

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER M. MISCELLANEOUS PROGRAMS

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

1 TAC §355.9040

The Texas Health and Human Services Commission (HHSC) adopts new Division 3, Comprehensive Rehabilitation Services for Individuals with a Traumatic Brain Injury or Traumatic Spinal Cord Injury, and new §355.9040, concerning Reimbursement Methodology for Comprehensive Rehabilitation Services Program, without changes to the proposed text as published in the June 17, 2016, issue of the *Texas Register* (41 TexReg 4376) and will not be republished.

BACKGROUND AND JUSTIFICATION

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

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

COMMENTS

HHSC received written comments in opposition to the new rule from two providers: The Transitional Learning Center at Galveston and Pate Rehabilitation.

Comment: Both commenters said that HHSC's statements in the proposed rule preamble that the new rule will not require any changes in practice or additional cost to contracted providers

are incorrect. They stated the proposed rule requires changes in provider practices that will likely lead to increased provider costs. Specifically, the commenters said compliance with the rule requires increased data collection for the tier-tracking log and monthly service record, as well as additional staff time for calculating reimbursement levels on a daily and weekly basis for billing purposes. Both commenters said they will be required to add staff to meet these new documentation and billing requirements. One commenter referred to the CRS program "Standards for Providers Manual" as containing examples of costs providers will now be required to incur to meet documentation and billing requirements.

Response: HHSC disagrees that this rule requires changes in provider practices or imposes additional costs on providers to comply. This rule describes the methodology used by HHSC to calculate rates; it does not require tier tracking logs or monthly service records, nor does it address billing requirements. The commenters did not identify any language in this rule that they allege to be objectionable. For these reasons, the comments do not appear to be directed at this rule, but rather at DARS program standards as described in the CRS provider manual cited by one of the commenters.

HHSC will refer these comments to staff at DARS for consideration in the on-going development of CRS program standards. No changes were made to the rule in response to these comments.

Comment: One commenter stated the new rates are less than the per-diem the provider received in the past and will not cover its cost of providing services to DARS consumers, particularly in light of the increased costs for billing and regulatory compliance. The commenter also pointed to the "arbitrary decision of the rate setters that group session time will be cut in half" as contributing to reductions in its reimbursement.

Response: HHSC is committed to calculating payment rates that are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers to provide access to care. To develop the rates that will be effective beginning September 1, 2016, HHSC conducted a survey of CRS provider costs. Administrative, office, and facility costs reported by the responding providers were taken into consideration in setting the base component of the rates. HHSC and DARS will continue to review and monitor data from providers as the program year progresses to determine whether rate changes are necessary to account for higher costs.

Transitioning from the previous provider-specific reimbursement methodology to the methodology described in this rule means that some providers may see a reduction in reimbursement. The offsetting benefit to providers, consumers, the state, and the public will be a more transparent, consistent, and defensible rate structure.

HHSC disagrees that HHSC arbitrarily decided to cut group session time in half. This rule does not address group session time. This comment does not appear addressed at this rule but at program standards outside of the rule. No changes were made to the rule in response to this comment.

Comment: One commenter expressed concern that HHSC and DARS have developed a set of service definitions, rules, and processes that do not consider current capabilities and practices of PABI providers. The commenter stated that the reimbursement model described in this rule deeply discounts the clinical purpose and value of a professionally-directed model of rehabilitation.

Response: HHSC disagrees with this comment. The commenter did not identify any language in the rule that purportedly supports this comment. To the contrary, the methodology in this rule allows for greater specificity in payment for actual billable services performed instead of relying on a per diem that is not service specific.

No changes were made in response to this comment.

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 11, 2016.

TRD-201604029

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CHAPTER 392. PURCHASE OF GOODS AND SERVICES FOR SPECIFIC HEALTH AND HUMAN SERVICES COMMISSION PROGRAMS

SUBCHAPTER J. INDEPENDENT LIVING SERVICES PROGRAM CONTRACTS

1 TAC §392.901

The Texas Health and Human Service Commission (HHSC) adopts new Subchapter J, Independent Living Services Program Contracts, including new §392.901, concerning Independent Living Services Program Contracts, without changes to the proposed text as published in the June 24, 2016, issue of the *Texas Register* (41 TexReg 4539) and will not be republished.

BACKGROUND AND JUSTIFICATION

New §392.901 implements provisions of House Bill 2463, 84th Legislature, Regular Session, 2015, effective September 1, 2015. Texas Human Resource Code §117.080(e)(2) - (5), cre-

ated by House Bill 2463, requires the adoption of rules relating to Independent Living Services (ILS) Program contracts.

COMMENTS

The 30-day comment period ended July 25, 2016. During this period, HHSC did not receive any comments regarding the new rule.

STATUTORY AUTHORITY

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

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 6. STATE RECORDS

SUBCHAPTER A. RECORDS RETENTION SCHEDULING

13 TAC §6.10

(Editor's note: In accordance with Texas Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 13 TAC §6.10 is not included in the print version of the Texas Register. The figure is available in the on-line version of the June 24, 2016, issue of the Texas Register.)

The Texas State Library and Archives Commission adopts amendments to 13 TAC §6.10, regarding the Texas State Records Retention Schedule (RRS) with changes to the proposed text as published in the June 24, 2016, issue of the *Texas Register* (41 TexReg 4555) pursuant to the Government Code §441.185(f). The amendment makes amendments that address new requirements set forth in Government Code §441.1855 concerning retention of contracts and related documents by state agencies. The new law requires state agencies to retain contracts and contract solicitation documents for a period of seven years, and the RRS is amended to reflect that requirement.

Comments were received regarding the amendment during the comment period. These comments and the resulting changes are identified in this preamble.

Comment: An official from Commission on State Emergency Communications commented on item 1.1.060 stating the agency does not have authority to require written minutes of every open meeting of a state agency see Tex. Att'y Gen. Op. No. GA-0727. Official requests that caution statement be revised and retention period changed to PM, or, "recordings" could be added to 1.1.058 and 1.1.060 be removed.

Response: Agency is aware of the Attorney General opinion and it is on our list of required revisions. The current rule amendments did not include revisions to this records series nor did the agency perform a full review and revision to the State Records Retention Schedule. Our goal was to make required changes concerning contract related records series. Future revisions including this recommendation will be addressed and presented at a future Commission meeting.

Comment: An official from Texas Department of Criminal Justice requested that item 4.2.005, Purchase Vouchers and 4.2.007 Expenditure Vouchers, should be changed from FE+3 to FE+7. Additionally, they commented that while the proposed changes are consistent with the language in SB20, the description of purchase vouchers in the schedule includes "orders" which are contractual procurements and should be considered such for records retention purposes.

Response: Agency agrees that "orders" being included in the description is confusing and it has been removed. Orders are covered by purchase orders as part of the Contracts records series. Agency disagrees with the other recommendation to increase retention period to FE+7. Agency's opinion is that applying 7 year retention period to purchase vouchers and expenditure vouchers is outside the scope of the law. Retaining invoices and vouchers for 7 years could be unreasonably onerous for agencies and does not appear to be the intent of SB20. If an agency desires to increase the retention period for these records series they may do so.

Comment: An official from the Office of the Attorney General recommended including grant records in the implementation of the SB20 requirement. Government Code §2261.002(1) includes grants in its definition of a contract and the State of Texas Contract Management Guide recommends applying requirements to grants. Until such time that the statute is amended to expressly exclude grants, it is recommended they be included in the implementation of SB20.

Response: Agency disagrees with recommendation. The bill sponsor for SB20, Senator Jane Nelson, did not intend for grants to be included as part of the SB20 requirements. If the statute is revised in the future to specifically include grants then agency will amend the schedule accordingly.

Comment: An official from the Office of the Governor commented that bids are scheduled under 5.3.007 and therefore should be removed from 5.1.001. Otherwise, the same record will be scheduled under two different records series.

Response: Agency agrees with recommendation and revised records description for 5.1.001.

Comment: An official from the Office of the Governor commented that an equipment history file (log of service/repair) is not a contract or agreement. Equipment Service Agreements should be removed from 5.2.008. If deemed necessary, a reference to 5.1.001 could be added to the remarks of 5.2.008 to address such agreements.

Response: Agency agrees with recommendation and revised records series and title and added note to remarks section.

Comment: An official from the Office of the Governor commented on item 5.3.007 stating SB20 does not apply to contracts executed, renewed, or amended on or before 8/31/15. There is no legal basis for changing the retention period for unsuccessful-but-evaluated pre-FY16 bids to AC+4, and in fact it would be burdensome to the agency to have to retroactively apply this retention period to older bid documentation. Recommends keeping retention period for pre-FY16 bids as FE+3.

Response: Agency agrees with recommendation and revised retention period for bids prior to 8/31/15.

Comment: An official from the Office of the Attorney General recommended excluding the new series under 5.3.007 for unaccepted bids that do not meet submission requirements from the implementation of the SB20 requirements. Procedures may vary across agencies. Some agencies may not physically accept or receive bids after the due date and time for submission. This revision would require that those bids be accepted and retained AC+2 years. This could place a burden on the agency. Some agencies may, return bids to the bidder if the bid does not meet the submission requirements.

Response: Agency disagrees with recommendation. Multiple agencies requested for the addition of this item so that agencies would be able to dispose of unaccepted bids and not have to retain for AC+7. It is our opinion that this will not require agencies to change practices. If an agency's practice is to return or not accept bids that are submitted after the submission date and return to vendor, they can continue to do so. This would not require them to retain for AC+2.

Comment: An official from the Office of the Attorney General recommended creating separate records series for unaccepted bids and add reference to new records series in Remarks for 5.3.007. It is RIM industry standard to not have more than one function/purpose or more than one retention period within the same records series.

Response: Agency understands the recommendation to create a separate records series according to RIM industry standard. However, the current format of the State Records Retention Schedule does easily allow for this revision at this time. TSLAC will add this to our list of suggested revisions and will review when we plan future revisions to the State Records Retention Schedule.

Comment: An official from the Office of the Attorney General recommended keeping caution statement for 5.3.007 from the current version of this records series in addition to adding the AC=definition in the Remarks column.

Response: Agency disagrees with recommendation. Caution statement is no longer valid since unsuccessful and successful bids are being retained for AC+7.

Comment: An official from the Office of the Attorney General recommended using the term "contract" rather than "instrument" on item 5.3.007, and recommend aligning the terminology used in the retention statement with the terminology used in the remarks statement for clarity and consistency.

Response: Agency disagrees with recommendation. Language is consistent with additional contract related records series in the schedule.

Comment: An official from the University of Texas at Austin requested clarification of retention period and Caution Note for item 5.3.009. Recommend revising AC definition to AC=Decision not to proceed with the procurement. Revise Caution Note to CAUTION: If the request for information leads to request for proposal or bid, the request for information documentation must be retained in accordance with item number 5.3.007.

Response: Agency agrees with recommendations and revised AC definition and Caution note as suggested.

Comment: An official from Texas Facilities Commission requested revisions to several records series unrelated to contracts and SB20.

Response: The current rule amendments do not include revisions to these records series nor were we conducting a full review and revision to the State Records Retention Schedule at this time. Our goal is to make required changes concerning contract related records series. TSLAC will add these to our list of suggested revisions and will review when we plan future revisions to the State Records Retention Schedule.

The amended section is adopted under Government Code §441.185(f) which grants authority to the Texas State Library and Archives Commission to prescribe a minimum retention period for any state record unless a minimum retention period for the record is prescribed by another federal or state law, regulation, or rule of court.

The adopted section affects Government Code §441.185(f).

§6.10. *Texas State Records Retention Schedule.*

A record listed in the Texas State Records Retention Schedule (Revised 4th Edition) must be retained for the minimum retention period indicated by any state agency that maintains a record of the type described. Figure: 13 TAC §6.10

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 319. VETERINARY PRACTICES AND DRUG TESTING

SUBCHAPTER B. TREATMENT OF HORSES

16 TAC §319.110

The Texas Racing Commission adopts an amendment to 16 TAC §319.110, Health Certificate, without changes to the proposed text as published in the July 1, 2016, issue of the *Texas Register*

(41 TexReg 4753). The rule text will not be republished. The section relates to the health inspection requirements that must be met for a horse to be allowed to enter the premises of a licensed racetrack.

The adopted amendment deletes the previous requirements relating to equine infectious anemia tests and health certificates and instead substitutes a general requirement that a horse entering an association's grounds must be accompanied by a current certificate of veterinary inspection and also meet any other health inspection requirements established by the Texas Animal Health Commission (TAHC). The change will allow the Texas Racing Commission to follow the requirements of the TAHC without requiring a rule amendment each time TAHC changes its rules. Consistent with the substantive change in the rule, the adoption broadens the rule's title to reflect that it addresses more than just health certificates.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Texas Revised Civil Statutes Annotated, Article 179e, §3.02, which authorizes the Commission to adopt rules for conducting horse racing and to adopt other rules to administer the Act, and §6.061, which requires the Commission to adopt rules addressing the safety of conditions on the racetrack.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2016.

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION

SUBCHAPTER J. FINANCIAL AID ADVISORY COMMITTEE

19 TAC §§1.149 - 1.151, 1.154

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §§1.149 - 1.151, and 1.154, concerning the Financial Aid Advisory Committee, with changes to §1.150(3) of the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3217). Specifically, §1.149, regarding authority and purpose, removes redundant language. Section 1.150, regarding definitions, removes unnecessary language referring to the location of the Texas Financial Aid Information Center call center and the College for All Texans website. Section 1.150(3) removes the definition of "Commissioner" as the term is not referenced in the rule.

The proposed amendments posted in the *Texas Register* did not show the definition for "Commissioner" as stricken from the rule as indicated in the preamble. Section 1.151(a) regarding committee membership and officers adds language regarding the composition of the committee's membership to include representatives employed in the non-profit sector. Section 1.151(b)(1) - (4) language is modified to state the minimum of one representative from a health-related institution is to be included in the committee. Language is also added to clarify that the committee will be comprised of at least one student representative from a health-related institution or a four-year institution, one student representative from a two-year college sector, and one representative from the Texas Association of Student Financial Aid Administrators (TASFAA). Each will serve as a non-voting member on the committee. Language referencing the specific professional associations is removed from §1.151(c). In §1.151(e)(1) and (2) language is added to clarify the procedures for appointment of the presiding officer as well as appointment procedures in which the vice chair succeeds the presiding officer. Section 1.151(g) adds language clarifying the one-year term of the TASFAA-appointed committee member. Section 1.154(a) and (b) adds language stating that the committee will provide guidance and advice on tasks assigned to the Coordinating Board and has been renumbered accordingly.

No comments were received, however staff discovered that the proposed amendments as posted in the May 6, 2016 issue of the *Texas Register* did not show the definition for "Commissioner" as stricken from the rule as indicated in the proposed preamble and this additional change was to §1.150(3).

The amendments are adopted under Texas Education Code, §61.026 and Chapter 2110, Government Code which, provides the Coordinating Board with the authority to adopt rules regarding an advisory committee.

§1.150. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings:

- (1) Board--The Texas Higher Education Coordinating Board.
- (2) Center for Financial Aid Information--The state's entity for developing and disseminating information about financial aid for college, consisting of the Texas Financial Aid Information Center call center, and the College for All Texans website.
- (3) Interested persons--Persons who attend committee meetings as representatives of stakeholder entities and any other persons who have made their interest in the work of the committee known to its presiding officer. Such interested persons may participate in committee discussions, as invited by the presiding officer to do so, but do not have the authority to cast votes.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 4. RULES APPLYING TO
ALL PUBLIC INSTITUTIONS OF HIGHER
EDUCATION IN TEXAS
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §4.12

The Texas Higher Education Coordinating Board (Coordinating Board) adopts new §4.12, pertaining to the tracking of participation of students with intellectual and developmental disabilities (IDD) in Texas institutions of higher education, without changes to the rule as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3218). Specifically, the new section defines IDD for the purposes of tracking students and establishes that the Coordinating Board may collect information from institutions of higher education regarding the undergraduate and graduate participation of students with IDD, as required by Texas Education Code, Subchapter C, §61.0664.

