physician's plan of care, nursing care plan and protocols, psychosocial needs, and therapeutic and developmental service needs required by a minor and family served.

(80) [(79)] Psychologist--A person who has a valid license under Texas Occupations Code, Chapter 501, as a psychologist.

(81) [(80)] Psychosocial treatment--The provision of skilled services to a minor under the direction of a physician that includes one or more of the following:

(A) assessment of alterations in mental status or evidence of suicide ideation or tendencies;

(B) teaching coping mechanisms or skills;

(C) counseling activities; or

(D) evaluation of a plan of care.

(82) [(81)] Public health disaster declaration--A governor's announcement based on a determination by the Department of State Health Services that there exists an immediate threat from a communicable disease that:

(A) poses a high risk of death or serious long-term disability to a large number of people; and

(B) creates a substantial risk of public exposure because of the disease's high level of contagion or the method by which the disease is transmitted.

(83) [(82)] Quiet time--A behavior management technique used to provide a minor with an opportunity to regain self-control, where the minor enters and remains for a limited period of time in a designated area from which egress is not prevented.

(84) [(83)] Recovery--Activities implemented during and after a disaster response, including a public health disaster response, designed to return a center to its normal operations as quickly as possible.

(85) [(84)] Registered nurse--RN. A person who has a valid license under Texas Occupations Code, Chapter 301, to practice professional nursing.

(86) [(85)] Relocation--The closing of a center and the movement of its business operations to another location.

(87) [(86)] Respiratory therapist--A person who has a valid license under Texas Occupations Code, Chapter 604, as a respiratory care practitioner.

(88) [(87)] Response--Actions taken immediately before an impending disaster or during and after a disaster, including a public health disaster, to address the immediate and short-term effects of the disaster.

(89) [(88)] Restraint--Physical restraint, chemical restraint, or mechanical restraint.

(90) [(89)] RN delegation--Delegation of tasks by an RN in accordance with 22 TAC Chapter 224 (relating to Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments).

(91) [(90)] Sedation--The act of allaying nervous excitement by administering medication that commonly induces the nervous system to calm. Sedation is a protective device.

(92) [(91)] Social worker--A person who has a valid license under Texas Occupations Code, Chapter 505, as a social worker.

(93) [(92)] Speech-language pathologist--A person who has a valid license under Texas Occupations Code, Chapter 401, as a speech-language pathologist.

(94) [(93)] Substantial compliance--A finding in which a center receives no recommendation for enforcement action after an inspection.

(95) [(94)] Supervision--Authoritative procedural guidance by a qualified person that instructs another person and assists in accomplishing a function or activity. Supervision includes initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(96) [(95)] Support services--Social, spiritual, and emotional care provided to a minor and a minor's parent by a center.

(97) [(96)] THSC--Texas Health and Safety Code.

(98) [(97)] Total census--The total number of minors with active plans of care at a center.

(99) [(98)] Transition support--Planning, coordination, and assistance to move the location of services provided to a minor from a center to the least restrictive setting appropriate.

(100) [(99)] Violation--A finding of noncompliance with this chapter or THSC Chapter 248A resulting from an inspection.

(101) [(100)] Volunteer--An individual who provides assistance to a center without compensation other than reimbursement for actual expenses.

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

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Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4077



SUBCHAPTER B. LICENSING APPLICATION, MAINTENANCE, AND FEES

40 TAC §15.123

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §248A.101, which provides that the HHSC executive commissioner shall adopt rules that are necessary to implement the chapter and to establish minimum standards for prescribed pediatric extended care centers.

The new section implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §248A.101.

§15.123. Request and Issuance of Temporary License.

(a) An applicant for an initial license under §15.105 of this subchapter (relating to Initial License Application Procedures and Issuance) may request that DADS issue a temporary license pending DADS review of the applicant's application for an initial license.

(b) To request a temporary license, the applicant must submit to DADS Provider Licensure and Certification Unit a written request for a temporary license and a copy of the applicant's policies, procedures and staffing plans that demonstrate compliance with the licensing standards of this chapter.

(c) DADS issues a temporary license to an applicant who has requested a temporary license if DADS:

(1) determines that the applicant has submitted an application for an initial license in accordance with §15.105 of this subchapter;

(2) determines that the applicant meets the building requirements of Subchapter E of this chapter; and

(3) approves the applicant's policies, procedures and staffing plans submitted in accordance with subsection (b) of this section.

(d) If DADS issues a temporary license, the center may admit no more than six minors to the center until the temporary license expires or terminates.

(e) The issuance of a temporary license constitutes DADS notice to the applicant of the approval of the temporary license request.

(f) A temporary license expires on the earlier of:

(1) 90 days after DADS issues the temporary license or the last day of any extension DADS grants in accordance with subsection (g) of this section; or

(2) the date DADS issues an initial license.

(g) A temporary license holder may request that DADS extend the term of a temporary license by 90 days. To request an extension, the license holder must submit to DADS Provider License and Certification Unit, a written request for an extension. If DADS receives the request at least 30 days before the date the temporary license expires, DADS extends the term of the license for 90 days and notifies the temporary license holder of the extension in writing. DADS grants an applicant only one temporary license extension for a center.

(h) A temporary license holder must comply with the requirements of THSC Chapter 248A and the licensing standards of this chapter for the term of the temporary license. DADS may take the enforcement action described in Subchapter G of this chapter (relating to Enforcement) if the temporary license holder does not comply with THSC Chapter 248A or this chapter.

(i) DADS may visit or conduct an investigation or inspection of a center owned or operated by a temporary license holder, as described in Subchapter F of this chapter (relating to Inspections and Visits).

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

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SUBCHAPTER C. GENERAL PROVISIONS

DIVISION 4. GENERAL SERVICES

40 TAC §15.501

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §248A.101, which provides that the HHSC executive commissioner shall adopt rules that are necessary to implement the chapter and to establish minimum standards for prescribed pediatric extended care centers.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §248A.101.

§15.501. Basic Services.

(a) A center must ensure the provision of all basic services based on the needs of a minor and a minor's family in accordance with the plan of care.

(b) A minor's parent is not required to accompany the minor when the minor receives services in the center, including therapeutic services provided in the center but billed separately.

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SUBCHAPTER D. TRANSPORTATION

40 TAC §15.1101

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §248A.101, which provides that the HHSC executive commissioner shall adopt rules that are necessary to implement the chapter and to establish minimum standards for prescribed pediatric extended care centers.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §248A.101.

§15.1101. Transportation Services.

(a) A center must ensure transportation services are provided for a minor, as authorized by an adult minor, the minor's parent, and the minor's prescribing physician:

- (1) from the minor's home to the center;
- (2) from the center to the minor's home; and
- (3) to and from the center for services coordinated by the center.

(b) A minor's parent is not required to accompany the minor when the center transports or provides for the transport of the minor.

(c) [(b)] A center must ensure that vehicles are accessible for a minor with disabilities and equipped to meet the needs of a minor during transport.

(d) [(e)] A minor's parent may decline a center's transportation services.

(e) [(d)] A center must adopt and enforce written policies and procedures describing the staff and equipment that will accompany a minor during transportation. The staff must include a driver and a nurse.

(f) [(e)] A center must ensure that:

- (1) a person transporting a minor on behalf of a center has a valid and appropriate Texas driver's license, a copy of which the center must keep on file;
- (2) a vehicle used to transport a minor has a current Texas safety inspection sticker and vehicle registration decal properly affixed to a vehicle;
- (3) the center maintains commercial insurance for the operation of a center's vehicles, including coverage for minors and staff in a center's vehicle in the event of accident or injury;
- (4) documentation of the insurance is maintained and includes:
 - (A) the name of the insurance company;
 - (B) the insurance policy number;
 - (C) the period of coverage; and
 - (D) an explanation of the coverage;
- (5) the center provides a driver and the center's nurse with an up-to-date master transportation list that includes a minor's name, pick up and drop off locations, and authorized persons to whom a minor may be released;
- (6) the master transportation list is on file at the center;
- (7) the driver and the center's nurse riding in the vehicle maintain a daily attendance record for each trip that includes the driver's

name, the date, names of all passengers in the vehicle, the name of the person to whom a minor was released, and the time of release; and

(8) the number of people in a vehicle used to transport minors does not exceed the manufacturer's recommended capacity for the vehicle.

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

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SUBCHAPTER F. INSPECTIONS AND VISITS

40 TAC §15.1302

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Health and Safety Code, §248A.101, which provides that the HHSC executive commissioner shall adopt rules that are necessary to implement the chapter and to establish minimum standards for prescribed pediatric extended care centers.

The amendment implements Texas Government Code, §531.0055 and Texas Health and Safety Code, §248A.101.

§15.1302. Investigation of Complaints and Self-Reported Incidents.

(a) DADS investigates complaints of abuse, neglect, or exploitation if:

- (1) the act occurs at the center;
- (2) the center is responsible for the supervision of a minor at the time the act occurs;
- (3) the alleged perpetrator is associated with the center; or
- (4) the alleged perpetrator is present at the center.

(b) DADS refers complaints of abuse, neglect, or exploitation not meeting the criteria in subsection (a) of this section to the Department of Family and Protective Services.

(c) DADS conducts an investigation under this section in accordance with THSC §260A.007 [§260.007].

(d) A center's investigation of complaints and self-reported incidents does not preclude DADS from taking action in accordance with Subchapter G of this chapter (relating to Enforcement).

(e) DADS notifies the following individuals of the results of a DADS investigation:

- (1) the individual who reported the allegation or complaint;
- (2) an adult minor;
- (3) a minor's parent;

(4) any person designated by an adult minor or minor's parent to receive information concerning a minor; and

(5) a center.

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

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Lawrence Hornsby

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CHAPTER 18. NURSING FACILITY ADMINISTRATORS

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §18.2 and §18.35 and new §18.42, in Chapter 18, Nursing Facility Administrators.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments and new section is to implement Senate Bill (S.B.) 807 and S.B. 1307, 84th Legislature, Regular Session, 2015, which amended Texas Occupations Code, Chapter 55, Licensing of Military Service Members, Military Veterans, and Military Spouses. The proposed new section addresses several areas that relate to licensure of military service members, military veterans, and military spouses. First, the proposed new section describes the process that a license applicant who is a military service member or a military veteran must follow to request a waiver of the application and initial license fees. Second, the proposed rule describes the process that a license applicant or a nursing facility administrator who is a military service member, a military veteran, or a military spouse, and who holds a license in good standing in another jurisdiction must follow to request a waiver of the application and initial license fees. Third, the proposal describes the process that a nursing facility administrator who is a military service member must follow to request two additional years to complete license renewal requirements. Fourth, the proposal describes the process that a license applicant must follow to request credit based on military service, training, or education toward the internship requirements for an administrator-in-training. Finally, the proposal describes the process a former administrator who is a military service member, a military veteran, or a military spouse must follow to request renewal of an expired license.

The proposed amendments add definitions related to the military provisions and replace several defined terms with acronyms. The proposed amendments also delete a provision related to a military member having additional time to meet continuing education requirements for license renewal because the information is included in the new section.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §18.2 adds definitions for "active duty," "armed forces of the United States," "military service member," "military spouse," and "military veteran," which are terms

that are used in new §18.42. The definition of NFAAC (Nursing Facility Administrators Advisory Committee) references Texas Administrative Code, Title 40, §89.6, a recently added section in which the NFAAC is described. The amendment also uses the acronyms for several terms that are currently defined and puts the terms in alphabetical order based on the acronyms.

The proposed amendment to §18.35 deletes subsection (g) regarding continuing education requirements for military members because this information is addressed in new §18.42(c) by providing a process by which administrator who is a military service member may request two additional years to complete license renewal requirements.

The proposed new §18.42 describes the process that a license applicant who is a military service member or a military veteran must follow to request a waiver of the application and initial license fees. The proposed new section also describes the process that a license applicant or a nursing facility administrator who is a military service member, a military veteran, or a military spouse, and who holds a license in good standing in another jurisdiction must follow to request a waiver of the application and initial license fees. In addition, the proposed new section describes the process that a nursing facility administrator who is a military service member must follow to request two additional years to complete license renewal requirements. The proposed new section describes the process that a license applicant must follow to request credit based on military service, training, or education toward the internship requirements for an administrator-in-training. Finally, the proposed new section describes the process a former administrator who is a military service member, a military veteran, or a military spouse must follow to request renewal of an expired license.

FISCAL NOTE

David Cook, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new section are in effect, enforcing or administering the amendments and new section does not have foreseeable implications relating to costs or revenues of local governments. The new section allows certain fees to be waived, which will decrease revenue to the state, but DADS does not anticipate a large number of fee waivers, so the decrease will likely be minimal.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new section will not have an adverse economic effect on small businesses or micro-businesses, because the proposed amendments and new section do not impose new requirements on nursing facility administrators.

PUBLIC BENEFIT AND COSTS

Mary T. Henderson, Assistant Commissioner for DADS Regulatory Services, has determined that, for each year of the first five years the proposed amendments and new section are in effect, the public benefit expected as a result of enforcing the proposed amendments and new section is a reduction in financial and administrative barriers for military service members, military veterans, and military spouses to receive and renew a nursing facility administrator license.