The following comments were received from The University of Texas at Austin (UT-Austin):

Comment: UT-Austin expressed concern that the definition of Intellectual and Developmental Disability (IDD) in the proposed rule is ambiguous and allows for a high degree of subjectivity. UT-Austin notes that the definition as written may result in a very small number of students being reported and unreliable reporting across institutions.

Staff Response: The definition outlined in the proposed rule is based on the definition of Intellectual Disability from the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition, published by the American Psychiatric Association (DSM-V). A group of experts who were convened suggested that it was best to keep the definition broad in order to allow each institution's disability services office to use their own process for identifying students with an IDD. Although the broad definition may result in differences in reporting across institutions, decisions on how or whether a student is identified as having a certain disability, such as an IDD, is up to the discretion of each institution. In addition, a more specific definition or definitions could lead to a much greater reporting burden for institutions. No changes were made as a result of this comment.

Comment: UT-Austin expressed concern that relying on data based on self-reports of Intellectual and Developmental Disability will not reflect actual numbers of students with IDD.

Staff Response: We understand that relying on self-identification by students may result in an undercounting of this population. However, we cannot require that students who have an IDD identify themselves for the purpose of this data collection, nor do we wish to encourage faculty or staff to attempt to identify a student who does not wish to register their disability with the institution. We understand the disability services offices have a role in confirming reported disabilities and we do not wish to interfere with that process. Using data from only students who self-identify, as confirmed by trained staff as meeting the definition provided in rule, both protects the privacy of students and ensures some consistency of reporting. No changes were made as a result of this comment.

Comment: UT-Austin expressed concern that the definition of "postsecondary transitional program or postsecondary program for students with IDD" in §4.12(b) is inconsistent with the require-

ment that only students in college-level coursework or technical continuing education be reported, which would exclude some students only enrolled in a transitional program (such as the UT informal classes available at UT-Austin). UT-Austin requests clarification of the apparent inconsistency.

Staff Response: The statute upon which this proposed rule is based (TEC, §61.0664) specifies that the Texas Higher Education Coordinating Board only collect data "relating to undergraduate and graduate level participation of persons with intellectual and developmental disabilities at institutions of higher education..." which is why we specify in §4.12(d) that data can only be collected on students in credit-bearing college-level coursework or technical continuing education. We include a definition for "postsecondary transitional programs or programs for students with IDD" in §4.12(b) because one of the proposed data collection elements is whether the student with IDD has ever been or is currently enrolled in one of these transitional programs. This question will serve to show how many students in these transitional programs go on to enroll in college-level course work and provide the ability to track their subsequent outcomes. No changes were made as a result of this comment.

Comment: UT-Austin requested clarification of the categories listed in §4.12(e)(1) as the category for "not identified as having an IDD" could be interpreted in many ways.

Staff Response: Coordinating Board staff agree that the categories should be explicitly defined. The categories listed in the proposed rule will be specifically described and explained in detail within the CBM manual where this item will be reported. For example, the direction that "all students who are not defined in the other options must be reported as not identified as having an IDD." No changes were made as a result of this comment.

Comment: UT-Austin expressed concern that the proposed rule requires that an Autism Spectrum Disorder be reported separately from students with an Intellectual or Developmental Disability. UT-Austin requested clarification regarding whether this determination would be made based upon additional evaluation or diagnosis. They reiterate that the definition of IDD in section (b) is ambiguous and will introduce inconsistencies across institutions.

Staff Response: At the request of practitioners, we separated out the identification of those with an Autism Spectrum Disorder but not an Intellectual Disability as this group is qualitatively different from students with Intellectual Disabilities. We are leaving the identification of the diagnosis of Autism Spectrum Disorder up to the policies of each institution. We realize this may result in inconsistencies across each institution; however, it is not the role of the Texas Higher Education Coordinating Board to prescribe what documentation or evaluation is necessary for an office of disability services to accept a diagnosis to allow for accommodations. No changes were made as a result of this comment.

The following comment was received from Texas State University:

Comment: Texas State expressed that the proposed rules in general are excellent, but requested that an additional indicator be added to the reporting requirement regarding whether the student actually received any accommodations through the institution for their disability.

Staff Response: In the opinion of the Texas Higher Education Coordinating Board staff, collecting information on whether a student with IDD receives accommodations is beyond the scope

of the statute, and would add an extra reporting requirement to office of disability services staff and reporting staff. Generally, self-identification of an IDD would be for the specific purpose of receiving accommodations. No changes were made as a result of this comment.

The new section is adopted under Texas Education Code, §61.0664, Collection and Study of Data on Participation of Persons with Intellectual and Developmental Disabilities in Higher Education, which requires the board to collect and maintain data relating to undergraduate and graduate level participation of persons with intellectual and developmental disabilities (IDD) at institutions of higher education.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. TEXAS SUCCESS INITIATIVE

19 TAC §4.54

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §4.54, concerning the Texas Success Initiative (TSI), to incorporate into existing rules changes that address the college readiness benchmarks for the new College Board SAT examinations administered on or after March 5, 2016 without changes to the proposed text as published in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3807). Specifically, the amendment to §4.54(a)(1)(B), the TSI exemption for the SAT examinations, would add the college readiness benchmarks set by The College Board and would provide additional clarification of rule application.

No comments were received concerning these amendments.

The amendments are adopted under Texas Education Code (TEC), §51.3062, which provides the Coordinating Board with the authority to establish policies and procedures relating to the TSI and §51.307, which provides the Coordinating Board with the authority to adopt and publish rules and regulations to effectuate the provisions of Chapter 51, Subchapter F of the TEC.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 5. RULES APPLYING TO PUBLIC UNIVERSITIES, HEALTH-RELATED INSTITUTIONS, AND/OR SELECTED PUBLIC COLLEGES OF HIGHER EDUCATION IN TEXAS

SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §5.5

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §5.5 concerning the Uniform Admission Policy without changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3220). Specifically, House Bill 2472, passed by the 84th Texas Legislature, Regular Session, repealed Texas Education Code (TEC) §51.803(e), which indicated The University of Texas at Austin would lose the authority to offer admission under TEC §51.803(a-1) after the 2017 - 2018 academic year. As a result, the institution will continue indefinitely to have the authority under TEC §51.803(a-1) to limit its automatic admission of entering first-time freshmen in the top 10 percent of their high school classes to no more than 75 percent of the institution's enrollment capacity for first-time entering undergraduate students.

No comments were received concerning these amendments.

The amendments are adopted under the Texas Education Code, §51.803, which provides the Coordinating Board with the authority to adopt rules for the Uniform Admission Policy.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 13. FINANCIAL PLANNING SUBCHAPTER M. TOTAL RESEARCH EXPENDITURES

19 TAC §§13.300 - 13.304

The Texas Higher Education Coordinating Board (Coordinating Board) adopts new Subchapter M, Total Research Expenditures, §§13.300 - 13.304, concerning standards and accounting

methods for determining total research expenditures. Section 13.302 and §13.303 are adopted with changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3220). Sections 13.300, 13.301, and 13.304 are adopted without changes. The intent of these new sections is to prescribe standards and accounting methods for total restricted research expenditures required by Texas Education Code, Chapter 62, Subchapter C, §62.053.

Four comments were received. Two comments were received from The University of Texas at Austin (UT Austin) and two comments were received from the Texas Tech University System (TTU System).

Comment: UT Austin suggested to include state appropriated trustee funds as part of the reconciliation of research expenses between Annual Financial Report (AFR) and the total Research and Development (R&D) expenditures by adding them to the AFR total, in §13.303(c)(4) of the proposed subchapter.

Staff response: No changes were made to the proposed rules. Any research expenses from state appropriated trustee funds are already part of the AFR total before any reconciliation is done. Therefore no additional reconciliation is needed. Such an addition of research expenditures from state appropriated trustee funds in §13.303(c)(4) would count these expenses twice, in effect.

Comment: UT Austin suggested to add an additional reconciliation in §13.303(c), which would be a new subsection (c)(6), by adding expenditures from the Dell Medical School that would not be reported in the AFR of the school's institution.

Staff response: No changes were made to the proposed rules. Medical schools report total research expenditures separately from their institutions. The reason is that medical schools collect and report data for different special interest areas than their academic institutions.

Comment: TTU System suggested to strike the clause "part of the Annual Financial Report" from the definition for the Sources and Uses Template, given in proposed §13.302(9).

Staff response: Staff agrees and amended the section accordingly. Without the clause the definition aligns with the existing definition for the Sources and Uses Template in 19 TAC Chapter 13, §13.122(20).

Comment: TTU System suggested to change the citation of statute giving authority to the proposed rules in §13.301. The suggestion was to strike the reference to Texas Education Code (TEC) §62.051, which establishes the Texas Research University Fund, leave the citation of §62.053, which gives expressive authority to establish standards and accounting methods, and to add a reference to TEC §62.134, which provides funds to the Core Research Support fund based on total research expenditures.

Staff response: No changes were made to the proposed rules. The wording as originally proposed cites the section of the TEC that gives authority to the Coordinating Board to prescribe the standards and accounting methods for total research expenditures. The additional reference to TEC §62.134 does not authorize but in turn cites the same §62.053 as proposed.

The rules are adopted under Texas Education Code, Chapter 62, Subchapter C, §62.053, which authorized the Coordinating Board to prescribe standards and accounting methods for determining the amount of total research funds expended.

§13.302. *Definitions.*

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

(1) Annual Financial Report (AFR)--Institutional financial report for one fiscal year as required by Texas Education Code, §51.005.

(2) Areas of Special Interest--Major research topics important to the public as listed in the Research Expenditure Survey.

(3) Coordinating Board or Board--The Texas Higher Education Coordinating Board.

(4) Research Expenditures or Expenditures--In a specific fiscal year, expenditure of funds paid out by an institution to support institutional Research and Development activities.

(5) Pass-through to sub-recipient--External award funds that are passed from one entity to a sub-recipient. The sub-recipient expends the award funds on behalf of, or in connection with, the pass-through entity.

(6) Research and Development (R&D)--All research activities, both basic and applied, and all development activities that are supported at universities, colleges, and other non-profit institutions:

(A) Research--The systematic study directed toward fuller scientific knowledge or understanding of the subject studied.

(B) Development--The systematic use of knowledge or understanding gained from research directed toward the production of useful materials, devices, systems, or methods, including design and development of prototypes and processes.

(C) R&D Training--R&D also includes activities involving the training of individuals in research techniques where such activities utilize the same facilities as other research and development activities and where such activities are not included in the instruction function.

(7) Research Expenditure Survey--Instrument that establishes total R&D expenditures for each institution by research field and areas of special interest, both accounted by funding source. The survey includes a Research Expenditure Survey, specific definition of R&D, and reporting guidelines for R&D activities.

(8) Research fields--Subject areas for R&D, as listed in the Research Expenditure Survey.

(9) Sources and Uses Template--An annual survey of Texas general academic and health-related institutions to detail financial information and provide specific information about revenues and expenditures.

§13.303. *Standards and Accounting Methods for Determining Total Research Expenditures.*

(a) Each institution reports R&D expenditures annually in the Research Expenditure Survey.

(b) R&D expenditures for Texas A&M University include consolidated expenses from Texas A&M University and its service agencies.

(c) Research expenses from the AFR are reconciled to the total R&D expenditures of the Research Expenditure Survey by a:

(1) Decrease of the AFR total by the amount of R&D expenses that do not meet the narrow definition of R&D expenditures used in the Coordinating Board's Research Expenditure Survey.

(2) Increase of the AFR total by the amount of indirect costs associated with expenses for R&D as reported through the Research Expenditure Survey.

(3) Increase of the AFR total by the amount of capital outlay for research equipment, not including R&D plant expenses or construction.

(4) Increase of the AFR total by the amount of expenditures for conduct of R&D made by an institution's research foundation, or 501(c) corporation on behalf of the institution, and not reported in the institution's AFR, including indirect costs.

(5) Increase of the AFR total by the amount of pass-throughs from Texas Engineering Experiment Station, as defined for the Research Expenditure Survey.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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CHAPTER 21. STUDENT SERVICES SUBCHAPTER C. HINSON-HAZLEWOOD COLLEGE STUDENT LOAN PROGRAM

19 TAC §§21.53 - 21.55

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §21.53 - 21.55, concerning the Hinson-Hazlewood College Student Loan Program (HHCSLP), without changes to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3221). Specifically, §21.53 is amended to remove the definition for "career college", which does not meet the definition of an eligible institution as defined in Texas Education Code, §61.003. The section has been renumbered accordingly.

The amendments to §21.54 regarding the eligibility of institutions is to align the language in rules with the eligibility provisions in Texas Education Code, §61.003, and §21.049, therefore removing career colleges. The previous language has been stricken.

The amendments to §21.55 regarding student eligibility requirements is to remove the reference to students attending career colleges, because these institutions are not eligible to participate in the loan program. The section has been renumbered accordingly.

No comments were received regarding the amendments.

The amendments are adopted under the Texas Education Code, Chapter 52, which states that the Coordinating Board shall administer the student loan program authorized by this chapter pursuant to Article III, §§50b-4, 50b-5, 50b-6, and 50b-7, of the Texas Constitution.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER II. EDUCATIONAL AIDE EXEMPTION PROGRAM

19 TAC §§21.1080, 21.1081, 21.1083 - 21.1085, 21.1087, 21.1088

The Texas Higher Education Coordinating Board adopts amendments to Chapter 21, Subchapter II, §§21.1080, 21.1081, 21.1083 - 21.1085, 21.1087, and 21.1088, concerning the Educational Aide Exemption Program, with changes to §21.1083(b) of the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3223). Specifically, the amendment to §21.1080 strikes reference to the former citation, §54.214, which was re-designated as §54.363 in 2011. In §21.1080 the term "Educational Aides" has been amended to show capitalization.

Changes to §21.1081, regarding Definitions, introduce terms relevant to new requirements for students receiving continuation awards, beginning fall 2014 (Senate Bill 1210, 83rd Texas Legislature, Regular Session). Amendments to program rules are just now being made due to the lack of program funding for FY 2014 and FY 2015. The new provisions include a grade point average requirement for graduate and undergraduate students and a loss of eligibility once an undergraduate student reaches the credit hour limit for formula funding. The addition of definitions for "Continuation Award" and "Excessive Hours" caused subsequent definitions to be renumbered. In addition, the definition of "Financial Need" is revised to align with the definition found in other state programs.

The amendments to §21.1083 reflects two subsections, (a) and (b), to distinguish between the general eligibility requirements and the provisions for continuation awards. In subsection (a)(3), the section number for "Hardship Provisions" is updated from §21.1089 to §21.1088. The term "Resident" has been capitalized. New subsection (b) includes the Senate Bill 1210, 83rd Texas Legislature requirements regarding grade point average and number of completed semester credit hours for continuation awards and the proposed text as published in the May 6, 2016, issue of the *Texas Register* has been amended to remove the following language, "receiving a Continuation Award in fall 2014 or later,".

The titles for §21.1084 and §21.1085 have been updated to reflect current rules. The amendments to §21.1085(a) and (b) state that the exemption covers a student's full tuition and mandatory fee charges and only applies to courses for which an institution receives formula funding. Outdated language has been removed.

The amendments to §21.1087 adds the Texas Education Code citation, §21.050(c), which authorizes an exemption from student teaching for Educational Aide award recipients.

The amendments to §21.1088 outlines hardship provisions that institutions must follow to allow an individual, even though he or she failed to meet program grade point average requirements, to receive an exemption if that failure was due to circumstances outlined in statute as a basis for special consideration. Such circumstances include illness, caring for another person, military deployment or other just causes acceptable to the institution. In addition, in keeping with Senate Bill 1210, the new sections indicate institutions may, on a showing of good cause, allow an undergraduate to receive the exemption although he or she has completed a number of semester credit hours considered excessive under §21.1083(b) of this subchapter (relating to Continuation Awards). The former language relating to hardship provisions for recipients who are unable to remain employed for the full term has been stricken.

No comments were received regarding the amendments however, the staff discovered that the proposed text in §21.1083(b) as published in the May 6, 2016, issue of the *Texas Register* should be amended to remove the following language, "receiving a Continuation Award in fall 2014 or later,".

The amendments are adopted under the Texas Education Code, §54.363 which provides the Coordinating Board with the authority to adopt rules to implement the Educational Aide Exemption Program.

§21.1083. *Eligible Students.*

(a) To receive an award through the Educational Aide Exemption Program, a student must:

- (1) be a Resident of Texas;
- (2) have met the definition of an Educational Aide at some time during the five years preceding the term or semester for which the student is awarded his or her initial exemption;
- (3) be employed in some capacity by a school district in Texas during the full term for which the student receives the award unless granted a hardship waiver as described in §21.1088 of this title (relating to Hardship Provisions);
- (4) show Financial need;
- (5) if he or she received an exemption through this subchapter prior to the fall 2012 semester, be enrolled in courses required for teacher certification at the institution granting an exemption under this subchapter or (if enrolled in lower-level course-work), sign a statement indicating an intention to become certified as a teacher and teach in Texas;
- (6) if he or she received his or her first award through this subchapter in fall 2012 or later, be enrolled at the institution granting an exemption under this subchapter in courses required for teacher certification in one or more subject areas determined by the Texas Education Agency to be experiencing a critical shortage of teachers at the public schools in this state;
- (7) meet the academic progress standards of the institution;
- (8) follow application procedures and schedules as indicated by the Board;
- (9) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law; and

(10) apply for an exemption by the end of the term for which the exemption is to apply.

(b) If a person receiving a Continuation Award at the beginning of the term or semester in which the award is received must also:

(1) if classified as an undergraduate or a graduate, be meeting the institution's financial aid grade point average requirement for making satisfactory academic progress towards a degree or certificate in accordance with the institution's policy regarding eligibility for financial aid, unless granted a hardship waiver by the institution in keeping with §21.1088 of this title (relating to Hardship Provisions); and

(2) if classified as a resident undergraduate, have not completed a number of semester credit hours that is considered to be excessive under Texas Education Code, §54.014, unless granted a hardship waiver by the institution in keeping with §21.1088 of this title (relating to Hardship Provisions). In determining the number of hours an undergraduate has completed, semester credit hours completed include transfer credit hours that count towards the person's undergraduate degree or certificate requirements, but exclude:

(A) hours earned exclusively by examination;

(B) hours earned for a course for which the person received credit toward the person's high school academic requirements; and

(C) hours earned for developmental courses that the institution required the person to take under Texas Education Code, §51.3062 or under the former provisions of Texas Education Code, §51.306.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER KK. MATH AND SCIENCE SCHOLARS LOAN REPAYMENT PROGRAM

19 TAC §§21.2021 - 21.2029

The Texas Higher Education Coordinating Board (Coordinating Board) adopts new Chapter 21, Subchapter KK, §§21.2021 - 21.2029 concerning the Math and Science Scholars Loan Repayment Program. Section 21.2026 is adopted with a minor change to the proposed text as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3225). Sections 21.2021 - 21.2025 and 21.2027 - 21.2029 are adopted without changes and will not be republished. The 83rd Texas Legislature authorized the Math and Science Scholars Loan Repayment Program. However, funds for the Program were first appropriated by the 84th Texas Legislature. The statute specifies that awards will first be made based on teaching service during the 2016-2017 school year. Texas Education Code, §61.9840 states that the Coordinating Board shall adopt rules necessary for the administration of this program.

No comments were received regarding the new rules.

The new rules are adopted under the Texas Education Code, §61.9840, which authorizes the Coordinating Board to adopt rules necessary for the administration of the Math and Science Scholars Loan Repayment Program.

§21.2026. Eligibility for Disbursement of Award.

To be eligible for disbursement of a loan repayment award, a teacher must:

(1) for teachers having a probationary teaching certificate during the initial year in the Program, have received a standard teaching certificate by the beginning of the second year of employment, to qualify for a second-year award;

(2) for the first four years of employment, submit all required end-of-year forms verifying completion of one, two, three, or four consecutive years of employment as a full-time classroom teacher in a Title I school; and

(3) following the first four years of employment, submit all required end-of-service period forms verifying completion of five, six, seven, or eight consecutive years of employment as a full-time classroom teacher in any Texas public school.

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CHAPTER 25. OPTIONAL RETIREMENT PROGRAM

SUBCHAPTER A. OPTIONAL RETIREMENT PROGRAM

19 TAC §§25.3 - 25.6

The Texas Higher Education Coordinating Board (Coordinating Board) adopts amendments to §§25.3 - 25.6, concerning the Optional Retirement Program, with changes to the proposed text of §§25.3, 25.4, and 25.6 as published in the May 20, 2016, issue of the *Texas Register* (41 TexReg 3588). Section 25.5 is adopted without changes. These amendments incorporate changes in state law and IRS-related interpretations, make technical corrections and add clarifying language.

The following comments were received from the Teacher Retirement System of Texas (TRS).

Comment: TRS expressed concern that the proposed replacement throughout Ch. 25 of "appropriate ORP election forms" with a specific reference to the TRS 28 ORP election form would potentially restrict TRS' future ability to change the name of the form or to modify its format for ORP election (i.e., online election). TRS recommended removing the specific reference to the TRS 28 and using a more generic description, such as requiring

the individual to elect ORP "in the appropriate form and manner as determined by TRS" or by "signing the form prescribed by TRS."

Staff response: THECB staff's intention in proposing that "appropriate ORP election forms" should be changed to a specific reference to the TRS 28 form is to make it clear to institutional staff and ORP-eligible employees that the TRS 28 is the official ORP election form and as such, is the only form that an ORP-eligible employee can use to elect to participate in ORP in lieu of TRS. Institutions provide ORP-eligible employees with additional local forms that are required to be completed as part of the process to enroll in ORP but these additional forms are sometimes misinterpreted by ORP-eligible employees as the actual election form, which could result in a failure to timely elect ORP. Specifying the name of the official election form in the rules would help reduce this confusion. Staff responded to this comment by adding "or its successor" when the specific name of the form is used. TRS indicated that this adjustment would address their concern.

The changes based on this comment are adopted in §§25.3(11)(A), 25.4(f), 25.4(f)(1)(A), 25.4(g)(1)(A), 25.4(g)(2), 25.4(i), and 25.6(a)(4).

Comment: TRS expressed concern that the proposed removal of the text indicating that employees must "submit" their signed TRS 28 form to the institution might be misinterpreted by employees to mean that they can send the signed form directly to TRS, which would be problematic because the institution must complete a certification statement on the form before it is submitted to TRS. Additionally, the proposed deletion of references to submitting the TRS 28 to the institution could result in a delay between the time the employee signs the form and submits it, which could be problematic for determining whether a timely election has been made. TRS recommended that the proposed deletion of the references to submitting the TRS 28 not be made.

Staff response: THECB staff agrees with this recommendation and has removed the proposed deletions of the references to submitting the TRS 28 form except in §25.4(g), which establishes the ORP Participation Start Date. TRS has indicated that in cases where a form is submitted within a few days of the signature date, TRS will use the signature date (rather than the submission date) as the date of election. The Participation Start Date is based on the election date, so this subsection should not include references to the submission date, only the signature date.

The changes based on this comment are adopted in §§25.3(11)(A), 25.4(f), 25.4(f)(1)(A), 25.4(i), and 25.6(a)(4).

Comment: TRS expressed concern that part of the proposed additional text in the definition of "Initial ORP Eligibility Date" in §25.3(7) could be confused with the minimum amount of employment necessary to be eligible for active TRS membership (which is one of the requirements to become eligible to elect ORP).

Staff response: THECB staff agrees with this comment and has removed the proposed new text in §25.3(7) that could cause the confusion ("including employment in an ORP-eligible position that is expected to be full-time (i.e., 100 percent effort) for a period of at least one full semester or four and one-half months").

The following comment was received from The University of Texas System:

Comment: UT System expressed concern that the proposed deletion of §25.4(o)(4) and the proposed new text in

§25.4(o)(2)(A) - (C) could cause IRS-related issues for institutions that are attempting to rectify an administrative error that resulted in an ORP-eligible employee not being timely provided notice of his or her eligibility to elect ORP. The proposed deletion of §25.4(o)(4) would eliminate authority for institutions to automatically correct a "Failure to Notify" error by extending the 90-day ORP election period. The proposed new text would prohibit institutions from extending an employee's 90-day ORP election period for any reason. UT System indicated that the proposed changes would place institutions "between a rock and a hard place" when using the IRS correction programs that are available to plan sponsors in these situations. UT System recommended that §25.4(o)(4) not be deleted and that the proposed new text in §25.4(o)(2)(A) - (C) not be adopted.

Staff response: THECB staff agrees that the proposed changes could be problematic for institutions that are attempting to rectify a "Failure to Notify" administrative error using the IRS correction programs. Staff would like additional time to pursue further research on this concern and have removed the proposed deletion of §25.4(o)(4) and the proposed new text in §25.4(o)(2)(A) - (C).

Reference correction: THECB staff corrected a reference error in §§25.4(f)(3)(B) and 25.4(f)(5). The references were updated from §25.5(f) and (g) to §25.5(f) and (h).

The amended sections are adopted under the Texas Education Code, §61.027, which provides the Coordinating Board with general rule-making authority; Texas Government Code, §830.002(c), which provides the Coordinating Board with authority to develop policies, practices, and procedures to provide greater uniformity in the administration of ORP; §830.101(b), which provides the Coordinating Board with specific rulemaking authority to establish eligibility for participation in ORP; and §830.006(b), which provides that institutions must keep records, make certifications, and furnish to the Coordinating Board information and reports as required by the Coordinating Board to enable it to carry out its ORP-related functions.

§25.3. Definitions.

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

(1) Active Participation--Period of employment during which an ORP participant makes regular ORP contributions through payroll deduction based on the statutory percentage of the employee's salary earned during that period, which along with the matching employer contributions, are sent by the ORP employer to an authorized ORP company. A faculty member who is not employed by a Texas public institution of higher education during the three summer months but who was participating in ORP at the end of the spring semester immediately preceding the summer and who resumes ORP participation with the same or another Texas public institution of higher education in the fall semester immediately following that summer shall be considered an active participant during the three summer months.

(2) Applicable Retirement System--The Teacher Retirement System of Texas for employees of Texas public institutions of higher education and the Employees Retirement System of Texas for employees of the Board.

(3) Board--The Texas Higher Education Coordinating Board.

(4) Break in Service--A period following a participant's termination of all employment with all Texas public institutions of higher education or the Board that is at least one full calendar month in which

no ORP contribution is made, excluding the three summer months for faculty members who were participating in ORP at the end of the spring semester immediately preceding the summer and who resume ORP participation with the same or another Texas public institution of higher education in the fall semester immediately following that summer, and excluding periods of leave-without-pay. A transfer between Texas public institutions of higher education with less than a full calendar month in which no ORP contribution is made shall not be considered a break in service.

(5) ERS--Employees Retirement System of Texas.

(6) Full-time--For purposes of determining initial ORP eligibility, the term "full-time" shall mean employment for the standard full-time workload established by the institution ("100 percent effort").

(7) Initial ORP Eligibility Date--The first day of an ORP-eligible employee's 90-day ORP election period. An employee's initial ORP eligibility date shall be the first date that the employee meets all four criteria in §25.4(a) of this title (relating to Eligibility Criteria).

(8) Initial ORP Eligibility Period--The period of time an ORP participant must be employed on a full-time basis ("100 percent effort") beginning with the initial ORP eligibility date, as defined in paragraph (7) of this section, and ending after one full semester or four and one-half months.

(9) Major Department Requirement--One of the factors used to determine whether a position is ORP-eligible in the "Other Key Administrator" category as defined in §25.4(k) of this title (relating to Eligible Positions). A department or budget entity at a public institution of higher education shall meet this requirement if:

(A) the department or budget entity is considered a "major" department by the institution based on the specific organizational size and structure of that institution; and

(B) the department or budget entity has its own budget, policies and programs.

(10) ORP--Optional Retirement Program.

(11) ORP Election Period--The period of time during which ORP-eligible employees have a once-per-lifetime opportunity to elect to participate in ORP in lieu of the applicable retirement system. The ORP election period shall begin on an employee's initial ORP eligibility date, as defined in paragraph (7) of this section, and shall end on the earlier of:

(A) the date the employee makes an ORP election by signing the TRS 28 ORP election form (or its successor) or, for employees of the Board, the ORP election form provided by the Board, and submitting the ORP election form to the ORP employer for certification; or

(B) the 90th calendar day after the employee's initial ORP eligibility date, not including the initial ORP eligibility date and including the 90th calendar day. If the 90th calendar day after the initial ORP eligibility date falls on a weekend or holiday, the deadline shall be extended until the first business day after the 90th calendar day.

(12) ORP Employer--All public institutions of higher education in Texas and the Board.

(13) ORP Retiree--An individual who participated in ORP while employed with a Texas public institution of higher education or the Board and who established retiree status by meeting the applicable retiree insurance requirements and enrolling in retiree group insurance provided by ERS, The University of Texas System, or The Texas A&M University System, regardless of whether currently enrolled.

(14) Principal Activity Requirement--One of the factors used to determine whether a position is ORP-eligible based on the percent of effort required by the position to be devoted to ORP-eligible duties. The principal activity requirement shall be met if at least 51 percent of the position's duties are devoted to ORP-eligible duties in one of the ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions), with two exceptions:

(A) During Initial ORP Eligibility Period. During an employee's initial ORP eligibility period (when the position is required to be 100 percent effort to qualify as ORP-eligible), if the ORP-eligible duties associated with an ORP-eligible category are less than 51 percent of the activities for a particular position, the position shall be considered to meet the principal activity requirement if all of the position's other duties are ORP-eligible duties under one of the other ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions), for a total of 100 percent effort devoted to ORP-eligible duties, as would be the case, for example, for a position with required duties that are 50 percent instruction and/or research (faculty position) and 50 percent department chair (faculty administrator position).

(B) After Initial ORP Eligibility Period. For a participant who has completed the initial ORP eligibility period but who has not vested in ORP and who fills a position that is less than 100 percent effort but at least 50 percent effort, then the principal activity requirement shall be considered met if at least 50 percent effort is devoted to applicable ORP-eligible duties in one of the ORP-eligible categories defined in §25.4(k) of this title (relating to Eligible Positions).

(15) TRS--Teacher Retirement System of Texas.

(16) Vesting Requirement--The minimum amount of ORP participation required to attain vested status. An ORP participant shall be considered vested on the first day of the second year of active participation in lieu of the applicable retirement system, as provided in §25.5(a) of this title (relating to Vesting Requirement). A vested participant shall have ownership rights to the employer contributions in his or her ORP accounts, meaning that, upon termination of employment with all ORP employers or reaching age 70-1/2, he or she may access both the employee and employer contributions (and any net earnings) in his or her accounts. A vested participant shall remain in ORP even if subsequently employed in a position that is not ORP-eligible, as provided in §25.5(f) of this title (relating to Employment in a non-ORP-Eligible Position).

§25.4. Eligibility to Elect ORP.