Ms. Henderson anticipates that there will not be an economic cost to persons who are required to comply with the amendments and new section. The amendments and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS 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 Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Laura Bagheri at (512) 438-4836 in DADS Regulatory Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-15R13, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 15R13" in the subject line.

SUBCHAPTER A. GENERAL INFORMATION

40 TAC §18.2

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Health and Safety Code, Chapter 242, which authorizes the executive commissioner to adopt rules regarding the licensing of nursing facility administrators; Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Occupations Code, Chapter 55, which requires a state agency to adopt rules related to licensure of military service members, military veterans, and military spouses.

The amendment affects Texas Government Code, §531.0055 and §531.021; Texas Health and Safety Code, Chapter 242; Texas Human Resources Code, §161.021 and §32.021; and Texas Occupations Code, Chapter 55.

§18.2. Definitions.

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

(1) **Abuse**--Any act, failure to act, or incitement to act done willfully, knowingly, or recklessly through words or physical action that causes or could cause mental or physical injury or harm or death to a nursing facility resident. Abuse includes verbal, sexual, mental, psy-

chological, or physical abuse; corporal punishment; involuntary seclusion; or any other actions within this definition.

(2) **Active duty--Current full-time military service in the armed forces of the United States or as a member of the Texas military forces, as defined in Texas Government Code §437.001, or similar military service of another state.**

~~[(2) Administrative law judge (ALJ)--A State Office of Administrative Hearings (SOAH) attorney who conducts formal hearings for the Department of Aging and Disability Services.]~~

(3) **Administrator**--A licensed nursing facility administrator.

~~[(4) Administrator-in-training (AIT)--A person undergoing a minimum 1,000-hour internship under a DADS-approved certified preceptor.]~~

(4) ~~[(5)]~~ **Administrator of Record**--The individual who is listed as the facility's licensed nursing facility administrator with the DADS ~~[DADS']~~ Licensing and Credentialing Section.

(5) **AIT--Administrator-in-training.** A person undergoing a minimum 1,000-hour internship under a DADS-approved certified preceptor.

(6) **ALJ--Administrative law judge.** A State Office of Administrative Hearings (SOAH) attorney who conducts formal hearings for the Department of Aging and Disability Services.

(7) ~~[(6)]~~ **Applicant**--A person applying for a Texas nursing facility administrator license.

(8) ~~[(7)]~~ **Application**--The notarized DADS application for licensure as a nursing facility administrator, as well as all required forms, fees, and supporting documentation.

(9) **Armed forces of the United States--The Army, Navy, Air Force, Coast Guard, or Marine Corps of the United States, including reserve units of those military branches.**

(10) ~~[(8)]~~ **Complaint**--An allegation that a licensed nursing facility administrator violated one or more of the licensure rules or statutory requirements.

(11) ~~[(9)]~~ **DADS**--The Department of Aging and Disability Services.

(12) ~~[(10)]~~ **Deficiency**--Violation of a federal participation requirement in a nursing facility.

(13) ~~[(11)]~~ **Domains of the NAB**--The five categories for education and continuing education of the National Association of Long Term Care Administrator Boards, which are resident care and quality of life; human resources; finance; physical environment and atmosphere; and leadership and management.

(14) ~~[(12)]~~ **Equivalent**--A level of achievement that is equal in amount and quality to completion of an educational or training program.

(15) ~~[(13)]~~ **Formal hearing**--A hearing held by SOAH to adjudicate a sanction taken by DADS against a licensed nursing facility administrator.

(16) ~~[(14)]~~ **Good standing**--The licensure status of a nursing facility administrator who is in compliance with the rules in this chapter and, if applicable, the terms of any sanction imposed by DADS.

(17) ~~[(15)]~~ **Informal review**--The opportunity for a licensee to dispute the allegations made by DADS. The informal review includes the opportunity to show compliance.

(18) [(16)] Internship--The 1,000-hour training period in a nursing facility for an AIT.

(19) [(17)] License--A nursing facility administrator license or provisional license.

(20) [(18)] Licensee--A person licensed by DADS as a nursing facility administrator.

(21) Military service member--A person who is on active duty.

(22) Military spouse--A person who is married to a military service member.

(23) Military veteran--A person who has served on active duty and who was discharged or released from active duty.

(24) [(19)] Misappropriation of resident property--The deliberate misplacement, exploitation, or wrongful temporary or permanent use of a nursing facility resident's belongings or money without the resident's consent.

(25) [(20)] NAB--The National Association of Long Term Care Administrator Boards, which is composed of state boards or agencies responsible for the licensure of nursing facility administrators.

(26) [(21)] NAB examination--The national examination developed by NAB that applicants must pass in combination with the state licensure examination to be issued a license to practice nursing facility administration in Texas.

(27) [(22)] NCERS--The National Continuing Education Review Service, which is the part of NAB that approves and monitors continuing education activities for nursing facility administrators.

(28) NFAAC--Nursing Facility Administrators Advisory Committee. The advisory committee described in §89.6 of this title (relating to Nursing Facility Administrator Advisory Committee).

(29) [(23)] Neglect--A deprivation of life's necessities of food, water, or shelter; or a failure of an individual to provide services, treatment, or care to a nursing facility resident that causes or could cause mental or physical injury, harm, or death to the nursing facility resident.

[(24) Nursing Facility Administrators Advisory Committee. The advisory committee described in §89.6 of this title (relating to Nursing Facility Administrator Advisory Committee).]

(30) [(25)] Nursing facility--An institution or facility licensed by DADS as a nursing home, nursing facility, or skilled nursing facility.

(31) [(26)] Nursing facility administrator--A person who is licensed to engage in the practice of nursing facility administration, regardless of whether the person has ownership interest in the facility.

(32) [(27)] Opportunity to show compliance--An informal meeting between DADS and a licensee that allows the licensee an opportunity to show compliance with the requirements of law for the retention of the license. The opportunity to show compliance is part of an informal review.

(33) [(28)] Preceptor--A licensed nursing facility administrator certified by DADS to provide supervision to an AIT.

(34) [(29)] PES--Professional examination services. The testing agency that administers the NAB and state examinations to applicants seeking licensure as nursing facility administrators.

(35) [(30)] Referral--A recommendation made by Regulatory Services Division staff to investigate an administrator's com-

pliance with licensure requirements when deficiencies or substandard quality of care deficiencies are found in a nursing facility, as required by Title 42 Code of Federal Regulations.

(36) [(31)] Regulatory Services Division--The division of DADS responsible for long term care regulation, including determining nursing facility compliance with licensure and certification requirements and licensing nursing facility administrators.

(37) [(32)] Sanctions--Any adverse licensure actions DADS imposes against a licensee, including letter of reprimand, suspension, revocation, denial of license, and monetary penalties.

(38) [(33)] Self-study course--A NAB-approved education course that an individual pursues independently to meet continuing education requirements for license renewal.

(39) [(34)] State examination--The state licensure examination that applicants must pass, in combination with the NAB examination, to be issued a license to practice nursing facility administration in Texas. This examination covers the nursing facility requirements found in Chapter 19 of this title (relating to Nursing Facility Requirements for Licensure and Medicaid Certification).

(40) [(35)] State of Texas Administrator-In-Training Internship Manual--The DADS program guide used by an AIT and preceptor during the AIT's internship for nursing facility administrator licensure.

(41) [(36)] Substandard quality of care--Any deficiency in Resident Behavior and Facility Practices, Quality of Life, or Quality of Care that is immediate jeopardy to nursing facility resident health or safety; or a pattern of widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm that is not immediate jeopardy, with no actual harm.

(42) [(37)] Survey--A resident-focused complaint/incident investigation or annual licensure or certification inspection of a nursing facility by DADS.

(43) [(38)] Traditional business hours--Monday through Friday from 8:00 a.m. until 5:00 p.m.

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

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Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4836



SUBCHAPTER C. LICENSES

40 TAC §18.35

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates

a portion of the Medicaid program; Texas Health and Safety Code, Chapter 242, which authorizes the executive commissioner to adopt rules regarding the licensing of nursing facility administrators; Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Occupations Code, Chapter 55, which requires a state agency to adopt rules related to licensure of military service members, military veterans, and military spouses.

The amendment affects Texas Government Code, §531.0055 and §531.021; Texas Health and Safety Code, Chapter 242; Texas Human Resources Code, §161.021 and §32.021; and Texas Occupations Code, Chapter 55.

§18.35. Continuing Education Requirements for License Renewal.

(a) The 40 clock hours of continuing education required for license renewal must:

- (1) be completed during the previous two-year licensure period;
- (2) include one or more of the five domains of the NAB listed in §18.11 of this chapter (relating to Academic Requirements);
- (3) include at least six clock hours in ethics; and
- (4) be:

(A) approved by the National Continuing Education Review Service;

(B) a DADS-sponsored event; or

(C) an upper-division semester credit course taken or taught at a post-secondary institution of higher education accredited by an association recognized by the Texas Higher Education Coordinating Board.

(b) DADS accepts no more than 34 clock hours of NAB-approved self-study courses toward the required 40 clock hours of continuing education.

(c) DADS waives, at a maximum, 20 of the 40 clock hours of continuing education to a licensee who completes one three-semester hour upper-division course taken at a post-secondary institution of higher education.

(d) DADS approves continuing education hours once per licensure renewal period for the same course, seminar, workshop, or program.

(e) DADS waives 20 of the required 40 clock hours of continuing education for preceptors who sponsor an AIT.

(f) DADS may perform an audit of continuing education courses, seminars, or workshops that the licensee has reported by requesting certificates of attendance.

~~[(g) If a licensee is on deployed military duty, the deadline to meet continuing education requirements is extended based on the actual duration of the deployment up to two years.]~~

~~[(1) A licensee must submit a copy of the military orders to DADS within 60 days of completion of deployed duty.]~~

~~[(2) If continuing education requirements for licensure renewal are not met by the extension deadline, the licensee must:]~~

~~[(A) meet the licensure application and examination requirements for an initial license as listed in §18.15 of this chapter (relating to Application Requirements); §18.16 of this chapter (relating to Examinations); and §18.31 of this subchapter (relating to Initial License); or]~~

~~[(B) prior to the extension deadline, place the license in a formal inactive status in accordance with §18.38 of this subchapter (relating to Inactive Status).]~~

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

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Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-4836



40 TAC §18.42

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Health and Safety Code, Chapter 242, which authorizes the executive commissioner to adopt rules regarding the licensing of nursing facility administrators; Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Occupations Code, Chapter 55, which requires a state agency to adopt rules related to licensure of military service members, military veterans, and military spouses.

The new section affects Texas Government Code, §531.0055 and §531.021; Texas Health and Safety Code, Chapter 242; Texas Human Resources Code, §161.021 and §32.021; and Texas Occupations Code, Chapter 55.

§18.42. Alternate Licensing Requirements for Military Service Personnel.

(a) Fee waiver based on military experience.

(1) DADS waives the application fee described in §18.15(a)(2) of this chapter (relating to Application Requirements) and the initial license fee described in §18.31(a)(2) of this chapter (relating to Initial License) for an applicant if DADS receives and approves a request for a waiver of fees from the applicant in accordance with this subsection.

(2) To request a waiver of fees under this subsection, an applicant must submit a written request for a waiver with the appli-

cant's initial license application submitted to DADS in accordance with §18.31 of this chapter. The applicant must include with the request:

(A) documentation of the applicant's status as a military service member or military veteran that is acceptable to DADS; and

(B) documentation of the type and dates of the service, training, and education the applicant received, and an explanation as to why the applicant's military service, training, or education substantially meets all of the requirements for licensure under this chapter.

(3) Documentation of military status that is acceptable to DADS includes:

(A) for status as a military service member, a copy of a current military service order issued to the applicant by the armed forces of the United States, the State of Texas, or another state; and

(B) for status as a military veteran, a copy of a military service discharge order issued to the applicant by the armed forces of the United States, the State of Texas, or another state.

(4) If DADS requests additional documentation, the applicant must submit the requested documentation.

(5) DADS approves a request for a waiver of fees submitted in accordance with this subsection if DADS determines that the applicant is a military service member or a military veteran and the applicant's military service, training, or education substantially meets all of the requirements for licensure under this chapter.

(b) Fee waiver based on license issued by another jurisdiction.

(1) DADS waives the application fee described in §18.15(a)(2) of this chapter and the initial license fee described in §18.32(c)(2) of this chapter (relating to Provisional License) for an applicant if DADS receives and approves a request for a waiver of fees in accordance with this subsection.

(2) To request a waiver of fees under this subsection, an applicant must include a written request for a waiver of fees with the applicant's provisional license application that is submitted to DADS in accordance with §18.32 of this chapter. The applicant must include with the request documentation of the applicant's status as a military service member, military veteran, or military spouse that is acceptable to DADS.

(3) Documentation of military status that is acceptable to DADS includes:

(A) for status as a military service member, a copy of a current military service order issued to the applicant by the armed forces of the United States, the State of Texas, or another state;

(B) for status as a military veteran, a copy of a military service discharge order issued to the applicant by the armed forces of the United States, the State of Texas, or another state; and

(C) for status as a military spouse:

(i) a copy of a marriage certificate issued to the applicant by a state of the United States or a foreign government; and

(ii) a copy of a current military service order issued to the applicant's spouse by the armed forces of the United States, the State of Texas, or another state.