(a) Eligibility Criteria. An employee shall be eligible to make a once-per-lifetime irrevocable election of ORP in lieu of the applicable retirement system if all of the following criteria are met:

(1) ORP-eligible Position: Employment in an ORP-eligible position as defined in subsection (k) of this section;

(2) 100 Percent Effort: Employment in an ORP-eligible position that is expected to be full-time (i.e., 100 percent effort) for a period of at least one full semester or four and one-half months.

(A) Initial Eligibility Period. This eligibility requirement is an employee's initial ORP eligibility period, as defined in §25.3 of this title (relating to Definitions).

(B) Combining of Percent Effort at Different Institutions Not Permitted. The 100 percent effort requirement shall be satisfied by employment with only one institution, unless an individual is simultaneously employed in ORP-eligible positions with more than one component institution under the same governing board that operates its ORP either as a single plan for all components or includes the applicable components in the same plan, in which case, the employee's

percent effort at each component may be combined to meet the minimum 100 percent effort requirement;

(3) **First Election Opportunity:** No previous opportunity to elect ORP in lieu of the applicable retirement system during the current or a prior period of employment at the same or another Texas public institution of higher education or the Board; and

(4) **Active Membership in Retirement System:** Current membership or eligibility for active membership in the applicable retirement system as provided in subsection (h) of this section.

(b) **ORP Participation after Election.** Once an employee makes an election of ORP, the employee's eligibility to continue participating in ORP shall be determined in accordance with §25.5 of this title (relating to ORP Vesting and Participation).

(c) **Non-Texas ORP Plans.** Prior enrollment, participation or vested status in any plan other than the ORP plan authorized under Texas Government Code, Chapter 830, shall have no bearing on an employee's eligibility to elect ORP, except that the employee must be eligible for active membership in the applicable retirement system as provided in subsection (h) of this section.

(d) **Separate Elections.** An election of ORP in lieu of TRS at a Texas public institution of higher education shall be considered separate and distinct from an election of ORP in lieu of ERS at the Board.

(1) An employee's prior election of ORP in lieu of ERS at the Board on or after September 1, 1994, shall have no bearing on that person's eligibility to elect ORP in lieu of TRS at a Texas public institution of higher education.

(2) An election of ORP by a Board employee prior to September 1, 1994, was made in lieu of TRS; therefore, an institution shall treat an employee's election of ORP in lieu of TRS at the Board prior to September 1, 1994, in the same manner as if the election had been made at an institution.

(3) An employee's prior election of ORP in lieu of TRS at an institution, or an employee's election of ORP in lieu of TRS at the Board prior to September 1, 1994, shall have no bearing on that person's eligibility to elect ORP in lieu of ERS at the Board.

(e) **Opportunity to Elect.**

(1) The governing board of each Texas public institution of higher education shall provide an opportunity to all eligible employees in the component institutions governed by the board to elect ORP in lieu of TRS in accordance with these rules. The Board shall provide an opportunity to all eligible employees to elect ORP in lieu of ERS in accordance with these rules.

(2) **Documentation.**

(A) ORP employers shall maintain documentation in each ORP-eligible employee's employment record that an opportunity to elect ORP was provided. Such documentation shall indicate the beginning and ending dates of the employee's ORP election period.

(B) The documentation required by this paragraph may be maintained in an electronic format in accordance with applicable provisions for such records.

(C) This paragraph applies to employees who become eligible to elect ORP on or after September 1, 2006, including employees who are hired for the Fall 2006 semester whose first active duty date is in the month of August 2006.

(f) **90-Day ORP Election Period.** An employee who meets the eligibility criteria in subsection (a) of this section shall be provided

an ORP election period, as defined in §25.3 of this title (relating to Definitions), during which an election to participate in ORP may be made by signing the TRS 28 ORP election form (or its successor) or, for employees of the Board, the ORP election form provided by the Board, and submitting the ORP election form to the ORP employer for certification.

(1) **Beginning and Ending Dates.** The 90-day ORP election period shall begin on the employee's initial ORP eligibility date, as defined in §25.3 of this title (relating to Definitions), and shall end on the earlier of:

(A) the date the employee makes an ORP election by signing the TRS 28 ORP election form (or its successor) or, for employees of the Board, the ORP election form provided by the Board, and submitting the ORP election form to the ORP employer for certification; or

(B) the 90th calendar day after the employee's initial ORP eligibility date, not including the initial ORP eligibility date and including the 90th calendar day. If the 90th calendar day after the initial ORP eligibility date falls on a weekend or holiday, the deadline shall be extended until the first business day after the 90th calendar day.

(2) **Written Notification.** In accordance with §25.6(h)(2) of this title (relating to ORP Election Period Dates), each ORP employer shall, within 15 business days of an ORP-eligible employee's initial ORP eligibility date, provide written notification to the ORP-eligible employee that indicates the beginning and ending dates of his or her ORP election period and the local procedures for submitting the election form and additional required paperwork.

(3) **Once-per-Lifetime Irrevocable Election.** An employee who is eligible to elect ORP shall have only one opportunity during his or her lifetime, including any future periods of employment in Texas public higher education, to elect ORP in lieu of the applicable retirement system, and the election may never be revoked.

(A) **Default Election.** Failure to elect ORP during the 90-day ORP election period shall be a default election to continue membership in the applicable retirement system.

(i) **ORP in Lieu of TRS.** An employee of a Texas public institution of higher education who does not elect ORP in lieu of TRS during the 90-day ORP election period shall never again be eligible to elect ORP in lieu of TRS, even if subsequently employed in an ORP-eligible position at the same or another Texas public institution of higher education.

(ii) **ORP in Lieu of ERS.** An employee of the Board who does not elect ORP in lieu of ERS during the 90-day ORP election period shall never again be eligible to elect ORP in lieu of ERS, even if subsequently employed in an ORP-eligible position at the Board.

(B) **Irrevocable.** An election of ORP shall be irrevocable. An employee who elects ORP shall remain in ORP, except as provided by §25.5(f) and (h) of this title (relating to ORP Vesting and Participation). A default election of the applicable retirement system, as described in subparagraph (A) of this paragraph shall be irrevocable. An employee who fails to elect ORP during the ORP election period shall remain in the applicable retirement system in accordance with the laws and rules governing eligibility for the retirement system.

(C) **Separate Elections.** As provided in subsection (d) of this section, an election of ORP in lieu of TRS at a Texas public institution of higher education shall be considered separate and distinct from an election of ORP in lieu of ERS at the Board; therefore, an election of ORP in lieu of one retirement system shall not preclude an eligible employee's election of ORP in lieu of the other retirement

system if subsequently employed in a position that is eligible to elect ORP in lieu of the other retirement system.

(4) **Company Selection Required at Election.** An employee who elects to participate in ORP shall select an ORP company from the ORP employer's list of authorized companies in conjunction with the election of ORP. An ORP employer shall establish a policy that failure to select an authorized company may result in disciplinary action up to and including termination of employment because retirement contributions are required by law as a condition of employment.

(5) **Waiver of Retirement System Benefits.** An election of ORP shall be a waiver of the employee's rights to any benefits that may have accrued from prior membership in the applicable retirement system, other than benefits resulting from transfers of service credit between the applicable retirement systems and reinstatement of withdrawn service credit under the ERS/TRS service transfer law, even if the participant has met the applicable system's vesting requirement. Except as provided by §25.5(f) and (h) of this title (relating to ORP Vesting and Participation) and the ERS/TRS service transfer law, an ORP participant shall not be eligible to become an active member of the applicable retirement system or receive any benefits from the system other than a return of employee contributions that may have been deposited with the system (and accrued interest, if any).

(g) **Participation Start Date.** The first day that ORP contributions are made shall be determined as follows:

(1) **Election on Initial ORP Eligibility Date.**

(A) **Employees of Institutions of Higher Education.**

(i) **New Employees.** For new employees who sign the TRS 28 ORP election form (or its successor) on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment).

(ii) **Transfers within Same Institution.** For employees who transfer from a non-ORP-eligible position to an ORP-eligible position within the same institution and who sign the TRS 28 ORP election form (or its successor) on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment), unless the initial ORP eligibility date is not the first day of the month, in which case, to avoid dual contributions to both TRS and ORP during the same month, as provided in §25.6(a)(4) of this title (relating to No Dual Contributions), the participation start date shall be the first day of the month following the month in which the initial ORP eligibility date falls.

(B) **Employees of the Board.**

(i) **New Employees.** For new Board employees who sign the ORP election form provided by the Board on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment).

(ii) **Transfers within the Board.** For Board employees who transfer from a non-ORP-eligible position at the Board to an ORP-eligible position at the Board, and who sign the ORP election form provided by the Board on or before their initial ORP eligibility date, the participation start date shall be the initial ORP eligibility date (i.e., first day of ORP-eligible employment), unless the initial ORP eligibility date is not the first day of the month, in which case, to avoid dual contributions to both ERS and ORP during the same month, as provided in §25.6(a)(4) of this title, the participation start date shall be the first day of the month following the month in which the initial ORP eligibility date falls.

(2) **Election After Initial ORP Eligibility Date.** The participation start date for ORP-eligible employees who sign the TRS 28

ORP election form (or its successor) or, for employees of the Board, the ORP election form provided by the Board, after their initial ORP eligibility date, shall be the first day of the month following the date that the form is signed, with the following exceptions:

(A) **During Month of Initial ORP Eligibility Date.** ORP employers may establish a policy that employees who elect ORP by signing the TRS 28 ORP election form (or its successor) or, for employees of the Board, the ORP election form provided by the Board, after their initial ORP eligibility date but before the end of the month in which the initial ORP eligibility date falls may be treated as if they had signed the form on or before their initial ORP eligibility date as provided by paragraph (1) of this subsection, provided the employee earns enough compensation between the date of the election and the end of the month in which the initial ORP eligibility date falls to cover the employee's ORP contribution for the entire month.

(B) **After Month of Initial ORP Eligibility Date:** ORP employers may establish a policy that employees who elect ORP by signing the TRS 28 ORP election form (or its successor) or, for employees of the Board, the ORP election form provided by the Board, after the month in which their initial ORP eligibility date falls, but before the end of the month in which the form is signed, may start participating in the month in which the form is signed rather than the first of the following month, provided the employee earns enough compensation between the date of the election and the end of the month in which the form is signed to cover the employee's ORP contribution for the entire month. To avoid partial month payments, contributions for these participants shall be based on salary earned during the entire month in which the form is signed.

(C) **Retirement System Membership Before Election.** As provided in subsection (i) of this section, ORP-eligible employees who elect ORP after their initial ORP eligibility date, except as provided in subparagraph (A) of this paragraph, shall be reported as members of the applicable retirement system for any months prior to their election of ORP.

(h) **Active Membership in Retirement System Requirement.** Participation in ORP shall be an alternative to active membership in the applicable retirement system.

(1) A TRS retiree shall not be eligible to elect ORP in lieu of TRS at a Texas public institution of higher education.

(2) An ERS retiree shall not be eligible to elect ORP in lieu of ERS at the Board.

(i) **Automatic Retirement System Enrollment.** A new employee at a Texas public institution of higher education who is eligible to elect ORP in lieu of TRS shall be automatically enrolled in TRS until an election to participate in ORP is made by signing the TRS 28 ORP election form (or its successor) and submitting the TRS 28 to the institution for certification as provided in subsection (g) of this section. A new Board employee who is eligible to elect ORP in lieu of ERS shall be automatically enrolled in ERS until an election to participate in ORP is made by signing the ORP election form provided by the Board and submitting the ORP election form to the Board as provided in subsection (g) of this section.

(j) **Dual Employment in TRS/ORP Positions at Different Employers.**

(1) **Simultaneous Retirement Plan Membership Not Permitted.**

(A) **Dual Employment with Institution and Non-Higher Education TRS-Covered Employer.**

(i) Active TRS Membership not Permitted. A member of TRS who is employed in the Texas public school system (including all Texas Independent School Districts and regional educational service centers) or with any other Texas public educational institution or state agency that is covered by TRS but does not offer ORP in lieu of TRS, and who concurrently becomes employed in an ORP-eligible position with a Texas public institution of higher education and elects to participate in ORP, may not remain an active member of TRS as an employee of the non-higher education TRS-covered employer once ORP participation has started at the institution.

(ii) No TRS Contributions. Notwithstanding the participant's employment in what would otherwise be considered a TRS-eligible position at a non-higher education TRS-covered employer, TRS contributions may not be made for the participant by that employer while he or she is actively participating in ORP, but shall resume if the employee is required to return to active TRS membership as provided in paragraph (2) of this subsection.

(B) Dual Employment with Different Institutions.

(i) Active TRS Membership not Permitted. A member of TRS who is employed with a Texas public institution of higher education in a position that is eligible for TRS but is not ORP-eligible and who becomes concurrently employed with another Texas public institution of higher education in a position that is ORP-eligible and who elects to participate in ORP, may not remain an active member of TRS once ORP participation has started.

(ii) Retirement Contributions.

(I) No TRS Contributions. Notwithstanding the participant's employment in what would otherwise be considered a TRS-eligible position at an institution, TRS contributions may not be made for the participant by that institution while he or she is actively participating in ORP at another institution, but shall resume if the employee is required to return to active TRS membership as provided in paragraph (2) of this subsection.

(II) Before Vesting in ORP. An employee who elects ORP at one institution while concurrently employed in what would otherwise be a TRS-eligible position at another institution is not eligible for ORP contributions based on the participant's TRS-only employment prior to the participant vesting in ORP.

(III) After Vesting in ORP. Once the participant vests in ORP, the institution employing the participant in a position that would otherwise be eligible for TRS shall enroll him or her in ORP.

(2) Returning to TRS.

(A) Dual Employment with Institution and Non-Higher Education TRS-Covered Employer.

(i) Termination of Employment with Institution. If the individual described in paragraph (1)(A) of this subsection terminates all employment with the institution while concurrently employed in a TRS-eligible position with a non-higher education TRS-covered employer, then, regardless of ORP vesting status, he or she shall return to active TRS membership with the non-higher education TRS-covered employer and shall be ineligible for any future ORP participation in lieu of TRS, even if subsequently employed in an ORP-eligible position with the same or another institution.

(ii) Transfer to Non-ORP Eligible Position at Institution. If, prior to meeting the ORP vesting requirement, the individual described in paragraph (1)(A) of this subsection transfers to a position at the institution that is not ORP-eligible but is eligible for TRS, then he or she shall return to active TRS membership with both the institution and the non-higher education TRS-covered employer and shall

be ineligible for any future ORP participation in lieu of TRS, even if subsequently employed in an ORP-eligible position with the same or another institution.

(iii) Transfer to Non-Benefits-Eligible Position at Institution. In accordance with §25.5(g) of this title (relating to Employment in a Non-Benefits-Eligible Position), an individual described in paragraph (1)(A) of this subsection who transfers to a non-benefits-eligible position at the institution shall not be eligible for ORP contributions and shall not be eligible for active TRS membership. This individual shall remain ineligible for TRS contributions at the non-higher education TRS-covered employer while employed in the non-benefits-eligible position at the institution. If this individual subsequently terminates all employment with the institution, then the provisions in clause (i) of this subparagraph will apply.

(B) Dual Employment with Different Institutions.

(i) Termination of Employment in ORP-eligible Position Before Vesting. If, prior to satisfying the ORP vesting requirement, the individual described in paragraph (1)(B) of this subsection terminates ORP participation by terminating employment or transferring to a non-ORP-eligible position with the same institution while concurrently employed in a TRS-eligible position with another Texas public institution of higher education, then he or she shall return to active TRS membership and shall be ineligible for any future ORP participation in lieu of TRS, even if subsequently employed in an ORP-eligible position with the same or another institution.

(ii) Termination of Employment in ORP-eligible Position After Vesting. If, after satisfying the ORP vesting requirement, the individual described in paragraph (1)(B) of this subsection terminates employment in the ORP-eligible position by terminating employment with the institution or transferring to a non-ORP-eligible position while concurrently employed in a TRS-eligible position with another Texas public institution of higher education, then he or she shall not return to TRS membership and shall continue to make ORP contributions at the other institution based on the employment in the TRS-eligible position (i.e., a benefits-eligible position) as provided in paragraph (1)(B)(ii)(III) of this subsection.

(iii) Transfer to Non-Benefits-Eligible Position. In accordance with §25.5(g) of this title, an individual described in paragraph (1)(B) of this subsection who transfers from the ORP-eligible position to a non-benefits-eligible position at the same institution shall not be eligible for ORP contributions at that institution and shall not be eligible for active TRS membership at either institution while employed in the non-benefits-eligible position.

(I) Termination Before Vesting in ORP. If this individual terminates employment in the non-benefits-eligible position before satisfying the ORP vesting requirement, then the provisions in clause (i) of this subparagraph for an individual who terminates employment in an ORP-eligible position before vesting in ORP will apply.

(II) Termination After Vesting in ORP. If this individual terminates employment in the non-benefits-eligible position after satisfying the ORP vesting requirement, then the provisions in clause (ii) of this subparagraph for an individual who terminates employment in an ORP-eligible position after vesting will apply.

(k) Eligible Positions. The following positions shall be considered ORP-eligible. Only those employees who fill ORP-eligible positions and who meet the eligibility requirements established in this chapter shall be eligible to elect ORP or to continue participating in ORP prior to vesting.

(1) Faculty Member--A member of the faculty whose duties include teaching and/or research as a principal activity, as defined

in §25.3 of this title (relating to Definitions), and who holds the title of professor, associate professor, assistant professor, instructor, lecturer, or equivalent faculty title, including "visiting professor" if the position is at least one full semester in duration.

(2) Faculty Administrator--An administrator responsible for teaching and research faculty whose principal activity, as defined in §25.3 of this title (relating to Definitions), is planning, organizing, and directing the activities of faculty and who holds the title of dean, associate dean, assistant dean, director, department chair, or head of academic department.

(3) Executive Administrator--An administrator who holds the title of chancellor, deputy chancellor, vice chancellor, associate vice chancellor, assistant vice chancellor, or the equivalent, and an administrator who holds the title of president, executive vice president, provost, vice president, associate vice president, assistant vice president, or the equivalent.

(4) Other Key Administrator--An administrator other than a faculty administrator or an executive administrator whose position is considered a key administrative position within the institution's organizational structure and that meets the requirements of this paragraph. The most common position titles in this category are director or associate director, but included titles may vary by institution based on differences in organizational structure, size, mission, etc. All positions in this category, including positions with the title of director or associate director, shall meet the following criteria:

(A) serves as director or other administrative head of a major department or budget entity, as defined in §25.3 of this title (relating to Definitions), excluding the title of assistant director unless the assistant director position has responsibility for what is considered a major department or budget entity that is within a larger department or budget entity, as may be the case at large institutions;

(B) is responsible for the preparation and administration of the budget, policies, and programs of the major department or budget entity;

(C) usually reports to the office of a chancellor, president, vice chancellor, vice president, dean, or equivalent; and

(D) is generally and customarily recruited from the same pool of candidates that other colleges and universities across the nation are recruiting from for this type of position by, for example, advertising in national publications such as the Chronicle of Higher Education or in newsletters or websites of national professional associations or at meetings of such associations.

(E) A position shall not be considered ORP-eligible under this category unless it can be reasonably demonstrated that all of the applicable criteria have been met. If there is significant ambiguity concerning whether a position meets the criteria for this category, the default finding shall be that the position is not ORP-eligible.

(5) Librarian--A professional librarian who holds, at a minimum, a master's degree in library science or information science, and whose principal activity, as defined in §25.3 of this title (relating to Definitions), is library services.

(6) Athletic Coach--An athletic coach, associate athletic coach, or assistant athletic coach whose principal activity, as defined in §25.3 of this title (relating to Definitions), is coaching, excluding an athletic trainer, and excluding an athletic director or assistant athletic director unless the principal activity is coaching rather than administrative.

(A) Athletic trainers may be included in the "professional" category if the position requires the trainer to be a physician.

(B) Athletic directors whose principal activity is not coaching normally shall be included in one of the administrator categories.

(7) Professional--An employee whose principal activity, as defined in §25.3 of this title (relating to Definitions), is performing the duties of a professional career position, including, but not necessarily limited to, physician, attorney, engineer, and architect, that meets the following criteria:

(A) requires a terminal professional degree in a recognized professional career field that requires occupation-specific knowledge and appropriate professional licensure;

(B) is a non-classified position; and

(C) is generally and customarily recruited from the same pool of candidates that other colleges and universities across the nation are recruiting from for this type of position by, for example, advertising in national publications such as the Chronicle of Higher Education or in newsletters of national professional associations or at meetings of such associations.

(D) A position shall not be considered ORP-eligible under this category unless it can be reasonably demonstrated that all of the applicable criteria have been met. If there is significant ambiguity concerning whether a position meets the criteria for this category, the default finding shall be that the position is not ORP-eligible.

(8) Board Administrative Staff--A member of the executive or professional staff of the Board, as determined by the Commissioner of Higher Education, who fills a position with the following requirements:

(A) college graduation and prior experience in higher education or experience of such kind and amounts to provide a comparable background; and

(B) national mobility requirements similar to those of faculty.

(l) Position-Required Qualifications. An employee who meets the qualifications of a "professional" or a "librarian" as defined in subsection (k) of this section shall not be considered eligible to elect ORP as a professional or librarian unless the position requires the professional or librarian qualifications, respectively, as a principal activity. For example, an attorney who fills a position that does not require that the position be filled by an attorney shall not be considered ORP-eligible based solely on the fact that the person is an attorney.

(m) Counselors. The eligibility of counselors shall be determined as follows.

(1) Faculty. If the institution has established policies that consider and treat counselors in the same manner as faculty in such areas as, for example, employment contracts, oversight, and work schedules, then ORP eligibility for a counselor position shall be determined under the same requirements as a faculty position, except that the principal activity shall be counseling rather than teaching and/or research, and the title shall be counselor rather than the faculty titles listed in that category.

(2) Staff. If the institution has established policies that consider and treat counselors in the same manner as staff rather than faculty, in such areas as, for example, employment contracts, oversight, and work schedules, then ORP eligibility for a counselor position shall not be determined under the faculty category. Depending on the duties and required qualifications, a counselor who is considered staff rather than faculty may meet the criteria for one of the non-faculty ORP-eligible positions.

(n) Review of Positions for ORP Eligibility.

(1) Comprehensive Review. ORP employers shall periodically conduct a comprehensive review of all non-classified positions to ensure that ORP eligibility requirements are being applied fairly and consistently across all departments and divisions.

(2) New Position. ORP employers shall analyze newly created non-classified positions for ORP eligibility determination and shall maintain proper documentation of the analysis and determination for future reference.

(3) Re-classified Position. ORP employers shall re-classify a position as ORP-eligible if changes in the position's responsibilities or the employer's organizational structure result in a position that meets the ORP-eligibility requirements.

(A) Option to Elect ORP. ORP employers shall provide the incumbent in a position that is re-classified as ORP-eligible an opportunity to elect ORP as if newly hired into the position.

(B) Initial ORP Eligibility Date. The incumbent's initial ORP eligibility date, as defined by §25.3 of this title (relating to Definitions), shall be the date that the re-classification is effective, unless the re-classification is retro-active to a prior month, in which case, the initial ORP eligibility date shall be the date that the employee is notified of the re-classification.

(o) Administrative Errors.

(1) Orientation Procedures. Each ORP employer shall develop and implement effective orientation and enrollment procedures to ensure appropriate and timely processing of newly eligible employees' retirement plan choices, including procedures for both new employees and current employees who transfer to an ORP-eligible position.

(2) Rectification. In the event an administrative error occurs which prevents the normal processing of an ORP-eligible employee's election, the ORP employer shall rectify the error as soon as practicable and in a manner that results in a situation that is as close to the originally expected outcome as possible, within applicable federal statutes, laws, and regulations, including IRS correction procedures, and state statutes, laws, and rules.

(3) Documentation and Prevention. When an administrative error occurs, the ORP employer shall:

(A) maintain documentation of the error and the actions taken by the ORP employer to address the problem, with a copy placed in the employee's file; and

(B) immediately develop and implement appropriate administrative procedures to avoid such errors in the future.

(4) Failure to Notify Error. If an ORP employer fails to notify an ORP-eligible employee of his or her eligible status on or before the employee's initial ORP eligibility date, the ORP employer shall notify the eligible employee as soon as the oversight is discovered. The 90-day ORP election period for the eligible employee shall begin on the date that the employee is notified, and the participation start date shall be determined in accordance with subsection (g) of this section.

(p) Texas Commissioner of Education.

(1) ORP Eligibility. Notwithstanding other provisions in this chapter, the Texas Commissioner of Education shall be eligible to elect ORP in lieu of ERS.

(2) Employment in Higher Education. Notwithstanding other provisions in this chapter, a Texas public institution of higher education shall, for the purpose of determining ORP eligibility for

a former Texas Commissioner of Education who is subsequently employed by the institution, treat an election of ORP in lieu of ERS made by the Texas Commissioner of Education at the Texas Education Agency in the same manner as if the election of ORP had been made in lieu of TRS at another Texas public institution of higher education.

§25.6. *Uniform Administration of ORP.*

(a) Contributions.

(1) Tax-Deferred. All ORP contributions shall be made on a tax-deferred basis.

(2) IRS Limits on Defined Contributions. Contributions to a participant's ORP account shall not exceed the maximum amount allowed under §415(c) of the Internal Revenue Code of 1986, as amended.

(A) 415(m) Plan. Institutions are authorized by the ORP statute to establish a plan authorized under §415(m) of the Internal Revenue Code of 1986, as amended, for a participant's ORP contributions that exceed the 415(c) limit.

(B) Stopping ORP Contributions. In the absence of a 415(m) plan, an ORP employer shall discontinue ORP contributions for participants who reach the 415(c) limit for the remainder of the applicable tax year.

(C) Interaction with TSA/TDA Program. An employee's contributions under the voluntary supplemental Tax-Sheltered Annuity/Tax-Deferred Account Program shall be included in the 415(c) limit.

(3) No Co-Mingling of ORP and non-ORP Funds.

(A) No Non-Texas ORP Funds. No non-Texas ORP funds, including any withdrawn TRS member contributions, may be rolled over or transferred to an ORP account prior to the participant's termination of ORP participation.

(B) No TSA/TDA Funds. Amounts that have been contributed by the participant through the Tax-Sheltered Annuity/Tax-Deferred Account Program may not be rolled over or transferred to an ORP account prior to the participant's termination of ORP participation.

(C) Texas ORP Contract Required. ORP contributions may only be made to a contract that is authorized by the participant's current ORP employer for Texas ORP contributions, even if the participant already has a contract with a company from a prior period of employment with another employer, whether a Texas ORP employer or not.

(4) No Dual Contributions. A contribution to the applicable retirement system and to an ORP company within the same calendar month shall not be permitted, except when a person terminates employment in a position covered by the applicable retirement system and, prior to the end of the calendar month in which the termination occurs, becomes employed in an ORP-eligible position at a different ORP employer and elects to participate in ORP by signing and submitting the TRS 28 ORP election form (or its successor) or, for employees of the Board, the ORP election form provided by the Board, on a date that results in an ORP participation start date that is prior to the end of that same calendar month, as provided in §25.4(g) of this title (relating to Participation Start Date).

(5) Eligible Compensation.

(A) Definition. For purposes of determining the amount of a participant's ORP contribution, institutions shall use the same definition of eligible compensation that is used for TRS members in §821.001 of the Texas Government Code.

(B) **IRS Limits.** The maximum amount of salary that can be taken into account for ORP purposes shall not exceed the limits established by §401(a)(17) of the Internal Revenue Code of 1986, as amended. An individual who first participated in ORP prior to September 1, 1996, regardless of a subsequent break in service, shall qualify for the "grandfathered" rate established by IRC §401(a)(17).

(C) **Stopping ORP Contributions.** An ORP employer shall discontinue ORP contributions for participants who reach the 401(a)(17) limit for the remainder of the applicable tax year.

(6) **Contribution Rates.** The amount of each participant's ORP contribution shall be a percentage of the participant's eligible compensation as established by the ORP statute and the General Appropriations Act for each biennium. Each contribution shall include an amount based on the employee rate and an amount based on the employer rate.

(A) **Employee Rate.** The employee contribution rate shall neither exceed nor be less than the rate established in the ORP statute for employee contributions.

(B) **Employer Rate.** The employer contribution rate shall consist of a state base rate (minimum), as established each biennium in the General Appropriations Act, and an optional supplemental rate, as provided in subparagraph (C) of this subsection.

(C) **Supplemental Employer Rate.** Institutions may provide a supplement to the state base rate under the following conditions:

(i) **Amount of Supplemental Rate.** The supplemental rate may be any amount that, when added to the state base rate, does not exceed the maximum employer rate established in the ORP statute. For example, if the state base rate is 6 percent and the maximum statutory rate is 8.5 percent, then the supplement may be any amount up to and including 2.5 percent.

(ii) **Component Institution Policies.** Governing boards may establish a supplemental rate policy that covers all component institutions or may establish different policies for one or more individual components.

(iii) **Annual Determination.** The governing board of each institution shall determine the amount of the supplement once per year, to be effective for the entire year.

(iv) **Method 1--All Participants.** Institutions may provide the same supplemental rate to all ORP participants, regardless of the participant's first date to participate in ORP or a break in service. If this method is selected, each ORP participant shall receive the same supplemental rate as every other participant.

(v) **Method 2--Two Groups.** Institutions may, instead of providing the same supplemental rate to all participants, provide two different supplemental rates based on a participant's first date to participate in ORP, as follows.

(I) **Grandfathered.** Each participant whose first date to participate in ORP in lieu of the applicable retirement system at any ORP employer, is prior to September 1, 1995, shall receive the same supplemental rate as other participants in this group, regardless of any break in service. This group of participants shall be referred to as the grandfathered group.

(II) **Non-Grandfathered.** Each participant whose first date to participate in ORP in lieu of the applicable retirement system at any ORP employer is on or after September 1, 1995, shall receive the same supplemental rate as other participants in this group, regard-

less of any break in service. This group of participants shall be referred to as the non-grandfathered group.

(vi) All ORP employers shall maintain documentation of a participant's first date to participate in ORP in lieu of the applicable retirement system at any ORP employer and shall provide that information to any future ORP employers of the participant for purposes of determining the participant's grandfather status. This information shall be maintained for as long as the employer's plan exists regardless of whether the ORP employer provides a supplemental employer rate contribution and regardless of the amount of any supplemental employer rate contribution provided.

(7) **Proportionality.** ORP employers shall pay ORP employer contributions from the appropriate funding source in accordance with applicable proportionality provisions, including provisions in the General Appropriations Act and §830.201 of the Texas Government Code.

(8) **Three-Day Submission Deadline.** ORP employers shall send ORP contributions to the ORP company within three business days of legal availability, except for contributions made on a supplemental payroll or contributions that are sent to a grandfathered company with less than 50 participants.

(A) **Legal Availability.** Contributions shall generally be considered legally available on payday. For ORP employers that normally pay participants on a twice-monthly basis, the three-day minimum shall apply to each payday in the month.

(B) **Grandfathered Company.** For purposes of this paragraph, a grandfathered company shall be a company that is no longer on a particular ORP employer's list of authorized ORP companies, but that continues to receive ORP contributions for certain participants as authorized by that ORP employer.

(C) **Exception Deadline.** Contributions that are exempted from the three-day submission deadline shall be sent to the company as soon as practicable, but not later than 10 business days after they are legally available.