(4) If DADS requests additional documentation, the applicant must submit the requested documentation.

(5) DADS approves a request for a waiver of fees submitted in accordance with this subsection if DADS determines that:

(A) the applicant holds a license in good standing in another jurisdiction with licensing requirements substantially equivalent to the requirements for a license under this chapter; and

(B) the applicant is a military service member, a military veteran, or a military spouse.

(c) Additional time for license renewal.

(1) DADS gives an administrator an additional two years to complete the license renewal requirements described in §18.34 of this subchapter (relating to License Renewal) and §18.35 of this subchapter (relating to Continuing Education Requirements for License Renewal), if DADS receives and approves a request for additional time to complete the licensing renewal requirements from an administrator in accordance with this subsection.

(2) To request additional time to complete license renewal requirements, an administrator must submit a written request for additional time to DADS before the expiration date of the administrator's license. The administrator must include with the request documentation of the administrator's status as a military service member that is acceptable to DADS. Documentation as a military service member that is acceptable to DADS includes a copy of a current military service order issued to the administrator by the armed forces of the United States, the State of Texas, or another state.

(3) If DADS requests additional documentation, the administrator must submit the requested documentation.

(4) DADS approves a request for two additional years to complete license renewal requirements submitted in accordance with this subsection if DADS determines that the administrator is a military service member, except DADS does not approve a request if DADS granted the administrator a previous extension and the administrator has not completed the license renewal requirements during the two-year extension period.

(5) If an administrator does not submit the written request described by paragraph (2) of this subsection before the expiration date of the administrator's license, DADS will consider a request after the expiration date of the license if the administrator establishes to the satisfaction of DADS that the request was not submitted before the expiration date of the administrator's license because the administrator was serving as military service member at the time the request was due.

(d) Credit toward internship requirements.

(1) DADS gives an applicant credit toward the internship requirements for an AIT described in §18.12 of this chapter (relating to Internship Requirements) based on the applicant's military service, training, or education if DADS receives and approves a request for credit from an applicant in accordance with this subsection.

(2) To request credit for military service, training, or education, the applicant must submit a written request for credit to DADS with the applicant's initial license application. The applicant must include with the request documentation of the type and dates of the service, training, and education the applicant received and an explanation as to how the applicant's military service, training, or education is substantially similar to the training or education requirements described in §18.12 of this chapter.

(3) If DADS requests additional documentation, the applicant must submit the requested documentation.

(4) DADS approves a request for credit submitted in accordance with this subsection if DADS determines that the military service, training, or education that the applicant received is substantially

similar to the training or education requirements described in §18.12 of this chapter.

(e) Renewal of expired license.

(1) DADS renews an expired license if DADS receives and approves a request for renewal from a former administrator in accordance with this subsection.

(2) To request renewal of an expired license, a former administrator must submit a written request with a license renewal application within five years after the former administrator's license expired. The former administrator must include with the request documentation of the former administrator's status as a military service member, military veteran, or military spouse that is acceptable to DADS.

(3) Documentation of military status that is acceptable to DADS includes:

(A) for status as a military service member, a copy of a current military service order issued to the former administrator by the armed forces of the United States, the State of Texas, or another state;

(B) for status as a military veteran, a copy of a military service discharge order issued to the former administrator by the armed forces of the United States, the State of Texas, or another state; and

(C) for status as a military spouse:

(i) a copy of a marriage certificate issued to the former administrator by a state of the United States or a foreign government; and

(ii) a copy of a current military service order issued to the former administrator's spouse by the armed forces of the United States, the State of Texas, or another state.

(4) If DADS requests additional documentation, the former administrator must submit the requested documentation.

(5) DADS approves a request for renewal of an expired license submitted in accordance with this subsection if DADS determines that:

(A) the former administrator is a military service member, military veteran, or military spouse;

(B) the former administrator has not committed an offense listed in Texas Health and Safety Code (THSC) §250.006(a) and has not committed an offense listed in THSC §250.006(b) during the five years before the date the former administrator submitted the initial license application; and

(C) the former administrator is not listed on the employee misconduct registry described in THSC Chapter 253.

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 23, 2016.

TRD-201603186

Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 438-4836



CHAPTER 39. COMMUNITY ALZHEIMER'S RESOURCES AND EDUCATION (CARE) PROGRAM

40 TAC §§39.1, 39.2, 39.4, 39.6, 39.8, 39.10, 39.12, 39.14, 39.16

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), the repeal of §§39.1, 39.2, 39.4, 39.6, 39.8, 39.10, 39.12, 39.14, and 39.16, in Chapter 39, Community Alzheimer's Resources and Education (CARE) Program.

BACKGROUND AND PURPOSE

The purpose of the repeals is to remove rules governing a program that is no longer being administered and, therefore, are not needed.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §39.1 deletes a rule relating to definitions.

The proposed repeal of §39.2 deletes a rule relating to eligibility.

The proposed repeal of §39.4 deletes a rule relating to contracted services.

The proposed repeal of §39.6 deletes a rule relating to procedure if no funds are available.

The proposed repeal of §39.8 deletes a rule relating to termination of benefits.

The proposed repeal of §39.10 deletes a rule relating to funding restrictions.

The proposed repeal of §39.12 deletes a rule relating to CARE program information.

The proposed repeal of §39.14 deletes a rule relating to right to appeal.

The proposed repeal of §39.16 deletes a rule relating to provider claims payment.

FISCAL NOTE

David Cook, DADS Chief Financial Officer, has determined that, for the first five years after the repeal, there are no foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed repeals will have no adverse economic effect on small businesses or micro-businesses because there are no costs imposed on small businesses or micro-businesses by the repeals.

PUBLIC BENEFIT AND COSTS

Kristi Jordan, Deputy Commissioner, has determined that, for each year of the first five years after the repeals, the public benefit expected as a result of repealing the sections is the removal of unnecessary rules from the DADS rule base.

Ms. Jordan anticipates that there will not be an economic cost to persons who are affected by the repeals. The repeals will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS 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 Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Corliss Powell at (512) 438-2430 in DADS Center for Policy and Innovation. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-15R21, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 15R21" in the subject line.

STATUTORY AUTHORITY

The repeals are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The repeals implement Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§39.1. *Definitions.*

§39.2. *Eligibility.*

§39.4. *Contracted Services.*

§39.6. *Procedure if No Funds Are Available.*

§39.8. *Termination of Benefits.*

§39.10. *Funding Restrictions.*

§39.12. *CARE Program Information.*

§39.14. *Right to Appeal.*

§39.16. *Provider Claims Payment.*

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

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TRD-201603176

Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 438-2430



CHAPTER 49. CONTRACTING FOR COMMUNITY SERVICES

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §49.102, in Subchapter A, Application and Definitions; and §49.205, in Subchapter B, Contractor Enrollment; and new §49.313, in Subchapter C, Requirements of a Contractor, in Chapter 49, Contracting for Community Services.

BACKGROUND AND PURPOSE

The purpose of the proposed rules is to implement recommendations in the Sunset Advisory Commission's July 2015 report regarding "day habilitation facilities" in the Home and Community-based Services (HCS) Program, Texas Home Living (TxHmL) Program, Deaf-Blind with Multiple Disabilities (DBMD) Program, and Community Living Assistance and Support Services (CLASS) Program. Specifically, the Sunset Advisory Commission recommended that an HCS, TxHmL, DBMD, or CLASS provider, to help ensure the safety of individuals enrolled in those programs, include in a contract with a day habilitation facility requirements to conduct background checks on employees and volunteers, have an emergency response plan, conduct fire drills, post abuse hotline information, and follow an individual's service plan. The proposed rules do not use the term "day habilitation facility," but instead refer to a contractor or subcontractor that provides day habilitation in the HCS Program, the TxHmL Program, or the DBMD Program, or that provides prevocational services in the CLASS Program.

The proposed rules also require a contractor of HCS, TxHmL, DBMD, or CLASS Program services that directly provides day habilitation or prevocational services to have an emergency response plan, conduct fire drills, and post abuse hotline information. These requirements ensure consistency with the requirements of subcontractors.

The proposed rules also implement Senate Bill (S.B.) 1999, 84th Texas Legislature, Regular Session, 2015, which amended the Texas Human Resources Code, Chapter 103, to change "adult day care" to "day activity and health services." Also, in accordance with DADS current policy and S.B. 202, 84th Texas Legislature, Regular Session, 2015, which repealed Texas Health and Safety Code, Chapter 781 regarding personal emergency response systems, the proposed rules delete the requirement for a contractor that provides Title XX emergency response services (ERS) to have a license as a personal emergency response system provider issued by the Department of State Health Services (DSHS) or a license as an alarm systems company issued by the Texas Private Security Board.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §49.102 adds a definition of "emergency response plan," makes a minor editorial change to the definition of "HCS Program," and moves the definition of "exploitation" to its correct alphabetical order.

The proposed amendment to §49.205 replaces "adult day care license" with "day activity and health services facility license." The proposed amendment updates the title of Chapter 98, which will be changed in response to S.B. 1999. The proposed amendment deletes the requirement for a contractor who provides Title XX ERS to have a license as a personal emergency response system provider issued by the DSHS or a license as an alarm systems company issued by the Texas Private Security Board.

Proposed new §49.313 requires a contractor that has a contract for the HCS Program, the TxHmL Program, the CLASS Program, or the DBMD Program, in a building or a portion of a building that is owned or leased by the contractor and in which the contractor provides day habilitation in the HCS Program, the TxHmL Program, or the DBMD Program, or provides prevocational services in the CLASS Program, to (1) conduct, at least once every 90 days, a fire drill during which individuals evacuate the building; and (2) prominently post, in an area of the building that is readily accessible to individuals, employees, subcontractors, volunteers, and visitors, a notice of the requirement to report an allegation of abuse, neglect, or exploitation of an individual and how to report such an allegation to the DFPS toll free telephone number. The proposed new rule also requires these contractors to have an emergency response plan for individuals while receiving day habilitation or prevocational services in the building. If a contractor has a written agreement with a subcontractor to provide day habilitation in the HCS Program, the TxHmL Program, or the DBMD Program or provide prevocational services in the CLASS Program, and the day habilitation or prevocational services are provided in a building or a portion of a building the subcontractor owns or leases, the proposed new rule requires the written agreement to include the following provisions: (1) that the subcontractor must conduct, at least once every 90 days, a fire drill during which individuals evacuate the building; (2) that the subcontractor must prominently post, in an area of the building that is readily accessible to individuals, employees, subcontractors, volunteers, and visitors, a notice of the requirement to report an allegation of abuse, neglect, or exploitation of an individual and how to report such an allegation to the DFPS toll free telephone number; (3) that the subcontractor, in accordance with §49.304, must conduct background checks on the subcontractor's employees, subcontractors, and volunteers who provide day habilitation or prevocational services; and (4) that the subcontractor must, for an individual in the HCS Program or TxHmL Program, provide day habilitation in accordance with the individual's implementation plan or for an individual in the CLASS Program or DBMD Program, provide prevocational services or day habilitation in accordance with the individual's individual program plan. The proposed new rule also requires a subcontractor to keep a copy of an individual's plan in the building.

FISCAL NOTE

David Cook, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new section are in effect, enforcing or administering the amendments and new section does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new section will have an adverse economic effect on small businesses and micro-businesses, because there may be costs associated with developing an emergency plan, conducting fire drills, and modifying written agreements with subcontractors. DADS estimates the number of small businesses and micro-businesses is less than 2523, the approximate number of contractors in the HCS, TxHmL, DBMD, and CLASS Programs. DADS is unable to estimate the cost of compliance, but the cost is expected to be minimal.

The rules implement specific recommendations of the Sunset Advisory Commission and no alternatives were considered to minimize the effect on small and micro-businesses.

PUBLIC BENEFIT AND COSTS

Kristi Jordan, DADS Deputy Commissioner, has determined that, for each year of the first five years the proposed amendments and new section are in effect, the public benefit expected as a result of enforcing the amendments and new section is to implement recent changes in Texas law and establish requirements to help ensure the safety of individuals receiving day habilitation services or prevocational services through the HCS, TxHmL, DBMD, and CLASS Programs.

Ms. Jordan anticipates that there may be an economic cost to persons who are required to comply with the amendments and new section to develop an emergency plan, conduct fire drills, and modify written agreements with subcontractors to add new requirements. DADS is unable to estimate these costs, but they are expected to be minimal. The amendments and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS 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 Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sheryl Loera at (512) 438-3693 in DADS Long-Term Services and Support unit. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-16R04, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 16R04" in the subject line.

SUBCHAPTER A. APPLICATION AND DEFINITIONS

40 TAC §49.102

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that

operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021 and §32.021.