(9) **Electronic Funds Transfer (EFT).**

(A) **Requirement.** ORP employers shall send all ORP contributions, including contributions based on a supplemental payroll and contributions sent to a grandfathered company as defined in paragraph (8) of this subsection, to each ORP company by electronic funds transfer (EFT) if the ORP employer is currently able to send funds by EFT and the company is currently able to receive funds by EFT.

(B) **Inability to Receive.** If a company is unable to receive funds by EFT, the ORP employer shall send contributions to the ORP company by check and provide the following notifications.

(i) **Certification.** The ORP employer shall certify to the Board, on the ORP employer's annual ORP report as required by subsection (g) of this section, that the company is unable to receive funds by EFT.

(ii) **Participant Notification.** At least once per fiscal year, the ORP employer shall provide notice to each participant indicating which ORP companies are unable to receive funds by EFT.

(10) **Same-Day Credit.** ORP companies shall deposit each participant's ORP contributions into the accounts and/or funds designated by the participant effective on the same business day that the contributions are received by the company if the funds are received before the close of business and on the next business day if the funds are received after the close of business. A company that does not com-

ply with this provision shall not be eligible to be authorized as an ORP company by any ORP employer.

(11) Forfeited ORP Employer Contributions. If a participant forfeits ORP employer contributions under §25.5(a) of this title (relating to Vesting Requirement), the ORP employer shall return the forfeited contributions to the originating fund in accordance with the following procedures.

(A) 93-Day Deadline for Request. Not later than 93 calendar days after the last day of the calendar month in which an unvested participant terminates all employment with all ORP employers, the ORP employer shall send a request to the ORP company or companies for a return of the ORP employer contributions that were sent to the company or companies for that participant during that period of employment. This request may be referred to as a vesting letter because it indicates that the participant has not met the vesting requirement.

(i) 93 Days is Outside Limit. An ORP employer may send the request for forfeited ORP employer contributions immediately upon a participant's termination if the ORP employer has knowledge that the participant has not become employed and is not anticipating becoming employed in a position that is eligible for ORP in lieu of the same retirement system at the same or another ORP employer within the 93-day period.

(ii) If Deadline is Missed. If the ORP employer fails to request the forfeited amounts within the 93-day deadline, then the ORP employer shall make the request immediately upon discovering the oversight, even if the participant later resumes participation after the 93-day deadline as described in subparagraph (B) of this paragraph.

(B) If Participant Returns After 93 Days. If an unvested participant returns to employment that is eligible for ORP in lieu of the same retirement system at the same or another ORP employer and resumes active participation on a date that is more than 93 calendar days after the last day of the calendar month in which he or she previously terminated participation, the participant's unvested ORP employer contributions from the prior period of employment shall still be forfeited, even if the participant subsequently satisfies the vesting requirement.

(C) Forfeited Amount. The forfeited amount shall be the actual amount of ORP employer contributions sent to the participant's ORP accounts during his or her current period of employment.

(i) Excess Amounts not Included. The forfeited amount shall not include any amounts in the participant's ORP account in excess of the actual ORP employer contributions that are attributable to net earnings.

(ii) If Account is Less than Actual Amount. The entire amount of actual ORP employer contributions shall be returned even if the account balance is less than the amount of the actual ORP employer contributions because of investment loss, transfer, or other occurrence or transaction.

(I) Company's Responsibility. The ORP company shall be responsible for making arrangements to cover any loss of unvested ORP employer contributions, so that the entire amount of actual ORP employer contributions is returned to the ORP employer upon request.

(II) Certification. Before an ORP employer may authorize a company to receive ORP contributions from unvested participants, as provided in subsection (c) of this section, the ORP employer shall require the company to certify that the entire amount of actual unvested ORP employer contributions will be returned upon request. The ORP employer may require the company to indicate what

method will be used, for example, restriction of unvested funds to money market or similar accounts.

(D) Company Response Deadline. Within 30 days of receiving the ORP employer's request for a return of unvested ORP employer contributions, the ORP company shall:

(i) process a reimbursement to the ORP employer; and

(ii) send notification of the transaction to the employee indicating the reason for the reduction in the account balance.

(E) Deposit into Originating Fund. The ORP employer shall deposit the reimbursed ORP employer contributions into the originating fund or funds in accordance with instructions from the Texas Comptroller of Public Accounts and any other applicable policies and procedures.

(F) Resumption of Participation within 93 Days.

(i) If unvested ORP employer contributions are returned to the originating fund when the participant did, in fact, resume ORP participation in lieu of the same retirement system at the same or another ORP employer within 93 calendar days of the last day of the calendar month in which the termination of participation occurred, the ORP employer that requested the reimbursement shall, immediately upon being notified of the employee's resumption of participation, return the reimbursed amount to the ORP company for re-deposit into the participant's account.

(ii) The ORP employer with which the participant resumes participation, if not the ORP employer that requested the reimbursement, shall notify the ORP employer that requested the reimbursement of the participant's status as soon as practicable after the participant resumes participation.

(iii) The entire amount of actual ORP employer contributions that were returned to the originating fund under the provisions in this paragraph shall be sent back to the company. There shall be no allowance for any earnings or losses on the ORP employer contributions that may have accrued during the time that the amounts were not in the participant's account.

(b) Withdrawal of Retirement System Funds. An employee who elects to participate in ORP may withdraw any member contributions (plus accrued interest, if any) that he or she may have accumulated in the applicable retirement system prior to the election of ORP. Withdrawn member contributions shall not be rolled over into the participant's ORP account prior to termination of ORP participation.

(c) ORP Companies.

(1) Authorized by Each ORP Employer. Each ORP employer shall establish its own list of companies that are authorized to provide ORP products to that employer's ORP participants. Governing boards with more than one component institution may establish one list for all components or separate lists for one or more component institutions.

(2) Qualified Companies. Companies authorized by an ORP employer shall be qualified to do business in the state of Texas as determined by the Texas Department of Insurance, the Texas State Securities Board, and any other applicable state or federal agency.

(3) Minimum Number of Companies.

(A) Minimum of Four. Each ORP employer shall authorize a minimum of four qualified companies, including at least one company that offers 403(b)(1) annuity accounts and at least one company that offers 403(b)(7) custodial accounts.

(B) **Variety of Choices.** Each ORP employer's list of authorized companies and products shall provide a reasonable variety of choices among types of accounts and funds.

(C) **No Maximum Number.** Each ORP employer may authorize as many ORP companies as the ORP employer deems appropriate.

(4) **Return of Unvested Employer Contributions.** Before an ORP employer may authorize a company to receive ORP contributions from unvested participants, the ORP employer shall require the company to certify that the entire amount of actual unvested ORP employer contributions will be returned upon request, in accordance with the procedures in paragraph (a)(11) of this section. The ORP employer may require the company to indicate what method will be used, for example, restriction of unvested funds to money market or similar accounts.

(5) **Authorization Policies and Procedures.** Each ORP employer shall be responsible for establishing local policies and procedures for authorizing or certifying companies to provide ORP products to the ORP employer's ORP participants. Governing boards with more than one component institution may establish one policy for all components or separate policies for one or more component institutions.

(A) **Consultants.** ORP employers may enlist the assistance of consultants or other outside parties to develop selection criteria.

(B) **Objective Selection Process.** ORP employers may utilize an objective process to review the quality of ORP products and services and select ORP companies and products using pre-determined standards either in a competitive selection process or in a minimum criteria process. Standards may include performance relative to peer products in the same asset class, costs and fees paid by the participant to participate in the investment products, financial stability of the company, company ratings, and service to participants, including type of service delivery model, company financial counseling, and other services for participating employees. ORP employers may establish additional standards that must be met by ORP companies to remain on the ORP employer's list of authorized companies, such as minimum participation standards.

(C) **Participant Requests.** ORP employers shall not be required to authorize any ORP company, company representative, or product requested by any participant, although ORP employers may take such requests into account if it may be done in accordance with applicable laws, rules and policies.

(D) **Periodic Review of Policies.** Each ORP employer shall periodically review and update its authorization or certification policies and procedures.

(E) **Periodic Re-Authorization.** Each ORP employer shall periodically re-authorize or re-certify companies.

(6) **Participant's Change of Companies.**

(A) **Two Opportunities per Year.** Each ORP employer shall provide ORP participants with at least two opportunities during each fiscal year to select a different company from the ORP employer's list of authorized companies. The opportunities may be provided on set dates during the year or on a flexible individualized basis.

(B) **Two Changes per Year.** Each ORP employer shall allow a participant to change his or her company selection on either or both of the opportunities provided by the ORP employer under subparagraph (A) of this paragraph.

(C) **Effective within 35 Days.** The ORP employer shall start sending the participant's ORP contributions to his or her newly selected company beginning with the next payroll period if practicable, but not later than 35 days after the date the participant signs and submits the appropriate forms to the ORP employer.

(i) **Problems.** If the ORP employer cannot comply with this deadline due to circumstances beyond the ORP employer's control, the ORP employer shall notify the participant of the problem and shall provide the participant with an opportunity to change his or her company selection.

(ii) **Additional Change.** A participant's change of companies made in accordance with clause (i) of this subparagraph shall not be counted against the number of changes required under subparagraph (B) of this paragraph.

(D) **Prior Contributions.** Amounts contributed by the participant to previously selected ORP companies, including ORP contributions made during prior periods of employment with the same or another ORP employer, shall be under the same statutory distribution restrictions as the contributions in the participant's account with his or her newly selected ORP company.

(E) **Transfers of Prior Contributions.**

(i) Each ORP employer shall include a provision in the employer's ORP plan that permits participants to execute a contract exchange to transfer ORP funds that were contributed during the current or prior periods of employment with the ORP employer to another ORP company that is authorized by the employer to receive the funds. A contract exchange shall not be counted against the number of changes required under subparagraph (B) of this paragraph.

(ii) Each ORP employer may include provisions in the employer's ORP plan that permit participants to transfer ORP funds from one ORP employer's plan to another ORP employer's plan provided both employer plans include provisions authorizing such plan-to-plan transfers.

(7) **Grandfathered Companies.**

(A) ORP employers may allow participants to continue contributing to an ORP company that is no longer on the ORP employer's list of authorized companies. Such a company shall be referred to as a grandfathered company.

(B) Institutions may allow participants who directly transfer from another Texas public institution of higher education to continue contributing to the same ORP company that they were contributing to at their prior ORP employer, provided the institution verifies that the contract includes the statutory distribution restrictions.

(8) **Confirmation of ORP Contributions.** ORP employers shall require ORP companies that receive contributions for the ORP employer's ORP participants to submit confirmation of receipt of funds directly to each participant at least quarterly. The confirmation shall contain the date and amount of each ORP contribution received during the reporting period.

(9) **Confirmation of Funds Transfer.** ORP employers shall require ORP companies that receive contributions for the ORP employer's ORP participants to, immediately upon execution of a transfer from one fund or investment or account to another fund or investment or account, submit a confirmation directly to the participant, unless specifically waived by the participant in writing. The confirmation shall include all transfer information, including a statement of any applicable charges.

(10) Required Company Reports. Each ORP employer shall require all ORP companies that receive contributions for the ORP employer's ORP participants to submit, at least annually, a report or reports to each participant having ORP accounts with that company, including accounts that are no longer receiving current contributions, containing the information indicated in paragraphs (11), (12) and (13) of this subsection.

(11) For all accounts, the following information shall be provided:

- (A) name and address of the participant;
- (B) identifying number;
- (C) total payments received during the reporting period;
- (D) expense charges during the reporting period;
- (E) net payments during the reporting period;
- (F) total value of account at the end of the reporting period; and

(G) net cash surrender value of account at the end of the reporting period reflecting all potential charges against the account if it were surrendered for cash as of the last day of the reporting period.

(12) For fixed and variable annuity accounts, the following additional information shall be provided:

(A) interest rate or rates paid on the account from the previous reporting period to the end of the current reporting period; and

(B) where multilevel rates of interest were paid on an account, a breakdown showing the amount in the participant's account at each interest level, the amount of interest earned at each interest level, and the rates of interest. An ORP company may exclude the information required by this subparagraph concerning multilevel rates of interest from the annual report, but if this information is not provided on at least an annual basis, the company shall provide it at any time upon the participant's request.

(13) For variable annuity and custodial accounts, the following additional information shall be provided:

(A) units of each fund or investment or account purchased during the reporting period;

(B) total units of each fund or investment in the account at the end of the reporting period; and

(C) value of unit of each fund or investment or account at the end of the reporting period.

(14) Optional Information. ORP employers may require ORP companies to provide participants with other information in addition to the reporting requirements in paragraph (10) of this subsection, including, but not limited to:

- (A) additional account-related information;
- (B) information about the company; and
- (C) general educational information related to investments.

(15) Authorized Company Representatives.

(A) Designated Representatives. ORP employers may require ORP companies to designate representatives, or may require that the company and the ORP employer jointly designate representatives, who are authorized to communicate directly with the ORP em-

ployer's ORP-eligible employees concerning the company and its products.

(B) Restricted Number. ORP employers may restrict the number of representatives authorized to represent each company.

(C) Brokers. ORP employers may authorize brokers who represent more than one authorized company. Such authorization may be in addition to the number of designated representatives of a particular company.

(D) Representative's ORP Knowledge. ORP employers may require ORP companies to certify that their designated representatives are sufficiently trained and knowledgeable about ORP, including an understanding of the statutory distribution restrictions that must be included in all ORP contracts.

(E) Responsibility to Correct Mistakes. ORP employers may require a company to fully rectify, at the company's cost, any mistakes made by a designated company representative concerning the delivery of incorrect ORP information and any resulting problems.

(16) Solicitation Practices. Each ORP employer shall establish the following procedures related to company solicitation practices.

(A) Sales Presentations. Authorized representatives shall be permitted to make sales presentations to ORP-eligible employees on the ORP employer's premises, under the following conditions:

(i) only at the employee's request;

(ii) as a guest of the employee and ORP employer;

and

(iii) in compliance with the ORP employer's applicable policies and procedures.

(B) Prohibited Gifts. ORP company representatives shall be prohibited from providing gifts or monetary rewards directly or indirectly to any employee of the ORP employer for information on newly eligible employees.

(C) Bulk Campaigning Prohibited. Authorized representatives shall be responsible for providing appropriate sales literature and service at locations designated by the ORP employer. Unless specifically authorized by the ORP employer, ORP company representatives shall be prohibited from using campus bulk mailing (including electronic mail) or telephone campaigning.

(D) Violations. ORP employers shall reserve the right to restrict solicitation privileges of authorized representatives based on violations of the solicitation procedures in this paragraph and each ORP employer's local policies and procedures.

(d) Qualified Domestic Relations Orders (QDROs).

(1) Company Responsibilities. Each ORP employer shall ensure that all ORP contracts include a provision that the ORP company is solely responsible for determining whether a domestic relations order is qualified and payable in accordance with Texas Government Code, Chapter 804. In lieu of requiring a contractual provision, ORP employers may require companies to certify, as part of the ORP employer's ORP company authorization process as provided in subsection (c) of this section, that the ORP company is solely responsible for determining whether a domestic relations order is qualified and payable in accordance with Texas Government Code, Chapter 804.

(2) Company Interpretation. ORP employers may include criteria relating to an ORP company's interpretation of Texas Government Code, Chapter 804, in the ORP employer's ORP company au-

thorization or certification process as provided in subsection (c) of this section.

(e) Investment Advisory Fees. Participants may pay certain investment advisory fees with tax-deferred funds in their ORP account in accordance with the following conditions.

(1) Investment advisory fees may only be paid with amounts in a participant's ORP account in accordance with the following provisions.

(A) The investment advisory fees for each fiscal year shall not exceed two percent of the annual value of the participant's account as of the last day of that fiscal year.

(B) The fees shall be paid directly to a registered investment advisor that provides advice to the participant.

(C) The investment advisor to whom the fees are paid shall be registered with the Securities and Exchange Commission and any other applicable federal or state agencies, and shall be engaged full-time in the business of providing investment advice.

(D) The participant and the investment advisor shall enter into a contract for a term of no more than one year. A contract that automatically renews each year shall be considered acceptable as long as both parties have the right to sever the relationship, with reasonable notification, at any time.

(2) An ORP employer shall not prohibit participants from utilizing this right and shall not restrict the payment percentage to less than two percent.

(3) An ORP employer may include in its ORP company authorization or certification process, as provided in subsection (c) of this section, a provision that prohibits commissions to an individual who also receives investment advisory fees for the same ORP account.

(4) An ORP company may request the ORP employer to sign a statement that investment advisory fees are permissible under the plan to provide assurance to the company that it is releasing ORP funds to the advisor in accordance with applicable ORP provisions.

(A) An ORP employer shall not sign the company's form indicating that investment advisory fees are permissible under the plan unless the ORP employer has received satisfactory documentation that the four conditions described in paragraph (1) of this subsection have been met.

(B) An ORP employer shall not sign a form that actually authorizes the payments because that is a relationship between the advisor, the participant and the company.

(f) Distribution Restrictions.

(1) Restricted Access.

(A) No Pre-Termination Access unless Age 70-1/2. ORP participants shall not access any of their ORP funds by any means (including partial or full withdrawals) until the earlier of the date that they:

(i) terminate all employment with all ORP employers; or

(ii) reach age 70-1/2 years.

(B) No Loans or Hardship Withdrawals.

(i) Loans, financial hardship withdrawals, or any other method that provides a participant with any type of access to ORP funds prior to the earlier of termination of employment or attainment of age 70-1/2 shall not be permitted.

(ii) ORP products may provide for loans or hardship withdrawals after the participant's termination of employment or attainment of age 70-1/2, if permissible under applicable laws, regulations and plan provisions.

(C) Previously Contributed Amounts. ORP contributions made during prior periods of employment with the same or another ORP employer and ORP contributions made to previously selected ORP companies with the current ORP employer shall be under the same statutory distribution restrictions as the contributions in the participant's current active account.

(D) Employment Transfer is not a Termination. A participant's transfer of employment between Texas public institutions of higher education without a break in service, as defined in §25.3 of this title (relating to Definitions), shall not be considered a termination of employment for ORP purposes, unless the new position is non-benefits-eligible, as defined in §25.5(g) of this title (relating to Employment in a Non-Benefits-Eligible Position).

(E) Transfer of Funds is not a Termination. A transfer of ORP funds between ORP accounts or ORP companies (contract exchange) shall not be considered a termination of employment for ORP purposes.

(F) Simultaneous Contributions and Withdrawals. An ORP participant shall not simultaneously make ORP contributions and withdraw funds from ORP accounts unless that participant is at least age 70-1/2.

(G) Documentation of Restrictions. ORP employers shall ensure that all ORP contracts specifically contain the statutory ORP distribution restriction provisions, which are sometimes referred to as the ORP endorsement.

(2) Authorization to Release ORP Funds. An ORP company shall not release any ORP funds to a participant until receipt of notification from the participant's ORP employer that a break in service or retirement has occurred, except when the participant has reached age 70-1/2, in which case, the ORP company may release funds upon verification that the participant has reached age 70-1/2. The ORP employer's termination notification may be referred to as a vesting letter because it indicates whether the participant has met the ORP vesting requirement.

(A) Unvested Participants. If a participant terminates prior to meeting the vesting requirement, the ORP employer's notification shall include a request for the return of the participant's forfeited ORP employer contributions, as provided in §25.6(a)(11) of this title (relating to Forfeited ORP Employer Contributions).

(B) Vested Participants. If a participant terminates after meeting the vesting requirement, all funds shall be available in accordance with applicable federal law, plan provisions and contractual provisions, but non-ORP-related early withdrawal penalties, such as additional federal income taxes or contractual surrender fees, may apply depending on factors such as the participant's product selection and age at termination.

(3) Prohibited Distribution by ORP Company. If an ORP company provides a participant with any access to ORP funds prior to the earlier of the participant's termination of employment with all ORP employers or attainment of age 70-1/2, then the ORP employer, as the plan sponsor, and the ORP company, as the trustee of the funds, shall rectify the situation in accordance with applicable IRS procedures.

(g) ORP Employer Reports.

(1) Required Information. All ORP employers shall submit the following information to the Board:

- (A) number of ORP participants;
- (B) amount of contributions sent to ORP companies;
- (C) list of ORP-eligible positions; and
- (D) any other information required by the Board.

(2) Annual Report.

(A) Format. The required information shall be provided in a reporting format developed by the Board, which may include an electronic format.

(B) Due Date. The required information shall be reported on a fiscal year basis and shall normally be due on October 1 of each year for the most recent fiscal year ending August 31.

(3) Additional Information as Needed. ORP employers shall provide additional information to the Board as needed to carry out its functions under the ORP statute, which may be in the form of ad hoc reports, formal or informal surveys, or other format, and may be requested in an electronic format.

(h) Required Notices to Employees.

(1) Basic Information for Newly Eligible Employees. On or before an ORP-eligible employee's initial ORP eligibility date, which is the first day of his or her 90-day ORP election period, each institution shall provide the ORP-eligible employee with written introductory information on ORP developed by the Board and titled, "An Overview of TRS and ORP for Employees Eligible to Elect ORP."

(A) Uniform and Unbiased. The purpose of this notification requirement is to ensure that all employees who become eligible to elect ORP are provided general, uniform and unbiased information on which to base their decision.

(B) Electronic Notification. An institution may meet this notification requirement by:

- (i) placing a link on its website to the Board's ORP website;
- (ii) providing the ORP-eligible employee with local internet/intranet access to the link to the Board's ORP website; and
- (iii) within the required timeframe, notifying the ORP-eligible employee in writing of the location of the link to the Board's ORP website.

(2) ORP Election Period Dates. Each ORP employer shall, within 15 business days of an ORP-eligible employee's initial ORP eligibility date, provide written notification to the ORP-eligible employee that indicates the beginning and ending dates of his or her ORP election period and the local procedures for submitting the election form and additional required paperwork.

(3) Participant's ORP Responsibilities. On or before an ORP-eligible employee's initial ORP eligibility date, which is the first day of his or her 90-day ORP election period, each ORP employer shall provide written notification to the ORP-eligible employee that:

- (A) an election of ORP entails certain responsibilities for the employee, including selection and monitoring of ORP companies and investments; and
- (B) the ORP employer has no fiduciary responsibility for the market value of a participant's ORP investments or for the financial stability of the ORP companies chosen by the participant.

(4) Possible Retiree Group Insurance Eligibility. ORP employers shall include in their normal out-processing procedures for ter-

minated employees, a notification to ORP participants that includes the following information:

- (A) the participant's possible future eligibility for retiree group insurance as an ORP retiree;
- (B) the ORP employer's policies for handling certification that an ORP participant meets the eligibility requirements for enrollment in retiree group insurance as an ORP retiree; and
- (C) for ORP employers that are covered under the group insurance program administered by ERS, a caution to the participant to refrain from withdrawing all of his or her ORP funds if the participant enrolls in the group insurance program administered by ERS as an ORP retiree or anticipates enrolling at a later date.
- (D) The notification may be either general in nature or specific to each participant.

(5) Verification of Notification Receipt. ORP employers shall develop forms and/or procedures to carry out the notification requirements in this subsection that provide documentation of the employee's acknowledgement of receipt of this information, including the date of receipt, such as a signature or electronic verification.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2016.

TRD-201604027
 Bill Franz
 General Counsel
 Texas Higher Education Coordinating Board
 Effective date: August 30, 2016
 Proposal publication date: May 20, 2016
 For further information, please call: (512) 427-6114



TITLE 22. EXAMINING BOARDS

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 322. PRACTICE

22 TAC §322.1

The Texas Board of Physical Therapy Examiners adopts an amendment to §322.1, concerning Provision of Services, without changes to the proposed text as published in the June 3, 2016, issue of the *Texas Register* (41 TexReg 3970).

The amendment to 22 TAC §322.1(d) adds the requirement for direct physical therapist-to-patient interaction during the reevaluation process and eliminates the requirement for a reexamination of the patient which implies completion of a comprehensive screening and testing process including patient history, systems review, and tests and measures.

No comments were received regarding the proposed amendment.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 15, 2016.

TRD-201604134

John P. Maline

Executive Director

Texas Board of Physical Therapy Examiners

Effective date: September 4, 2016

Proposal publication date: June 3, 2016

For further information, please call: (512) 305-6900



PART 22. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY

CHAPTER 501. RULES OF PROFESSIONAL CONDUCT

SUBCHAPTER C. RESPONSIBILITIES TO CLIENTS

22 TAC §501.76

The Texas State Board of Public Accountancy adopts an amendment to §501.76, concerning Records and Work Papers, without changes to the proposed text as published in the May 27, 2016, issue of the *Texas Register* (41 TexReg 3827). The rule will not be republished.

The amendment to §501.76 clarifies what constitutes Records and Work Papers and other minor revisions.

No comments were received regarding adoption of the amendment.

The amendment is adopted under the Public Accountancy Act (Act), Texas Occupations Code, §901.151 which provides the agency with the authority to amend, adopt and repeal rules deemed necessary or advisable to effectuate the Act.

No other article, statute or code is affected by the adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 10, 2016.

TRD-201604028

Jerry Hill

General Counsel

Texas State Board of Public Accountancy

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For further information, please call: (512) 305-7842



TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 39. PRIMARY HEALTH CARE SERVICES PROGRAM

SUBCHAPTER B. TEXAS WOMEN'S HEALTH PROGRAM

25 TAC §§39.31 - 39.45

The Executive Commissioner of the Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (department), adopts the repeal of §§39.31 - 39.45, concerning the Texas Women's Health Program without changes as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3234) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The Texas Women's Health Program operates within the department's Preventive and Primary Care Unit's (PPCU) Primary Health Care Services Program, which has statutory authority to provide to eligible clients primary health care services, including family planning services and health screenings. The Texas Women's Health Program provides clients - women ages 18-44 who are at or below 185% of the federal poverty level - with family planning and related services, including annual contraceptives, testing for breast and cervical cancer, testing for sexually transmitted infections (STIs), and treatment for certain STIs.

In 2014, the Sunset Advisory Commission reviewed the Texas Health and Human Services enterprise, including its women's health programs. In December 2014, the Sunset Commission issued the management decision to require HHSC to consolidate the women's health care programs in order to improve service and efficiency for clients and providers. This decision included the recommendation to consolidate the existing Texas Women's Health Program at HHSC and the Expanded Primary Health Care Program at the department into one program and division at HHSC.

In response to the Sunset Commission's recommendations, the 84th Legislature enacted Texas Government Code, §531.0201(a)(2)(C) to transfer client services functions performed by the department to HHSC. Texas Government Code, §531.0204(a)(1) and (3)(A) were also enacted to require the Executive Commissioner of HHSC to develop a transition plan which included an outline of the HHSC's reorganized structure, and to define client services functions.

Furthermore, the 2016-17 General Appropriations Act, H.B. 1, 84th Legislature, Regular Session, 2015, merged the women's health strategies (DSHS Strategy B.1.3., Family Planning Services, and Strategy B.1.4., Community Primary Care Services) into a single strategy within the HHSC Budget (HHSC Strategy D.2.3., Women's Health Services). To increase access to women's health and family planning services, Rider 76, Article II, allocated \$100 million for the new women's health programs.

The transition plan developed by HHSC pursuant to Texas Government Code, §531.0204, included the transfer of women's health services performed in the HHSC Texas Women's Health Program and the department's Expanded Primary Health Care Program and Family Planning Program to HHSC as of September 1, 2015. HHSC's transition plan also details the consolidation of the Texas Women's Health Program and Expanded Primary Health Care Program.

On July 1, 2016, HHSC consolidated the Texas Women's Health Program and the Expanded Primary Healthcare Program into a new program fully funded by state general revenue. The new program was named the Healthy Texas Women Program. The Healthy Texas Women Program will be a successor program to the Medicaid Women's Health Program and therefore subject to Texas Human Resources Code, §32.024(c-1).

SECTION-BY-SECTION SUMMARY

New rules for the Healthy Texas Women Program are adopted under HHSC in 1 TAC Part 15, Chapter 382, Subchapter A. As a result, §§39.31 - 39.45 governing the department's Texas Women's Health Program are no longer necessary and must be repealed.

COMMENTS

The department, on behalf of HHSC, did not receive any comments regarding the proposed repeal of rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services, General Counsel, Lisa Hernandez, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

These repeals are authorized generally by Health and Safety Code, §12.001 and §1001.071, and more specifically by Health and Safety Code, §§31.002(a)(4)(C) and (H), 31.003, and 31.004, under which DSHS may establish a program providing primary health care services, including family planning services and health screenings, and adopt rules governing the type of services to be provided, the eligibility of recipients, and administration of the program. In addition, Government Code, §531.0055 and Health and Safety Code, §1001.075, authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2016.

TRD-201604122

Lisa Hernandez

General Counsel

Department of State Health Services

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Proposal publication date: May 6, 2016

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



CHAPTER 56. FAMILY PLANNING

25 TAC §§56.1 - 56.15, 56.18, 56.19

The Executive Commissioner of the Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (department), adopts the repeal of §§56.1 -

56.15, 56.18 and 56.19, concerning the Family Planning Program without changes as published in the May 6, 2016, issue of the *Texas Register* (41 TexReg 3235) and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The Family Planning Program provides statewide family planning services to low-income women and men who do not have other sources of payment for services. The target population is women and men of reproductive age who are at or below 250% of the Federal Poverty Level. Family planning services include preventive health, medical, counseling, and educational services.

The repeal of the rules implements the Sunset Commission's recommendation that the administration of the Family Planning Program be transferred to HHSC from the department. New Family Planning Program rules are adopted under 1 TAC, Part 15, Chapter 382, Subchapter B, concerning the Family Planning Program. In response to the Sunset Commission's recommendation, the 84th Texas Legislature enacted Texas Government Code, §531.0201(a)(2)(C), to transfer client services functions performed by the department to HHSC. Texas Government Code, §531.0204(a)(1) and (3)(A) were also enacted to require the Executive Commissioner of the HHSC to develop a transition plan which included an outline of the HHSC's reorganized structure, and a definition of client services functions.

The transition plan developed by HHSC pursuant to Texas Government Code, §531.0204, included the transfer of women's health services performed by the department's Family Planning Program to HHSC as of September 1, 2015. HHSC's transition plan also details the expansion of the Family Planning Program to serve more women with a larger array of services. HHSC's updated Family Planning Program began operating on July 1, 2016.

SECTION-BY-SECTION SUMMARY

The repeal of §§56.1 - 56.15, 56.18 and 56.19 will remove the Family Planning Program rules from the department rules in its entirety. New Family Planning Program rules are adopted under HHSC in 1 TAC, Part 15, Chapter 382, Subchapter B, concerning the Family Planning Program.

COMMENTS

The department, on behalf of HHSC, did not receive any comments regarding the proposed repeal of rules during the comment period.

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Texas Health and Safety Code, Chapter 1001.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2016.

TRD-201604129

Lisa Hernandez
General Counsel
Department of State Health Services
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Proposal publication date: May 6, 2016
For further information, please call: (512) 776-6972

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CHAPTER 61. CHRONIC DISEASES
SUBCHAPTER C. BREAST AND CERVICAL
CANCER SERVICES

25 TAC §61.33

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), adopts an amendment to §61.33, concerning the Breast and Cervical Cancer Services (BCCS) Program, without changes to the proposed text as published in the March 18, 2016, issue of the *Texas Register* (41 TexReg 2085). The section will not be republished.