§49.102. *Definitions.*

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

- (1) AA--Adaptive aids.
- (2) Abuse--Abuse as defined in Texas Human Resources Code, §48.002 or, in reference to children, Texas Family Code, §261.001.
- (3) AFC--Adult foster care.
- (4) Applicant--A person seeking to obtain a contract.
- (5) Application denial period--A period of time during which DADS denies a contract application submitted to DADS.
- (6) Business day--Any day except a Saturday, a Sunday, or a national or state holiday listed in Texas Government Code §662.003(a) or (b).
- (7) CAS--Community attendant services.
- (8) CFC PAS/HAB--A Medicaid state plan service provided through the Community First Choice (CFC) Option, described in 1 Texas Administrative Code [(TAC)] Chapter 354, Subchapter A, Division 27 (relating to Community First Choice), under a contract for:
 - (A) the HCS Program;
 - (B) the TxHmL Program;
 - (C) a DSA in the CLASS Program; or
 - (D) the DBMD program.
- (9) CFS--Continued family services.
- (10) Change of legal entity--An event that occurs when a contractor is required to obtain a new federal tax identification number.
- (11) Change of ownership--An event that occurs when:
 - (A) as a result of a transfer or sale, at least 50 percent of the ownership of a contractor is held by one or more persons who owned less than 5 percent of the contractor before the transfer or sale; and
 - (B) the contractor is not required to obtain a new federal tax identification number.
- (12) Choice list--A list of contractors from which an individual or LAR chooses to receive services unless DADS has imposed a referral hold on the contractor.
- (13) CLASS Program--Community Living Assistance and Support Services Program.
- (14) Clean claim--In accordance with Code of Federal Regulations, Title 42, §447.45(b), a claim for services submitted by a contractor that can be processed without obtaining additional information from the contractor or a party other than DADS, including a claim with errors originating in the Texas claims management system, but not including a claim from a contractor under investigation for fraud or abuse, or a claim under review for medical necessity.

- (15) CMA--Case management agency.
- (16) CMPAS--Consumer managed personal attendant services.
 - (17) Contract--A written agreement between DADS and another person that obligates the other person to provide a service to an individual in exchange for payment from DADS. The term includes standard and provisional contracts.
 - (18) Contractor--The person other than DADS who is a party to a contract.
 - (19) Contractual agreement--A written, legally binding agreement that is not a contract as defined in this section.
 - (20) Controlling ownership interest--A direct ownership interest, an indirect ownership interest, or a combination of direct and indirect ownership interests, of 5 percent or more in an applicant or contractor.
 - (21) Controlling person--A person who:
 - (A) has a controlling ownership interest;
 - (B) is a managing employee;
 - (C) has been delegated the authority to obligate or act on behalf of an applicant or contractor;
 - (D) is an officer or director of a corporation that is an applicant or contractor;
 - (E) is a partner in a partnership that is an applicant or contractor;
 - (F) is a member or manager in a limited liability company that is an applicant or contractor;
 - (G) is a trustee or trust manager of a trust that is an applicant or contractor;
 - (H) is a spouse of a person who is an applicant or contractor; or
 - (I) because of a personal, familial, or other relationship with an applicant or contractor, is in a position of actual control or authority with respect to the applicant or contractor, regardless of the person's title.
 - (22) Conviction--A determination of being found or proved guilty that:
 - (A) is any of the following:
 - (i) a judgment of conviction that has been entered by a federal, state or local court, regardless of whether:
 - (I) there is a post-trial motion or an appeal pending; or
 - (II) the judgment of conviction or other record relating to the criminal conduct has been expunged or otherwise removed;
 - (ii) a finding of guilt made by a federal, state, or local court; or
 - (iii) an acceptance of a plea of guilty or *nolo contendere* by a federal, state, or local court; and
 - (B) does not include successful completion of a period of deferred adjudication community supervision and receipt of a dismissal and discharge in accordance with Texas Code of Criminal Procedure, Article 42.12, Section 5(c).

(23) DADS--The Department of Aging and Disability Services.

(24) DADS debarment list--A list, made before the effective date of this chapter, of persons and entities prohibited by DADS from conducting business with DADS in any capacity for a specified period.

(25) DAHS--Day activity and health services.

(26) Day--A calendar day, including weekends and holidays.

(27) DBMD Program--Deaf Blind with Multiple Disabilities Program.

(28) Desk review--A review by DADS of a contractor's service delivery or business operation that takes place away from the contractor's administrative and service delivery sites, using records provided to DADS by the contractor. The scope of the review is at the discretion of DADS.

(29) DFPS--The Department of Family and Protective Services.

(30) Direct ownership interest--An interest in the ownership of an applicant or contractor as described in subparagraphs (A) and (B) of this paragraph.

(A) Direct ownership interest is:

(i) ownership of equity in the capital, stock, or profits of an applicant or contractor; or

(ii) ownership in a mortgage, deed of trust, note, or other obligation secured by property of an applicant or contractor.

(B) The percentage of direct ownership interest of an applicant or contractor, based on ownership of a mortgage, deed of trust, note, or other obligation, is determined by multiplying the percentage of ownership in the obligation by the percentage of the applicant's or contractor's assets used to secure the obligation. For example, ownership of 10 percent of a note secured by 60 percent of a contractor's or applicant's assets equals 6 percent direct ownership interest in the applicant or contractor (that is, $0.1 \times 0.6 = 0.06$).

(31) DSA--Direct service agency.

~~(32) Exploitation--Exploitation as defined in Texas Human Resources Code, §48.002.~~

~~(32) [(33)] Electronic record--Information that is stored in a medium having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities, and is retrievable in perceivable form.~~

~~(33) Emergency response plan--A written plan that describes the actions that will be taken to protect individuals, including evacuation or sheltering-in-place, in the event of an emergency such as a fire or other man-made or natural disaster.~~

~~(34) Exploitation--Exploitation as defined in Texas Human Resources Code, §48.002.~~

(35) [(34)] FC--Family care.

(36) [(35)] FMSA--Financial management services agency. An entity that contracts with DADS to provide financial management services, as defined in §41.103 of this title (relating to Definitions).

(37) [(36)] Governmental entity--An agency or other entity of federal, state, or local government.

(38) [(37)] HCS Program--Home and Community-based [Community Based] Services Program.

(39) [(38)] HCSSA--Home and community support services agency.

(40) [(39)] HDM--Home delivered meals.

(41) [(40)] HHSC--The Texas Health and Human Services Commission.

(42) [(41)] Indirect ownership interest--An interest in the ownership of an applicant or contractor as described in subparagraphs (A) and (B) of this paragraph.

(A) Indirect ownership interest is an ownership interest in a person that has a direct or indirect ownership interest in an applicant or contractor.

(B) The percentage of indirect ownership interest is determined by multiplying the percentage of ownership interest in the person that has a direct ownership interest in the applicant or contractor by the percentage of direct ownership that the person has in the applicant or contractor. For example:

(i) ownership of 10 percent of the stock of a corporation that owns 80 percent of the stock of an applicant or contractor equals 8 percent indirect ownership of the applicant or contractor (that is, $0.1 \times 0.8 = 0.08$); and

(ii) ownership of 50 percent of the stock of a corporation that owns 10 percent of the stock of a corporation that owns 80 percent of the stock of an applicant or contractor equals 4 percent indirect ownership of the applicant or contractor (that is, $0.5 \times 0.1 \times 0.8 = 0.04$).

(43) [(42)] Individual--A person who is enrolled in a program or service described in §49.101(a) of this subchapter.

(44) [(43)] LAR--Legally authorized representative. A person authorized by law to act on behalf of an individual with regard to a particular matter. The term may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(45) [(44)] LEIE--List of excluded individuals and entities. In this context, "individual" does not have the meaning as defined in this section.

(46) [(45)] LIDDA--Local intellectual and developmental disability authority. An entity designated by the executive commissioner of HHSC in accordance with Texas Health and Safety Code, §533A.035.

(47) [(46)] Managing employee--A person who exercises operational or managerial control over, or who conducts the day-to-day operation of, an applicant or contractor.

(48) [(47)] MDCP--Medically Dependent Children Program.

(49) [(48)] Neglect--Neglect as defined in Texas Human Resources Code, §48.002 or, in reference to children, Texas Family Code, §261.001.

(50) [(49)] OHR--Out of home respite.

(51) [(50)] Paper record--Information that is stored on paper.

(52) [(51)] Person--A corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, natural person, or any other legal entity

that can function legally, sue or be sued, and make decisions through agents.

(53) [(52)] Personal attendant--An employee or sub-contractor of a contractor or an employee of a CDS employer who provides:

- (A) PHC;
- (B) FC;
- (C) CAS;
- (D) DAHS;
- (E) RC;
- (F) flexible family support in MDCP;
- (G) respite services in MDCP;
- (H) personal attendant services in the CMPAS Program;
- (I) habilitation or CFC PAS/HAB in the CLASS Program;

(J) residential habilitation or CFC PAS/HAB in the DBMD Program;

- (K) chore services in the DBMD Program;
- (L) day habilitation in the DBMD Program;

(M) supported home living or CFC PAS/HAB in the HCS Program; or

(N) community support or CFC PAS/HAB in the TxHmL Program.

(54) [(53)] PHC--Primary home care.

(55) [(54)] Provisional contract--An initial contract that DADS enters into in accordance with §49.208 of this chapter (relating to Provisional Contract Application Approval) that has a stated expiration date.

(56) [(55)] RC--Residential care.

(57) [(56)] Records--Paper records and electronic records.

(58) [(57)] Recoup--To reduce payments that are due to a contractor under a contract to satisfy a debt the contractor owes to DADS but does not include making routine adjustments for prior over-payments to the contractor.

(59) [(58)] Referral hold--An action in which DADS prohibits a contractor from, for a period of time determined by DADS, providing services to an individual not receiving services from the contractor at the time the referral hold was imposed.

(60) [(59)] SFS--Support family services.

(61) [(60)] SSPD--Special Services to Persons with Disabilities (SSPD) Program.

(62) [(61)] Standard contract--A contract that DADS enters into in accordance with §49.209 of this chapter (relating to Standard Contract) that does not have a stated expiration date.

(63) [(62)] Subcontract--An agreement, other than a contract, between a contractor and another person that obligates the other person to provide all or part of the goods, services, work, or materials required of the contractor in a contract.

(64) [(63)] Subcontractor--The person other than a contractor who is a party to a subcontract.

(65) [(64)] TAS--Transition assistance services.

(66) [(65)] TxHmL Program--Texas Home Living Program.

(67) [(66)] Vendor hold--A temporary suspension of payments that are due to a contractor under a contract.

(68) [(67)] Volunteer--A person who works for a contractor without compensation, other than reimbursement for actual expenses.

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 23, 2016.

TRD-201603190

Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 438-3693



SUBCHAPTER B. CONTRACTOR ENROLLMENT

40 TAC §49.205

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021 and §32.021.

§49.205. *License, Certification, Accreditation, and Other Requirements.*

(a) To be a contractor, an applicant must have a license, certification, accreditation, or other document as follows:

- (1) CLASS-CFS and CLASS-SFS require:

(A) a permit to operate a child-placing agency issued by DFPS in accordance with Chapter 745 of this title (relating to Licensing); or

(B) a HCSSA license issued by DADS in accordance with Chapter 97 of this title (relating to Licensing Standards for Home and Community Support Services Agencies) with:

(i) the licensed home health services (LHHS) category; or

(ii) the licensed and certified home health services (L&CHHS) category;

(2) CLASS-DSA requires a HCSSA license issued by DADS in accordance with Chapter 97 of this title with:

(A) the LHHS category; or

(B) the L&CHHS category;

(3) DBMD requires:

(A) a HCSSA license issued by DADS in accordance with Chapter 97 of this title with:

(i) the LHHS category; or

(ii) the L&CHHS category; and

(B) for a contractor that provides residential services to four to six individuals, an assisted living facility license Type A or Type B issued by DADS in accordance with Chapter 92 of this title (relating to Licensing Standards for Assisted Living Facilities);

(4) MDCP-AA requires, for a contractor that provides vehicle modification services, a copy of a current contractual agreement with the Department of Assistive and Rehabilitative Services (DARS) to provide vehicle modification services;

(5) MDCP-HCSSA requires a HCSSA license issued by DADS in accordance with Chapter 97 of this title with:

(A) the personal assistance services (PAS) category;

(B) the LHHS category; or

(C) the L&CHHS category;

(6) MDCP-OHR-camp requires written accreditation by the American Camping Association for providing summer camp services;

(7) MDCP-OHR-special care facility requires a special care facility license issued by the Department of State Health Services (DSHS) in accordance with 25 TAC Chapter 125 (relating to Special Care Facilities);

(8) MDCP-OHR-child care facility requires a child-care center license issued by DFPS in accordance with Chapter 745 of this title;

(9) MDCP-OHR-NF requires a nursing facility license issued by DADS in accordance with Chapter 19 of this title (relating to Nursing Facility Requirements for Licensure and Medicaid Certification);

(10) MDCP-OHR-hospital requires a hospital license issued by DSHS in accordance with 25 TAC Chapter 133 (relating to Hospital Licensing);

(11) MDCP-OHR-host family requires a foster family home license issued by DFPS in accordance with Chapter 745 of this title or verification as a child-placing agency foster family home issued by a child placing agency in accordance with Chapter 749 of this title (relating to Minimum Standards for Child-Placing Agencies);

(12) TAS requires:

(A) written documentation from DARS or the Rehabilitation Services Administration that the applicant is a center for independent living, as defined by 29 United States Code §796a;

(B) a contract other than the TAS contract; or

(C) written designation by DADS as an area agency on aging;

(13) Medicaid hospice requires:

(A) a HCSSA license for hospice issued by DADS in accordance with Chapter 97 of this title; and

(B) a written notification from the Centers for Medicare and Medicaid Services that the applicant is certified to participate as a hospice agency in the Medicare Program;

(14) PHC/CAS, and FC require a HCSSA license issued by DADS in accordance with Chapter 97 of this title with:

(A) the LHHS category;

(B) the L&CHHS category; or

(C) the PAS category;

(15) DAHS requires a day activity and health services facility [~~an adult day care~~] license issued by DADS in accordance with Chapter 98 of this title (relating to [~~Adult Day Care and~~] Day Activity and Health Services Requirements);

(16) Title XX AFC requires for an AFC facility serving four to eight individuals, an assisted living facility license Type A or Type B issued by DADS in accordance with Chapter 92 of this title; and

~~{(17) Title XX ERS requires:}~~

~~{(A) a license as a personal emergency response system provider issued by DSHS in accordance with 25 TAC Chapter 140, Subchapter B (relating to Personal Emergency Response System Providers); or}~~

~~{(B) a license as an alarm systems company issued by the Texas Private Security Board in accordance with the Texas Occupations Code, Chapter 1702; and}~~

(17) [(18)] Title XX RC requires an assisted living facility license Type A or Type B issued by DADS in accordance with Chapter 92 of this title.

(b) The license, certification, accreditation, or other document required by subsection (a) of this section must be valid in the service or catchment area:

(1) in which the applicant is seeking to provide services; or

(2) covered under the contractor's contract.

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 23, 2016.

TRD-201603191

Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 438-3693



SUBCHAPTER C. REQUIREMENTS OF A CONTRACTOR

40 TAC §49.313

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The new section affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021 and §32.021.

§49.313. Day Habilitation Requirements in the HCS Program, the TxHmL Program, and the DBMD Program and Prevocational Services Requirements in the CLASS Program.

(a) A contractor that has a contract for the HCS Program, the TxHmL Program, the CLASS Program, or the DBMD Program must:

(1) in a building or a portion of a building that is owned or leased by the contractor and in which the contractor provides day habilitation in the HCS Program, the TxHmL Program, or the DBMD Program or provides prevocational services in the CLASS Program:

(A) conduct, at least once every 90 days, a fire drill during which individuals evacuate the building; and

(B) prominently post, in an area of the building that is readily accessible to individuals, employees, subcontractors, volunteers, and visitors, a notice of the requirement to report an allegation of abuse, neglect, or exploitation of an individual and how to report such an allegation to the DFPS toll free telephone number at 1-800-647-7418; and

(2) have an emergency response plan for individuals while receiving day habilitation or prevocational services in the building.

(b) If a contractor described in subsection (a) of this section has a written agreement required by §49.308 of this subchapter (relating to Subcontracts) with a subcontractor to provide day habilitation in the HCS Program, the TxHmL Program, or the DBMD Program or provide prevocational services in the CLASS Program and the day habilitation or prevocational services are provided in a building or a portion of a building the subcontractor owns or leases, the written agreement must include the following provisions:

(1) that the subcontractor must conduct, at least once every 90 days, a fire drill during which individuals evacuate the building;

(2) that the subcontractor must have an emergency response plan for individuals while receiving day habilitation or prevocational services in the building;

(3) that the subcontractor must prominently post, in an area of the building that is readily accessible to individuals, employees, subcontractors, volunteers, and visitors, a notice of the requirement to report an allegation of abuse, neglect, or exploitation of an individual and how to report such an allegation to the DFPS toll free telephone number at 1-800-647-7418;

(4) that the subcontractor, in accordance with §49.304 of this subchapter (relating to Background Checks), must conduct back-

ground checks on the subcontractor's employees, subcontractors, and volunteers who provide day habilitation or prevocational services; and

(5) that the subcontractor must:

(A) for an individual in the HCS Program, provide day habilitation in accordance with the individual's implementation plan as defined in §9.153 of this title (relating to Definitions) and keep a copy of the plan in the building;

(B) for an individual in the TxHmL Program, provide day habilitation in accordance with the individual's implementation plan as defined in §9.553 of this title (relating to Definitions) and keep a copy of the plan in the building;

(C) for an individual in the CLASS Program, provide prevocational services in accordance with the individual's IPP as defined in §45.103 of this title (relating to Definitions) and keep a copy of the IPP in the building; and

(D) for an individual in the DBMD Program, provide day habilitation in accordance with the individual's IPP as defined in §42.103 of this title (relating to Definitions) and keep a copy of the IPP in the building.

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 23, 2016.

TRD-201603192

Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 438-3693



CHAPTER 94. NURSE AIDES

40 TAC §§94.2, 94.11, 94.13

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §94.2 and §94.11; and new §94.13, in Chapter 94, Nurse Aides.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments and new section is to implement Senate Bill (S.B.) 807 and S.B. 1307, 84th Legislature, Regular Session, 2015, which amended Texas Occupations Code, Chapter 55, Licensing of Military Service Members, Military Veterans, and Military Spouses. The proposal describes the process a nurse aide who is a military service member must follow to request an additional two years to complete in-service education requirements to maintain a listing on the nurse aide registry (NAR). The proposal also describes the process a former nurse aide who is a military service member, a military veteran, or a military spouse must follow to request that the status of a listing on the NAR be changed from expired to active during the five years after expiration.

The proposed amendments add definitions related to the military provisions and replace several defined terms with acronyms. The proposed amendments also delete a provision related to a military spouse being listed on the NAR with active status for up to five years after the listing expires.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §94.2 adds definitions for "active duty," "armed forces of the United States," "military service member," "military spouse," and "military veteran." The amendment also uses the acronyms for several terms that are currently defined and puts the terms in alphabetical order based on the acronyms.

The proposed amendment to §94.11 deletes subsection (d) regarding the spouse of a military service member being listed on the nurse aide registry as having active status because Texas Occupations Code, §55.004, the statutory basis for current §94.11(d), has been amended. The requirement in §55.004(a)(1) to issue a license to a military service member, military veteran, or military spouse who holds a current license issued in another jurisdiction is addressed by the general reciprocity provisions of §94.11. The requirement in §55.004(a)(2) to issue a license to a military service member, military veteran, or military spouse who held a license in this state during the preceding five years is addressed in new §94.13(b).

Proposed new §94.13 describes the process a nurse aide who is a military service member must follow to request an additional two years to complete in-service education requirements to maintain a listing on the NAR. The proposal also describes the process a former nurse aide who is a military service member, a military veteran, or a military spouse must follow to request that the status of a listing on the NAR be changed from expired to active during the five years after expiration.

FISCAL NOTE

David Cook, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new section are in effect, enforcing or administering the amendments and new section does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments and new section will not have an adverse economic effect on small businesses or micro-businesses, because the proposed amendments do not impose any new requirements on persons required to comply with the rules.

PUBLIC BENEFIT AND COSTS

Mary T. Henderson, Assistant Commissioner for DADS Regulatory Services, has determined that, for each year of the first five years the proposed amendments and new section are in effect, the public benefit expected as a result of enforcing the proposed amendments and new section is a reduction in financial and administrative barriers for military service members, military veterans, and military spouses to receive and renew a listing on the NAR.

Ms. Henderson anticipates that there will not be an economic cost to persons who are required to comply with the amendments and new section. The amendments and new section will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS 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 Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Laura Bagheri at (512) 438-4836 in DADS Regulatory Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-15R13, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 15R13" in the subject line.

STATUTORY AUTHORITY

The amendments and new section are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program; Texas Health and Safety Code, Chapter 250, which requires DADS to maintain a Nurse Aide Registry; and Texas Occupations Code, Chapter 55, which requires a state agency to adopt rules related to licensure of military service members, military veterans, and military spouses.

The amendments and new section affect Texas Government Code, §531.0055 and §531.021; Texas Health and Safety Code, Chapter 242; Texas Human Resources Code, §161.021 and §32.021; and Texas Occupations Code, Chapter 55.

§94.2. *Definitions.*

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

(1) Abuse--The willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain, or mental anguish.

(2) Act--The Social Security Act, codified at United States Code, Title 42, Chapter 7.

(3) Active duty--Current full-time military service in the armed forces of the United States or as a member of the Texas military forces, as defined in Texas Government Code §437.001, or similar military service of another state.

(4) [(3)] Active status--The designation given to a nurse aide listed on the NAR who is eligible to work in a nursing facility.

(5) Armed forces of the United States--The Army, Navy, Air Force, Coast Guard, or Marine Corps of the United States, including reserve units of those military branches.

(6) [(4)] Competency evaluation--A written or oral examination and a skills demonstration administered by a skills examiner to test the competency of a trainee.

(7) [(5)] Competency evaluation application--A DADS form used to request DADS approval to take a competency evaluation.

(8) [(6)] Curriculum--The publication titled *Texas Curriculum for Nurse Aides in Long Term Care Facilities* developed by DADS.

(9) [(7)] DADS--The Texas Department of Aging and Disability Services.

(10) [(8)] Direct supervision--Observation of a trainee performing skills in a NATCEP.

(11) [(9)] EMR--Employee misconduct registry. [(EMR)--]The registry maintained by DADS in accordance with Texas Health and Safety Code, Chapter 253, to record findings of reportable conduct by certain unlicensed employees.

(12) [(10)] Facility--A nursing facility that participates in Medicaid, a skilled nursing facility that participates in Medicare, or a nursing facility that participates in both Medicaid and Medicare.

(13) [(11)] Facility-based NATCEP--A NATCEP offered by or in a facility.

(14) [(12)] General supervision--Guidance and ultimate responsibility for another person in the performance of certain acts.

(15) [(13)] IR--Informal review. [(IR)--]An opportunity for a nurse aide to dispute a finding of misconduct made by DADS by providing testimony and supporting documentation to an impartial DADS staff person.

(16) [(14)] Licensed health professional--A person licensed to practice healthcare in the state of Texas including:

- (A) a physician;
- (B) a physician assistant;
- (C) a physical, speech, or occupational therapist;
- (D) a physical or occupational therapy assistant;
- (E) a registered nurse;
- (F) a licensed vocational nurse; or
- (G) a licensed social worker.

(17) [(15)] Licensed nurse--A registered nurse or licensed vocational nurse.

(18) [(16)] LVN--Licensed vocational nurse. [(LVN)--]An individual licensed by the Texas Board of Nursing to practice as a licensed vocational nurse.

(19) Military service member--A person who is on active duty.

(20) Military spouse--A person who is married to a military service member.

(21) Military veteran--A person who has served on active duty and who was discharged or released from active duty.

(22) [(17)] Misappropriation of resident property--The deliberate misplacement, exploitation, or wrongful, temporary or perma-

nent use of a resident's belongings or money without the resident's consent.

(23) NAR--Nurse Aide Registry. A listing of nurse aides, maintained by DADS, that indicates if a nurse aide has active status, revoked status, or is unemployable based on a finding of having committed an act of abuse, neglect or misappropriation of resident property.

(24) NATCEP--Nurse aide training and competency evaluation program. A program approved by DADS to train and evaluate an individual's ability to work as a nurse aide in a facility.

(25) [(18)] Neglect--The failure to provide goods and services necessary to avoid physical harm, mental anguish, or mental illness.

(26) [(19)] Non-facility-based NATCEP--A NATCEP not offered by or in a facility.

(27) [(20)] Nurse aide--An individual who provides nursing or nursing-related services to residents in a facility under the supervision of a licensed nurse and who has successfully completed a NATCEP or has been determined competent by waiver or reciprocity. This term does not include an individual who is a licensed health professional or a registered dietitian or who volunteers services without monetary compensation.

[(21) Nurse Aide Registry (NAR)--A state listing of nurse aides that indicates if a nurse aide has active status, revoked status, or is unemployable based on a finding of having committed an act of abuse, neglect or misappropriation of resident property.]

[(22) Nurse aide training and competency evaluation program (NATCEP)--A program approved by DADS to train and evaluate an individual's ability to work as a nurse aide in a facility.]

(28) [(23)] Nurse aide training and competency evaluation program (NATCEP) application--A DADS form used to request DADS initial approval to offer a NATCEP, to renew approval to offer a NATCEP, or to request DADS approval of changed information in an approved NATCEP application.

(29) [(24)] Nursing services--Services provided by nursing personnel that include, but are not limited to:

- (A) promotion and maintenance of health;
- (B) prevention of illness and disability;
- (C) management of health care during acute and chronic phases of illness;
- (D) guidance and counseling of individuals and families; and
- (E) referral to other health care providers and community resources when appropriate.

(30) [(25)] Performance record--An evaluation of a trainee's performance of major duties and skills taught by a NATCEP.

(31) [(26)] Person--A corporation, organization, partnership, association, natural person, or any other legal entity that can function legally.

(32) [(27)] Program director--An individual who is approved by DADS and meets the requirements in §94.5(a) of this chapter (relating to Program Director, Program Instructor, Supplemental Trainers, and Skills Examiner Requirements).

(33) [(28)] Program instructor--An individual who is approved by DADS to conduct the training in a NATCEP and who meets the requirements in §94.5(b) of this chapter.

~~[(29) Registered nurse (RN)--An individual licensed by the Texas Board of Nursing to practice professional nursing.]~~

~~(34) [(30)] Resident--An individual accepted for care or residing in a facility.~~

~~(35) RN--Registered nurse. An individual licensed by the Texas Board of Nursing to practice professional nursing.~~

~~(36) [(31)] Skills examiner--An individual who is approved by DADS and meets the requirements in §94.5(d) of this chapter.~~

~~(37) [(32)] Trainee--An individual who is enrolled in and attending, but has not completed, a NATCEP.~~

§94.11. Waiver, Reciprocity, and Exemption Requirements.

(a) DADS may waive the requirement for a nurse aide to take the NATCEP specified in §94.3 of this chapter (relating to Nurse Aide Training and Competency Evaluation Program (NATCEP) Requirements) and place a nurse aide on the NAR on active status if the nurse aide:

(1) submits proof of completing a nurse aide training course of at least 100 hours duration before July 1, 1989;

(2) submits a DADS Employment Verification form to DADS to document that the nurse aide performed nursing or nursing-related services for monetary compensation at least once every two years since July 1, 1989;

(3) is not listed as unemployable on the EMR;

(4) has not been convicted of a criminal offense listed in Texas Health and Safety Code (THSC), §250.006(a), or convicted of a criminal offense listed in THSC, §250.006(b) within the preceding five years; and

(5) completes the DADS Waiver of Nurse Aide Training and Competency Evaluation Program form.

(b) DADS places a nurse aide on the NAR by reciprocity if:

(1) the nurse aide is listed as having active status on another state's registry of nurse aides;

(2) the other state's registry of nurse aides is in compliance with the Act;

(3) the nurse aide is not listed as unemployable on the EMR;

(4) the nurse aide has not been convicted of a criminal offense listed in THSC, §250.006(a), or convicted of a criminal offense listed in THSC, §250.006(b) within the preceding five years; and

(5) the nurse aide completes a DADS Reciprocity form and submits it to DADS.

(c) A person is eligible to take a competency evaluation with an exemption from the nurse aide training specified in §94.3 of this chapter if the individual:

(1) meets one of the following requirements for eligibility:

(A) is seeking renewal under §94.9 of this chapter (relating to Nurse Aide Registry and Renewal);

(B) has successfully completed at least 100 hours of training at a NATCEP in another state within the preceding 24 months but has not taken the competency evaluation or been placed on an NAR in another state;

(C) has successfully completed at least 100 hours of military training, equivalent to civilian nurse aide training, on or after July 1, 1989;

(D) has successfully completed an RN or LVN program at an accredited school of nursing in the United States within the preceding 24 months, and:

(i) is not licensed as an RN or LVN in the state of Texas; and

(ii) has not held a license as an RN or LVN in another state that has been revoked; or

(E) is enrolled or has been enrolled within the preceding 24 months in an accredited school of nursing in the United States and demonstrates competency in providing basic nursing skills in accordance with the school's curriculum;

(2) is not listed as unemployable on the EMR;

(3) has not been convicted of a criminal offense listed in THSC, §250.006(a), or convicted of a criminal offense listed in THSC, §250.006(b) within the preceding five years;

(4) submits documentation to verify at least one of the requirements in subsection (c)(1) of this section;

(5) arranges for a facility or NATCEP to serve as a competency evaluation site; and

(6) before taking the competency evaluation, presents to the skills examiner an original letter from DADS authorizing the person to take the competency evaluation.

~~[(d) In accordance with Texas Occupations Code §55.004, the spouse of a person serving on active duty as a member of the United States armed forces may be listed on the NAR as having active status if:]~~

~~[(1) the spouse was listed on the NAR as having active status during the preceding five years;]~~

~~[(2) the spouse's listing on the NAR expired while the spouse lived in another state for at least six months;]~~

~~[(3) the spouse is not listed as unemployable on the EMR;]~~

~~[(4) the spouse is not listed as having revoked or suspended status on the NAR;]~~

~~[(5) the spouse has not been convicted of a criminal offense listed in THSC, §250.006(a), or a criminal offense listed in THSC, §250.006(b) within the preceding five years; and]~~

~~[(6) there has not been a period of 24 consecutive months in which the spouse did not provide nursing or nursing-related services for monetary compensation.]~~

§94.13. Alternate Licensing Requirements for Military Service Personnel.

(a) Additional time for in-service education.

(1) DADS gives a nurse aide an additional two years to complete in-service education required for a nurse aide to maintain an active listing on the NAR, as described in §94.9(d)(3) of this chapter (relating to Nurse Aide Registry and Renewal), if DADS receives and approves a request for additional time to complete in-service training from a nurse aide in accordance with this subsection.

(2) To request additional time to complete in-service education, a nurse aide must submit a written request for additional time to DADS before the expiration date of the nurse aide's certification. The nurse aide must include with the request documentation of the

nurse aide's status as a military service member that is acceptable to DADS. Documentation as a military service member that is acceptable to DADS includes a copy of a military service order issued by the United States Armed Forces, the State of Texas, or another state.

(3) If DADS requests additional documentation, the nurse aide must submit the requested documentation.

(4) DADS approves a request for two additional years to complete in-service education submitted in accordance with this subsection if DADS determines that the nurse aide is a military service member, except DADS does not approve a request if DADS granted the nurse aide a previous extension and the nurse aide did not complete the in-service education requirements during the previous extension period.

(b) Renewal of expired listing.

(1) DADS changes the status of a listing from expired to active if DADS receives and approves a request for an active status listing from a former nurse aide in accordance with this subsection.

(2) To request an active status listing, a former nurse aide must submit a written request with the documents required for renewal in accordance with §94.9(d) of this chapter within five years after the former nurse aide's listing expired. The former nurse aide must include with the request documentation of the former nurse aide's status as a military service member, military veteran, or military spouse that is acceptable to DADS.

(3) Documentation of military status that is acceptable to DADS includes:

(A) for status as a military service member, a copy of a current military service order issued to the former nurse aide by the armed forces of the United States, the State of Texas, or another state;

(B) for status as a military veteran, a copy of a military service discharge order issued to the former nurse aide by the armed forces of the United States, the State of Texas, or another state; and

(C) for status as a military spouse:

(i) a copy of a marriage certificate issued to the former nurse aide by a state of the United States or a foreign government; and

(ii) a copy of a current military service order issued to the former nurse aide's spouse by the armed forces of the United States, the State of Texas, or another state.

(4) If DADS requests additional documentation, the former nurse aide must submit the requested documentation.

(5) DADS approves a request for an active status listing submitted in accordance with this subsection if DADS determines that:

(A) the former nurse aide meets the requirements for renewal described in §94.9(d) (1) - (4) of this chapter;

(B) the former nurse aide is a military service member, military veteran, or military spouse;

(C) the former nurse aide has not committed an offense listed in Texas Health and Safety Code (THSC) §250.006(a) and has not committed an offense listed in THSC §250.006(b) during the five years before the date the former nurse aide submitted the initial license application; and

(D) the former nurse aide is not listed on the EMR.

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 23, 2016.

TRD-201603188

Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: August 7, 2016

For further information, please call: (512) 438-4836



CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Texas Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §97.2 and §97.527, in Chapter 97, Licensing Standards for Home and Community Support Services Agencies.

BACKGROUND AND PURPOSE

The purpose of the amendments is to make terminology used in Chapter 97 consistent with terminology used in Title 42, Code of Federal Regulations, Part 488, Subparts I and J. Specifically, the proposed amendments replace the term "informal review of deficiencies" (IRoD) with the term "informal dispute resolution" (IDR). Currently, IRoD is available for all violations and deficiencies, but the proposed amendments provide that IDR is available for violations and only for deficiencies that rise to the condition level, which are deficiencies that substantially limit the capacity of a home and community support services agency to furnish adequate care or that adversely affect the health or safety of patients. Additional amendments provide that DADS does not grant an agency's request for IDR if DADS cited the violation or deficiency at the agency's immediately preceding survey and DADS has cited the violation or deficiency again, with no new findings.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §97.2 deletes the definition of "IRoD" and adds a definition for "IDR" to conform with 42 CFR §488.745. The amendment also replaces the defined terms "alternate delivery site," "end stage renal disease," "legally authorized representatives," and "registered nurse," with acronyms and puts the acronyms in alphabetical order.

The proposed amendment to §97.527 replaces the term "IRoD" with "IDR." The amendment provides that IDR is available to an agency for condition-level deficiencies, violations, or both, and that the agency receives instructions for requesting IDR with written notification of the survey findings. The amendment states that DADS does not grant an agency's request for IDR if DADS cited the same violation or deficiency at the agency's immediately preceding survey and DADS has cited the violation or deficiency again, with no new findings. This change is made to ensure that an agency's and DADS resources for IDR are used in a cost effective and efficient manner. The proposed amendment makes editorial changes for clarity and consistency.

FISCAL NOTE

David Cook, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because there is no cost to comply with the amendments.

PUBLIC BENEFIT AND COSTS

Mary T. Henderson, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that agencies will have an opportunity to have an IDR to address serious deficiencies and state resources will be used efficiently.

Ms. Henderson anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS 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 Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Christy Parks at (512) 438-3791 in DADS Regulatory Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-13R28, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 13R28" in the subject line.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §97.2

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS, and Texas Health and Safety Code, §142.0011 which authorizes the HHSC executive commissioner to adopt rules relating to the licensing and regulation of home and community support services agencies.

The amendment implements Texas Government Code, §531.0055, and Texas Health and Safety Code, Chapter 142.

§97.2. Definitions.

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

(1) Accessible and flexible services--Services that are delivered in the least intrusive manner possible and are provided in all settings where individuals live, work, and recreate.

(2) Administration of medication--The direct application of any medication by injection, inhalation, ingestion, or any other means to the body of a client. The preparation of medication is part of the administration of medication and is the act or process of making ready a medication for administration, including the calculation of a client's medication dosage; altering the form of the medication by crushing, dissolving, or any other method; reconstitution of an injectable medication; drawing an injectable medication into a syringe; preparing an intravenous admixture; or any other act required to render the medication ready for administration.

(3) Administrative support site--A facility or site where an agency performs administrative and other support functions but does not provide direct home health, hospice, or personal assistance services. This site does not require an agency license.

(4) Administrator--The person who is responsible for implementing and supervising the administrative policies and operations of a home and community support services agency and for administratively supervising the provision of all services to agency clients on a day-to-day basis.

(5) ADS--Alternate delivery site. A facility or site, including a residential unit or an inpatient unit:

(A) that is owned or operated by an agency providing hospice services;

(B) that is not the hospice's principal place of business, which for the purposes of this definition, means it is not the parent agency;

(C) that is located in the geographical area served by the hospice; and

(D) from which the hospice provides hospice services.

(6) [(5)] Advanced practice nurse--A registered nurse who is approved by the Texas Board of Nursing to practice as an advanced practice nurse and who maintains compliance with the applicable rules of the Texas Board of Nursing. See the Texas Board of Nursing's definition of advanced practice nurse in 22 TAC §221.1.

(7) [(6)] Advisory committee--A committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup, established for the purpose of obtaining advice or recommendations on issues or policies that are within the scope of a person's responsibility.

(8) [(7)] Affiliate--With respect to an applicant or license holder that is:

(A) a corporation--means each officer, director, and stockholder with direct ownership of at least 5.0 percent, subsidiary, and parent company;

(B) a limited liability company--means each officer, member, and parent company;

(C) an individual--means:

(i) the individual's spouse;

(ii) each partnership and each partner thereof of which the individual or any affiliate of the individual is a partner; and

(iii) each corporation in which the individual is an officer, director, or stockholder with a direct ownership or disclosable interest of at least 5.0 percent.

(D) a partnership--means each partner and any parent company; and

(E) a group of co-owners under any other business arrangement--means each officer, director, or the equivalent under the specific business arrangement and each parent company.

(9) ~~(8)~~ Agency--A home and community support services agency.

~~{(9) Alternate delivery site (ADS)--A facility or site, including a residential unit or an inpatient unit;}~~

~~{(A) that is owned or operated by an agency providing hospice services;}~~

~~{(B) that is not the hospice's principal place of business, which for the purposes of this definition, means it is not the parent agency;}~~

~~{(C) that is located in the geographical area served by the hospice; and}~~

~~{(D) from which the hospice provides hospice services.}~~

(10) Applicant--The owner of an agency that is applying for a license under the statute. This is the person in whose name the license will be issued.

(11) Assistance with self-administration of medication--Any needed ancillary aid provided to a client in the client's self-administered medication or treatment regimen, such as reminding a client to take a medication at the prescribed time, opening and closing a medication container, pouring a predetermined quantity of liquid to be ingested, returning a medication to the proper storage area, and assisting in reordering medications from a pharmacy. Such ancillary aid includes administration of any medication when the client has the cognitive ability to direct the administration of their medication and would self-administer if not for a functional limitation.

(12) Association--A partnership, limited liability company, or other business entity that is not a corporation.

(13) Audiologist--A person who is currently licensed under the Texas Occupations Code, Chapter 401, as an audiologist.

(14) Bereavement--The process by which a survivor of a deceased person mourns and experiences grief.

(15) Bereavement services--Support services offered to a family during bereavement. Services may be provided to persons other than family members, including residents of a skilled nursing facility, nursing facility, or intermediate care facility for individuals with an intellectual disability or related conditions, when appropriate and identified in a bereavement plan of care.

(16) Biologicals--A medicinal preparation made from living organisms and their products, including serums, vaccines, antigens, and antitoxins.

(17) Boarding home facility--An establishment defined in Texas Health and Safety Code §260.001(2).

(18) Branch office--A facility or site in the service area of a parent agency from which home health or personal assistance services are delivered or where active client records are maintained. This does not include inactive records that are stored at an unlicensed site.

(19) Care plan--

(A) a written plan prepared by the appropriate health care professional for a client of the home and community support services agency; or

(B) for home dialysis designation, a written plan developed by the physician, registered nurse, dietitian, and qualified social worker to personalize the care for the client and enable long- and short-term goals to be met.

(20) Case conference--A conference among personnel furnishing services to the client to ensure that their efforts are coordinated effectively and support the objectives outlined in the plan of care or care plan.

(21) Certified agency--A home and community support services agency, or portion of the agency, that:

(A) provides a home health service; and

(B) is certified by an official of the Department of Health and Human Services as in compliance with conditions of participation in Social Security Act, Title XVIII (42 United States Code (USC) §1395 et seq.).

(22) Certified home health services--Home health services that are provided by a certified agency.

(23) CFR--Code of Federal Regulations. The regulations and rules promulgated by agencies of the Federal government that address a broad range of subjects, including hospice care and home health services.

(24) CHAP--Community Health Accreditation Program, Inc. An independent, nonprofit accrediting body that publicly certifies that an organization has voluntarily met certain standards for home and community-based health care.

(25) Chief financial officer--An individual who is responsible for supervising and managing all financial activities for a home and community support services agency.

(26) Client--An individual receiving home health, hospice, or personal assistance services from a licensed home and community support services agency. This term includes each member of the primary client's family if the member is receiving ongoing services. This term does not include the spouse, significant other, or other family member living with the client who receives a one-time service (for example, vaccination) if the spouse, significant other, or other family member receives the service in connection with the care of a client.

(27) Clinical note--A dated and signed written notation by agency personnel of a contact with a client containing a description of signs and symptoms; treatment and medication given; the client's reaction; other health services provided; and any changes in physical and emotional condition.

(28) CMS--Centers for Medicare and Medicaid Services. The federal agency that administers the Medicare program and works in partnership with the states to administer Medicaid.

(29) Complaint--An allegation against an agency regulated by DADS or against an employee of an agency regulated by DADS that involves a violation of this chapter or the statute.

(30) Community disaster resources--A local, statewide, or nationwide emergency system that provides information and resources during a disaster, including weather information, transportation, evacuation, and shelter information, disaster assistance and recovery efforts, evacuee and disaster victim resources, and resources for locating evacuated friends and relatives.

(31) Controlling person--A person with the ability, acting alone or with others, to directly or indirectly influence, direct, or cause the direction of the management, expenditure of money, or policies of an agency or other person.

(A) A controlling person includes:

(i) a management company or other business entity that operates or contracts with others for the operation of an agency;

(ii) a person who is a controlling person of a management company or other business entity that operates an agency or that contracts with another person for the operation of an agency; and

(iii) any other individual who, because of a personal, familial, or other relationship with the owner, manager, or provider of an agency, is in a position of actual control or authority with respect to the agency, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the agency.

(B) A controlling person, as described by subparagraph (A)(iii) of this paragraph, does not include an employee, lender, secured creditor, or other person who does not exercise formal or actual influence or control over the operation of an agency.

(32) Conviction--An adjudication of guilt based on a finding of guilt, a plea of guilty, or a plea of nolo contendere.

(33) Counselor--An individual qualified under Medicare standards to provide counseling services, including bereavement, dietary, spiritual, and other counseling services to both the client and the family.

(34) DADS--Department of Aging and Disability Services.

(35) Day--Any reference to a day means a calendar day, unless otherwise specified in the text. A calendar day includes weekends and holidays.

(36) Deficiency--A finding of noncompliance with federal requirements resulting from a survey.

(37) Designated survey office--A DADS Home and Community Support Services Agencies Program office located in an agency's geographic region.

(38) Dialysis treatment record--For home dialysis designation, a dated and signed written notation by the person providing dialysis treatment which contains a description of signs and symptoms, machine parameters and pressure settings, type of dialyzer and dialysate, actual pre- and post-treatment weight, medications administered as part of the treatment, and the client's response to treatment.

(39) Dietitian--A person who is currently licensed under the laws of the State of Texas to use the title of licensed dietitian or provisional licensed dietitian, or who is a registered dietitian.

(40) Disaster--The occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or man-made cause, such as fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, epidemic, air contamination, infestation, explosion, riot, hostile military or paramilitary action, or energy emergency. In a hospice inpatient unit, a disaster also includes failure of the heating or cooling system, power outage, explosion, and bomb threat.

(41) ESRD--End stage renal disease. [~~ESRD~~] For home dialysis designation, the stage of renal impairment that appears irreversible and permanent and requires a regular course of dialysis or kidney transplantation to maintain life.

(42) Functional need--Needs of the individual that require services without regard to diagnosis or label.

(43) Health assessment--A determination of a client's physical and mental status through inventory of systems.

(44) Home and community support services agency--A person who provides home health, hospice, or personal assistance services for pay or other consideration in a client's residence, an independent living environment, or another appropriate location.

(45) Home health aide--An individual working for an agency who meets at least one of the requirements for home health aides as defined in §97.701 of this chapter (relating to Home Health Aides).

(46) Home health medication aide--An unlicensed person issued a permit by DADS to administer medication to a client under the Texas Health and Safety Code, Chapter 142, Subchapter B.

(47) Home health service--The provision of one or more of the following health services required by an individual in a residence or independent living environment:

(A) nursing, including blood pressure monitoring and diabetes treatment;

(B) physical, occupational, speech, or respiratory therapy;

(C) medical social service;

(D) intravenous therapy;

(E) dialysis;

(F) service provided by unlicensed personnel under the delegation or supervision of a licensed health professional;

(G) the furnishing of medical equipment and supplies, excluding drugs and medicines; or

(H) nutritional counseling.

(48) Hospice--A person licensed under this chapter to provide hospice services, including a person who owns or operates a residential unit or an inpatient unit.

(49) Hospice aide--A person working for an agency licensed to provide hospice services who meets the qualifications for a hospice aide as described in §97.843 of this chapter (relating to Hospice Aide Qualifications).

(50) Hospice homemaker--A person working for an agency licensed to provide hospice services who meets the qualifications described in §97.845 of this chapter (relating to Hospice Homemaker Qualifications).

(51) Hospice services--Services, including services provided by unlicensed personnel under the delegation of a registered nurse or physical therapist, provided to a client or a client's family as part of a coordinated program consistent with the standards and rules adopted under this chapter. These services include palliative care for terminally ill clients and support services for clients and their families that:

(A) are available 24 hours a day, seven days a week, during the last stages of illness, during death, and during bereavement;

(B) are provided by a medically directed interdisciplinary team; and

(C) may be provided in a home, nursing facility, residential unit, or inpatient unit according to need. These services do not

include inpatient care normally provided in a licensed hospital to a terminally ill person who has not elected to be a hospice client. For the purposes of this definition, the word "home" includes a person's "residence" as defined in this section.

(52) IDR--Informal dispute resolution. An informal process that allows an agency to refute a violation or condition-level deficiency cited during a survey.

~~(53)~~ [(52)] Independent living environment--A client's residence, which may include a group home, foster home, or boarding home facility, or other settings where a client participates in activities, including school, work, or church.

~~(54)~~ [(53)] Individual and family choice and control--Individuals and families who express preferences and make choices about how their support service needs are met.

~~(55)~~ [(54)] Individualized service plan--A written plan prepared by the appropriate health care personnel for a client of a home and community support services agency licensed to provide personal assistance services.

~~(56)~~ [(55)] Inpatient unit--A facility, also referred to as a hospice freestanding inpatient facility, that provides a continuum of medical or nursing care and other hospice services to clients admitted into the unit and that is in compliance with:

(A) the conditions of participation for inpatient units adopted under Social Security Act, Title XVIII (42 United States Code §1395 et seq.); and

(B) standards adopted under this chapter.

~~[(56) IRoD--Informal review of deficiencies. An informal process that allows an agency to refute a deficiency or violation cited during a survey.]~~

(57) JCAHO--Joint Commission on Accreditation of Healthcare Organizations. An independent, nonprofit organization for standard-setting and accrediting in-home care and other areas of health care.

(58) Joint training--Training provided by DADS at least semi-annually for home and community support services agencies and DADS surveyors on subjects that address the 10 most commonly cited violations of federal or state law by home and community support services agencies as published in DADS annual reports.

(59) LAR--Legally authorized representative. [~~(LAR)~~] A person authorized by law to act on behalf of a client with regard to a matter described in this chapter, and may include a parent of a minor, guardian of an adult or minor, managing conservator of a minor, agent under a medical power of attorney, or surrogate decision-maker under Texas Health and Safety Code, §313.004.

(60) Licensed vocational nurse--A person who is currently licensed under Texas Occupations Code, Chapter 301, as a licensed vocational nurse.

(61) Life Safety Code (also referred to as NFPA 101)--The Code for Safety to Life from Fire in Buildings and Structures, Standard 101, of the National Fire Protection Association (NFPA).

(62) Local emergency management agencies--The local emergency management coordinator, fire, police, and emergency medical services.

(63) Local emergency management coordinator-- The person identified as the emergency management coordinator by the mayor or county judge in an agency's service area.

(64) Manager--An employee or independent contractor responsible for providing management services to a home and community support services agency for the overall operation of a home and community support services agency including administration, staffing, or delivery of services. Examples of contracts for services that will not be considered contracts for management services include contracts solely for maintenance, laundry, or food services.

(65) Medication administration record--A record used to document the administration of a client's medications.

(66) Medication list--A list that includes all prescription and over-the-counter medication that a client is currently taking, including the dosage, the frequency, and the method of administration.

(67) Mitigation--An action taken to eliminate or reduce the probability of a disaster, or reduce a disaster's severity or consequences.

(68) Multiple location--A Medicare-approved alternate delivery site that meets the definition in 42 CFR §418.3.

(69) Notarized copy--A sworn affidavit stating that attached copies are true and correct copies of the original documents.

(70) Nursing facility--An institution licensed as a nursing home under the Texas Health and Safety Code, Chapter 242.

(71) Nutritional counseling--Advising and assisting individuals or families on appropriate nutritional intake by integrating information from the nutrition assessment with information on food and other sources of nutrients and meal preparation consistent with cultural background and socioeconomic status, with the goal being health promotion, disease prevention, and nutrition education. Nutritional counseling may include the following:

(A) dialogue with the client to discuss current eating habits, exercise habits, food budget, and problems with food preparation;

(B) discussion of dietary needs to help the client understand why certain foods should be included or excluded from the client's diet and to help with adjustment to the new or revised or existing diet plan;

(C) a personalized written diet plan as ordered by the client's physician or practitioner, to include instructions for implementation;

(D) providing the client with motivation to help the client understand and appreciate the importance of the diet plan in getting and staying healthy; or

(E) working with the client or the client's family members by recommending ideas for meal planning, food budget planning, and appropriate food gifts.

(72) Occupational therapist--A person who is currently licensed under the Occupational Therapy Practice Act, Texas Occupations Code, Chapter 454, as an occupational therapist.

(73) Operating hours--The days of the week and the hours of day an agency's place of business is open as identified in an agency's written policy as required by §97.210 of this chapter (relating to Agency Operating Hours).

(74) Original active client record--A record composed first-hand for a client currently receiving services.

(75) Palliative care--Intervention services that focus primarily on the reduction or abatement of physical, psychosocial, and spiritual symptoms of a terminal illness. It is client and family-centered care that optimizes quality of life by anticipating, preventing, and

treating suffering. Palliative care throughout the continuum of illness involves addressing physical, intellectual, emotional, social, and spiritual needs and facilitating client autonomy, access to information, and choice.

(76) Parent agency--An agency that develops and maintains administrative controls and provides supervision of branch offices and alternate delivery sites.

(77) Parent company--A person, other than an individual, who has a direct 100 percent ownership interest in the owner of an agency.

(78) Person--An individual, corporation, or association.

(79) Person with a disclosable interest--Any person who owns at least a 5.0 percent interest in any corporation, partnership, or other business entity that is required to be licensed under Texas Health and Safety Code, Chapter 142. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company, unless these entities participate in the management of the agency.

(80) Personal assistance services--Routine ongoing care or services required by an individual in a residence or independent living environment that enable the individual to engage in the activities of daily living or to perform the physical functions required for independent living, including respite services. The term includes:

(A) personal care;

(B) health-related services performed under circumstances that are defined as not constituting the practice of professional nursing by the Texas Board of Nursing through a memorandum of understanding with DADS in accordance with Texas Health and Safety Code, §142.016; and

(C) health-related tasks provided by unlicensed personnel under the delegation of a registered nurse or that a registered nurse determines do not require delegation.

(81) Personal care--The provision of one or more of the following services required by an individual in a residence or independent living environment:

(A) bathing;

(B) dressing;

(C) grooming;

(D) feeding;

(E) exercising;

(F) toileting;

(G) positioning;

(H) assisting with self-administered medications;

(I) routine hair and skin care; and

(J) transfer or ambulation.

(82) Pharmacist--A person who is licensed to practice pharmacy under the Texas Pharmacy Act, Texas Occupations Code, Chapter 558.

(83) Pharmacy--A facility defined in the Texas Occupations Code, §551.003(31), at which a prescription drug or medication order is received, processed, or dispensed.

(84) Physical therapist--A person who is currently licensed under Texas Occupations Code, Chapter 453, as a physical therapist.

(85) Physician--This term includes a person who is:

(A) licensed in Texas to practice medicine or osteopathy in accordance with Texas Occupations Code, Chapter 155;

(B) licensed in Arkansas, Louisiana, New Mexico, or Oklahoma to practice medicine, who is the treating physician of a client and orders home health or hospice services for the client, in accordance with the Texas Occupations Code, §151.056(b)(4); or

(C) a commissioned or contract physician or surgeon who serves in the United States uniformed services or Public Health Service if the person is not engaged in private practice, in accordance with the Texas Occupations Code, §151.052(a)(8).

(86) Physician assistant--A person who is licensed under the Physician Assistant Licensing Act, Texas Occupations Code, Chapter 204, as a physician assistant.

(87) Physician-delegated task--A task performed in accordance with the Texas Occupations Code, Chapter 157, including orders signed by a physician that specify the delegated task, the individual to whom the task is delegated, and the client's name.

(88) Place of business--An office of a home and community support services agency that maintains client records or directs home health, hospice, or personal assistance services. This term includes a parent agency, a branch office, and an alternate delivery site. The term does not include an administrative support site.

(89) Plan of care--The written orders of a practitioner for a client who requires skilled services.

(90) Practitioner--A person who is currently licensed in a state in which the person practices as a physician, dentist, podiatrist, or a physician assistant, or a person who is a registered nurse registered with the Texas Board of Nursing as an advanced practice nurse.

(91) Preparedness--Actions taken in anticipation of a disaster.

(92) Presurvey conference--A conference held with DADS staff and the applicant or the applicant's representatives to review licensure standards and survey documents, and to provide consultation before the survey.

(93) Progress note--A dated and signed written notation by agency personnel summarizing facts about care and the client's response during a given period of time.

(94) Psychoactive treatment--The provision of a skilled nursing visit to a client with a psychiatric diagnosis under the direction of a physician that includes one or more of the following:

(A) assessment of alterations in mental status or evidence of suicide ideation or tendencies;

(B) teaching coping mechanisms or skills;

(C) counseling activities; or

(D) evaluation of the plan of care.

(95) Recovery--Activities implemented during and after a disaster response designed to return an agency to its normal operations as quickly as possible.

~~[(96) Registered nurse (RN)--A person who is currently licensed under the Nursing Practice Act, Texas Occupations Code, Chapter 301, as a registered nurse.]~~

(96) [(97)] Registered nurse delegation--Delegation by a registered nurse in accordance with:

(A) 22 TAC Chapter 224 (concerning Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments); and

(B) 22 TAC Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).

(97) [(98)] Residence--A place where a person resides, including a home, a nursing facility, a convalescent home, or a residential unit.

(98) [(99)] Residential unit--A facility that provides living quarters and hospice services to clients admitted into the unit and that is in compliance with standards adopted under the Texas Health and Safety Code, Chapter 142.

(99) [(100)] Respiratory therapist--A person who is currently licensed under Texas Occupations Code, Chapter 604, as a respiratory care practitioner.

(100) [(101)] Respite services--Support options that are provided temporarily for the purpose of relief for a primary caregiver in providing care to individuals of all ages with disabilities or at risk of abuse or neglect.

(101) [(102)] Response--Actions taken immediately before an impending disaster or during and after a disaster to address the immediate and short-term effects of the disaster.

(102) [(103)] Restraint--A restraint is:

(A) a [A] manual method, physical or mechanical device, material, or equipment that immobilizes or reduces the ability of a client in a hospice inpatient unit to move his or her arms, legs, body, or head freely, but does not include a device, such as an orthopedically prescribed device, a surgical dressing or bandage, a protective helmet, or other method that involves the physical holding of the client for the purpose of:

(i) conducting a routine physical examination or test;

(ii) protecting the client from falling out of bed; or

(iii) permitting the client to participate in activities without the risk of physical harm, not including a physical escort; or

(B) a [A] drug or medication when used as a restriction to manage a client's behavior or restrict the client's freedom of movement in a hospice inpatient unit, but not as a standard treatment or medication dosage for the client's condition.

(103) RN--Registered nurse. A person who is currently licensed under the Nursing Practice Act, Texas Occupations Code, Chapter 301, as a registered nurse.

(104) Seclusion--The involuntary confinement of a client alone in a room or an area in a hospice inpatient unit from which the client is physically prevented from leaving.

(105) Section--A reference to a specific rule in this chapter.

(106) Service area--A geographic area established by an agency in which all or some of the agency's services are available.

(107) Skilled services--Services in accordance with a plan of care that require the skills of:

(A) a registered nurse;

(B) a licensed vocational nurse;

(C) a physical therapist;

(D) an occupational therapist;

(E) a respiratory therapist;

(F) a speech-language pathologist;

(G) an audiologist;

(H) a social worker; or

(I) a dietitian.

(108) Social worker--A person who is currently licensed as a social worker under Texas Occupations Code, Chapter 505.

(109) Speech-language pathologist--A person who is currently licensed as a speech-language pathologist under Texas Occupations Code, Chapter 401.

(110) Statute--The Texas Health and Safety Code, Chapter 142.

(111) Substantial compliance--A finding in which an agency receives no recommendation for enforcement action after a survey.

(112) Supervised practical training--Hospice aide training that is conducted in a laboratory or other setting in which the trainee demonstrates knowledge while performing tasks on an individual. The training is supervised by a registered nurse or by a licensed vocational nurse who works under the direction of a registered nurse.

(113) Supervising nurse--The person responsible for supervising skilled services provided by an agency and who has the qualifications described in §97.244(c) of this chapter (relating to Administrator Qualifications and Conditions and Supervising Nurse Qualifications). This person may also be known as the director of nursing or similar title.

(114) Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity with initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(115) Support services--Social, spiritual, and emotional care provided to a client and a client's family by a hospice.

(116) Survey--An on-site inspection or complaint investigation conducted by a DADS representative to determine if an agency is in compliance with the statute and this chapter or in compliance with applicable federal requirements or both.

(117) Terminal illness--An illness for which there is a limited prognosis if the illness runs its usual course.

(118) Unlicensed person--A person not licensed as a health care provider. The term includes home health aides, hospice aides, hospice homemakers, medication aides permitted by DADS, and other unlicensed individuals providing personal care or assistance in health services.

(119) Unsatisfied judgments--A failure to fully carry out the terms or meet the obligation of a court's final disposition on the matters before it in a suit regarding the operation of an agency.

(120) Violation--A finding of noncompliance with this chapter or the statute resulting from a survey.

(121) Volunteer--An individual who provides assistance to a home and community support services agency without compensation other than reimbursement for actual expenses.

(122) Working day--Any day except Saturday, Sunday, a state holiday, or a federal holiday.

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

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Department of Aging and Disability Services

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For further information, please call: (512) 438-3791



SUBCHAPTER E. LICENSURE SURVEYS

DIVISION 2. THE SURVEY PROCESS

40 TAC §97.527

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS, and Texas Health and Safety Code, §142.0011, which authorizes the HHSC executive commissioner to adopt rules relating to the licensing and regulation of home and community support services agencies.

The amendment implements Texas Government Code, §531.0055, and Texas Health and Safety Code, Chapter 142.

§97.527. *Post-Survey Procedures.*

(a) After a survey is completed, the surveyor holds an exit conference with the administrator or alternate administrator to inform the agency of the preliminary findings.

(b) An agency may make an audio recording of the exit conference only if the agency:

- (1) records two tapes simultaneously;
- (2) allows the surveyor to review the tapes; and
- (3) gives the surveyor the tape of the surveyor's choice before leaving the agency.

(c) An agency may make a video recording of the exit conference only if the surveyor agrees to allow it and if the agency:

- (1) records two tapes simultaneously;
- (2) allows the surveyor to review the tapes; and
- (3) gives the surveyor the tape of the surveyor's choice before leaving the agency.

(d) An agency may submit additional written documentation and facts after the exit conference only if the agency describes the additional documentation and facts to the surveyor during the exit conference.

(1) The agency must submit the additional written documentation and facts to the designated survey office within two working days after the end of the exit conference.

(2) If an agency properly submits additional written documentation, the surveyor may add the documentation to the record of the survey.

(e) If DADS identifies additional violations or deficiencies after the exit conference, DADS holds an additional face-to-face exit conference with the agency regarding the additional violations or deficiencies.

(f) DADS provides official written notification of the survey findings to the agency within 10 working days after the exit conference.

(g) The official written notification of the survey findings includes a statement of violations, condition-level deficiencies, or both, cited by DADS against the agency as a result of the survey, and instructions for submitting an acceptable plan of correction, and for requesting IDR [provides an opportunity for an informal review of deficiencies (IRoD)].

(1) If the official written notification of the survey findings declares that an agency is in violation of the statute or this chapter, an agency must follow DADS [DADS'] instructions included with the statement of violations for submitting an acceptable plan of correction.

(2) An acceptable plan of correction includes the corrective measures and time frame with which the agency must comply to ensure correction of a violation. If an agency fails to correct each violation by the date on the plan of correction, DADS may take enforcement action against the agency. An agency must correct a violation in accordance with the following time frames:

(A) A Severity Level B violation that results in serious harm to or death of a client or constitutes a serious threat to the health or safety of a client must be addressed upon receipt of the official written notice of the violations and corrected within two days.

(B) A Severity Level B violation that substantially limits the agency's capacity to provide care must be corrected within seven days after receipt of the official written notice of the violations.

(C) A Severity Level A violation that has or had minor or no health or safety significance must be corrected within 20 days after receipt of the official written notice of the violations.

(D) A violation that is not designated as Severity Level A or Severity Level B must be corrected within 60 days after the date the violation was cited.

(3) An agency must submit an acceptable plan of correction for each violation or deficiency no later than 10 days after its receipt of the official written notification of the survey findings.

(4) If DADS finds the plan of correction unacceptable, DADS gives the agency written notice and provides the agency one additional opportunity to submit an acceptable plan of correction. An agency must submit a revised plan of correction no later than 30 days after the agency's receipt of DADS [DADS'] written notice of an unacceptable plan of correction.

(h) An acceptable plan of correction does not preclude DADS from taking enforcement action against an agency.

(i) An agency must submit a plan of correction in response to an official written notification of survey findings that declares a violation or deficiency even if the agency disagrees with the survey findings.

(j) If an agency disagrees with the survey findings citing a violation or condition-level deficiency, the agency may request IDR [an

IRoD and submit additional written information] to refute the [a] violation or deficiency [to demonstrate compliance in an informal setting].

(1) DADS does not grant an agency's request for IDR if:

(A) DADS cited the violation or deficiency at the agency's immediately preceding survey; and

(B) DADS cited the violation or deficiency again, with no new findings.

~~{(1) An IRoD is available for:}~~

~~{(A) a violation or deficiency cited during a visit;}~~

~~{(B) a violation or deficiency that remains uncorrected from a previous visit and is re-cited with no change in findings, as long as the agency has not already had an IRoD for the violation or deficiency from the original visit; and}~~

~~{(C) a violation or deficiency that remains uncorrected from a previous visit and is re-cited with new findings.}~~

(2) To request IDR [an IRoD], an agency must:

(A) mail or fax a complete and accurate IDR [IRoD] request form to the address or fax number listed on the form, which must be postmarked or faxed within 10 days after the date of receipt of the official written notification of the survey findings;

(B) mail or fax a rebuttal letter and supporting documentation to the address or fax number listed on the IDR [IRoD] request form and ensure receipt by the DADS Survey and Certification Enforcement Unit within seven days after the postmark or fax date of the IRoD request form; and

(C) mail or fax a copy of the IDR [IRoD] request form, rebuttal letter, and supporting documentation to the designated survey office within the same time frames each is submitted to the DADS Survey and Certification Enforcement Unit.

(3) An agency may not submit information after the deadlines established in paragraph (2)(A) and (B) of this subsection unless DADS requests additional information. The agency's response to DADS [DADS'] request for information must be received within three working days after the request is made.

(4) An agency waives its right to IDR [an IRoD] if the agency fails to submit the required information to the DADS Survey and Certification Enforcement Unit within the required time frames.

(5) An agency must present sufficient information to the DADS Survey and Certification Enforcement Unit to support the agency's desired IDR [IRoD] outcome.

(6) The rebuttal letter and supporting documentation must include:

(A) identification of the disputed deficiencies or violations;

(B) the reason the deficiencies or violations are disputed;

(C) the desired outcome for each disputed deficiency or violation; and

(D) copies of [attachments from] client records, [applicable] policies and procedures, and [or] other [supporting] documentation and [or] information that directly demonstrate [demonstrates] that the condition-level deficiency or violation should not have been cited.

(7) The written decision issued by DADS after the completion of its review is the final decision from IDR.

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

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