BACKGROUND AND PURPOSE

The BCCS Program provides access to high-quality breast and cervical cancer screening and diagnostic services for eligible Texas women who are unable to access the same care through other funding sources or programs. Services may include clinical breast examinations and mammograms to screen for breast cancer, and pelvic examinations and Pap tests to screen for cervical cancer. Diagnostic services and case management are also provided for women with abnormal breast or cervical cancer screening results.

The BCCS Program is the access point for women to apply for Medicaid for breast and cervical cancer services in order to access cancer treatment. Services are provided through contracts with non-profit agencies, local health departments, hospitals, and community health centers.

The purpose of the amendment is to revise language describing which providers are eligible to apply and be reimbursed for providing services in the BCCS Program. The amendment is necessary to comply with Article II, Rider 72 (relating to the BCCS Program) of the General Appropriations Act for State Fiscal Years 2016 and 2017 (House Bill 1, 84th Legislature, Regular Session, 2015, Art. II, at II-72). Article II, Rider 72 specifies that BCCS funds may be used to compensate only providers that satisfy the eligibility requirements for the Texas Women's Health Program (TWHP), except in very limited circumstances. Accordingly, BCCS providers must be eligible to participate in the TWHP and comply with the relevant TWHP statute, which can be found in Texas Human Resources Code, §32.024(c-1), and rules in 25 Texas Administrative Code, §39.33 and §39.38. Rider 72 also enables the department to compensate local providers, for BCCS purposes, that are not eligible to participate in the TWHP if the department is unable to locate a sufficient number of TWHP eligible providers in a certain region.

SECTION-BY-SECTION SUMMARY

New §61.33(a) requires BCCS providers to be eligible to participate in the TWHP in order to participate in BCCS and to be reimbursed for services provided in the BCCS Program. Specifically, §61.33(a) requires BCCS providers to comply with the TWHP requirements set forth under 25 TAC, Subchap-

ter B, §39.33 (relating to Definitions) and §39.38 (relating to Health-Care Providers), including the requirement that providers do not perform or promote elective abortions, and are not affiliates of entities that perform or promote elective abortions. The term "affiliate" is defined in §39.33(1), and the term "promote" is defined in §39.38(c).

New §61.33(b) allows the department to contract with providers, for purposes of the BCCS Program, that are not eligible to participate in the TWHP, if the department is unable to locate a sufficient number of TWHP eligible providers in a certain region. Section 61.33(b) sets forth a list of non-exhaustive factors that the department will use when determining whether a certain region has a sufficient number of TWHP eligible providers.

New §61.33(c) requires BCCS providers to provide the department, or its designee, with all requested information to determine the provider's compliance with program requirements.

New §61.33(d) provides that if the department, or its designee, determines that a BCCS provider has failed to comply with the requirements of this section, then the department, or its designee, will disqualify the provider from BCCS.

New §61.33(e) provides that if a BCCS provider is disqualified, the department, or its designee, will take appropriate action to assist an impacted BCCS client to find an alternative provider, and will recoup any funds paid to the disqualified provider for BCCS performed during the period of disqualification.

COMMENTS

The department did not receive any comments regarding the proposed rules during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services, General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code, §531.0055(e), and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Texas Health and Safety Code, Chapter 1001.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 12, 2016.

TRD-201604132

Lisa Hernandez

General Counsel

Department of State Health Services

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

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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

On behalf of the School Land Board ("SLB"), the General Land Office ("GLO") adopts 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), without changes to the proposed text as published in the July 8, 2016, issue of the *Texas Register* (41 TexReg 4952). The amended text will not be republished.

The adopted 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.

COMMENTS BY THE PUBLIC

The GLO did not receive any comments on the amendments.

STATUTORY AUTHORITY

This adopted amendment to 31 TAC §9.51 is adopted 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.

STATUTES AFFECTED

Texas Natural Resources Code Chapter 52 is affected by this adoption.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 15, 2016.

TRD-201604137

Anne L. Idsal

Chief Clerk, Deputy Land Commissioner

General Land Office

Effective date: September 4, 2016

Proposal publication date: July 8, 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) adopts 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, without changes to the proposed text as published July 8, 2016, issue of the *Texas Register* (41 TexReg 4953). The adopted text will not be republished.

INTRODUCTION AND BACKGROUND

The adopted 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 Section 51.413(b) of the Texas Natural Resources Code.

COMMENTS BY THE PUBLIC

The GLO did not receive any comments on the amendments.

STATUTORY AUTHORITY

The amendment is adopted 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.

STATUTES AFFECTED

Texas Natural Resources Code §51.413 and §32.061 are affected by this adopted rulemaking action.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 15, 2016.

TRD-201604141

Anne L. Idsal

Chief Clerk, Deputy Land Commissioner

School Land Board

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For further information, please call: (512) 475-1859



TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Texas Health and Human Services Commission (HHSC) adopts, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §97.2 and new §97.202 in Chapter 97, Licensing Standards for Home and Community Support Services Agencies. The amendment to §97.2 is

adopted with changes to the proposed text published in the April 22, 2016, issue of the *Texas Register* (41 TexReg 2880). The amendment to §97.202 is adopted without changes to the proposed text.

The amendment and new section are adopted, in part, to implement House Bill 4001, 84th Legislature, Regular Session, 2015, which amends Texas Health and Safety Code, Chapter 142, governing home and community support services agencies (HCSSA). House Bill 4001 adds habilitation as a service that a HCSSA provides and defines "habilitation" as services described in Texas Government Code §534.001 that are delivered by a licensed HCSSA. Therefore, the adoption allows a licensed HCSSA to provide habilitation and requires those services to be provided in accordance with Title 40, Texas Administrative Code, Chapter 97. The adoption does not require an entity providing habilitation to obtain a HCSSA license if the entity does not provide any other service for which a license is required - home health, hospice, or personal assistance services. The adoption also includes minor editorial changes for clarity and consistency.

DADS received written comments from the Coalition for Nurses in Advanced Practice. A summary of the comment and the response follows.

Comment: A commenter requested that the definition of "advanced practice nurse" in §97.2 be changed to "advanced practice registered nurse" to reflect changes to the Nursing Practice Act in 2013. The commenter further requested amending the definition of "practitioner" to change the term "advanced practice nurse" to "advanced practice registered nurse."

Response: The agency agrees that the term "advanced practice registered nurse" should replace "advanced practice nurse." The agency has added a definition of "advanced practice registered nurse" and used the term in the definition of "practitioner." The term "advanced practice nurse" cannot be deleted from the definitions because the term is used in sections of Chapter 97 that are not being amended. Therefore, the definition of "advanced practice nurse" has been amended to mean an "advanced practice registered nurse" and when all uses of the term "advanced practice nurse" in Chapter 97 have been removed, the term can be eliminated from the definitions.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §97.2

The amendment is adopted 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, Chapter 142 which authorizes the executive commissioner to license and regulate home and community support services agencies.

§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--Alternative 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) Advanced practice nurse--An advanced practice registered nurse.

(7) Advanced practice registered nurse--A person licensed by the Texas Board of Nursing as an advanced practice registered nurse. The term is synonymous with "advanced practice nurse."

(8) 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.

(9) 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.

- (10) Agency--A home and community support services agency.
- (11) 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.
- (12) 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.
- (13) Association--A partnership, limited liability company, or other business entity that is not a corporation.
- (14) Audiologist--A person who is currently licensed under the Texas Occupations Code, Chapter 401, as an audiologist.
- (15) Bereavement--The process by which a survivor of a deceased person mourns and experiences grief.
- (16) 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.
- (17) Biologicals--A medicinal preparation made from living organisms and their products, including serums, vaccines, antigens, and antitoxins.
- (18) Boarding home facility--An establishment defined in Texas Health and Safety Code §260.001(2).
- (19) 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.
- (20) 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.
- (21) 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.
- (22) 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.).
- (23) Certified home health services--Home health services that are provided by a certified agency.
- (24) 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.
- (25) 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.
- (26) Chief financial officer--An individual who is responsible for supervising and managing all financial activities for a home and community support services agency.
- (27) 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.
- (28) 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.
- (29) 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.
- (30) 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.
- (31) 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.
- (32) 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, se-

cured creditor, or other person who does not exercise formal or actual influence or control over the operation of an agency.

(33) Conviction--An adjudication of guilt based on a finding of guilt, a plea of guilty, or a plea of nolo contendere.

(34) 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.

(35) DADS--Department of Aging and Disability Services.

(36) Day--Any reference to a day means a calendar day, unless otherwise specified in the text. A calendar day includes weekends and holidays.

(37) Deficiency--A finding of noncompliance with federal requirements resulting from a survey.

(38) Designated survey office--A DADS Home and Community Support Services Agencies Program office located in an agency's geographic region.

(39) 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.

(40) 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.

(41) 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.

(42) ESRD--End stage renal disease. 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.

(43) Functional need--Needs of the individual that require services without regard to diagnosis or label.

(44) Habilitation--Habilitation services, as defined by Texas Government Code §534.001, provided by an agency licensed under this chapter.

(45) Health assessment--A determination of a client's physical and mental status through inventory of systems.

(46) Home and community support services agency--A person who provides home health, hospice, habilitation, or personal assistance services for pay or other consideration in a client's residence, an independent living environment, or another appropriate location.

(47) 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).

(48) 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.

(49) 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.

(50) 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.

(51) 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).

(52) 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).

(53) 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.

(54) 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.

(55) Individual and family choice and control--Individuals and families who express preferences and make choices about how their support service needs are met.

(56) 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.

(57) 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.

(58) IRoD--Informal review of deficiencies. An informal process that allows an agency to refute a deficiency or violation cited during a survey.

(59) 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.

(60) 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.

(61) LAR--Legally authorized representative. 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.

(62) Licensed vocational nurse--A person who is currently licensed under Texas Occupations Code, Chapter 301, as a licensed vocational nurse.

(63) 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).

(64) Local emergency management agencies--The local emergency management coordinator, fire, police, and emergency medical services.

(65) Local emergency management coordinator--The person identified as the emergency management coordinator by the mayor or county judge in an agency's service area.

(66) 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.

(67) Medication administration record--A record used to document the administration of a client's medications.

(68) 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.

(69) Mitigation--An action taken to eliminate or reduce the probability of a disaster, or reduce a disaster's severity or consequences.

(70) Multiple location--A Medicare-approved alternate delivery site that meets the definition in 42 CFR §418.3.

(71) Notarized copy--A sworn affidavit stating that attached copies are true and correct copies of the original documents.

(72) Nursing facility--An institution licensed as a nursing home under the Texas Health and Safety Code, Chapter 242.

(73) 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.

(74) Occupational therapist--A person who is currently licensed under the Occupational Therapy Practice Act, Texas Occupations Code, Chapter 454, as an occupational therapist.

(75) 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).

(76) Original active client record--A record composed first-hand for a client currently receiving services.

(77) 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.

(78) Parent agency--An agency that develops and maintains administrative controls and provides supervision of branch offices and alternate delivery sites.

(79) Parent company--A person, other than an individual, who has a direct 100 percent ownership interest in the owner of an agency.

(80) Person--An individual, corporation, or association.

(81) 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.

(82) 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.

(83) 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.

(84) Pharmacist--A person who is licensed to practice pharmacy under the Texas Pharmacy Act, Texas Occupations Code, Chapter 558.

(85) 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.

(86) Physical therapist--A person who is currently licensed under Texas Occupations Code, Chapter 453, as a physical therapist.

(87) 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).

(88) Physician assistant--A person who is licensed under the Physician Assistant Licensing Act, Texas Occupations Code, Chapter 204, as a physician assistant.

(89) 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.

(90) Place of business--An office of a home and community support services agency that maintains client records or directs home health, hospice, habilitation, 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.

(91) Plan of care--The written orders of a practitioner for a client who requires skilled services.

(92) 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 an advanced practice registered nurse.

(93) Preparedness--Actions taken in anticipation of a disaster.

(94) 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.

(95) 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.

(96) 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.

(97) Recovery--Activities implemented during and after a disaster response designed to return an agency to its normal operations as quickly as possible.

(98) 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).

(99) Residence--A place where a person resides, including a home, a nursing facility, a convalescent home, or a residential unit.

(100) 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.

(101) Respiratory therapist--A person who is currently licensed under Texas Occupations Code, Chapter 604, as a respiratory care practitioner.

(102) 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.

(103) 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.

(104) Restraint--A restraint is:

(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 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.

(105) RN--Registered nurse. A person who is currently licensed under the Nursing Practice Act, Texas Occupations Code, Chapter 301, as a registered nurse.

(106) 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.

(107) Section--A reference to a specific rule in this chapter.

(108) Service area--A geographic area established by an agency in which all or some of the agency's services are available.

(109) 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.

(110) Social worker--A person who is currently licensed as a social worker under Texas Occupations Code, Chapter 505.

(111) Speech-language pathologist--A person who is currently licensed as a speech-language pathologist under Texas Occupations Code, Chapter 401.

(112) Statute--The Texas Health and Safety Code, Chapter 142.

(113) Substantial compliance--A finding in which an agency receives no recommendation for enforcement action after a survey.

(114) 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.

(115) 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.

(116) 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.

(117) Support services--Social, spiritual, and emotional care provided to a client and a client's family by a hospice.

(118) 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.

(119) Terminal illness--An illness for which there is a limited prognosis if the illness runs its usual course.

(120) 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.

(121) 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.

(122) Violation--A finding of noncompliance with this chapter or the statute resulting from a survey.

(123) Volunteer--An individual who provides assistance to a home and community support services agency without compensation other than reimbursement for actual expenses.

(124) Working day--Any day except Saturday, Sunday, a state holiday, or a federal holiday.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Lawrence Hornsby

General Counsel

Department of Aging and Disability Services

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Proposal publication date: April 22, 2016

For further information, please call: (512) 438-3791



SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

DIVISION 1. GENERAL PROVISIONS

40 TAC §97.202

The new section is adopted 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, Chapter 142 which authorizes the executive commissioner to license and regulate home and community support services agencies.

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PART 15. TEXAS VETERANS COMMISSION

CHAPTER 460. FUND FOR VETERANS' ASSISTANCE PROGRAM

The Texas Veterans Commission (Commission) adopts amendments to Title 40, Part 15, Chapter 460, Subchapter A, §460.10, concerning Limitations on Grant Funds; Subchapter B, §460.21, concerning Monitoring Activities; and Subchapter C, §460.31, concerning Noncompliance without changes to the proposed text as published in the May 20, 2016, issue of the *Texas Register* (41 TexReg 3629). The amendments will not be republished.

The amended rules are adopted following a comprehensive review of the chapter under Government Code §2001.039, which requires each state agency to periodically review and consider for readoption each of its rules. The Commission has determined that the need for these rules continues to exist but that they should be amended to update obsolete references to provide current citations to the Code of Federal Regulations which provide a government-wide framework for grants management. Previous federal regulations found in OMB Circulars are now superseded by recent modifications to the Uniform Grant Guidance in the Code of Federal Regulations.

No comments were received regarding the proposed amendments.

SUBCHAPTER A. GENERAL PROVISIONS REGARDING THE FUND FOR VETERANS' ASSISTANCE PROGRAM

40 TAC §460.10

STATUTORY AUTHORITY

The amended rules are adopted under Texas Government Code §434.010, which provides the Texas Veterans Commission with the authority to establish rules that it considers necessary for the effective administration of the agency; and Texas Government

Code §434.017, which authorizes the Commission to establish rules governing the award of grants by the Commission.

The amendments implement the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 463-1549



SUBCHAPTER B. MONITORING ACTIVITIES

40 TAC §460.21

STATUTORY AUTHORITY

The amended rules are adopted under Texas Government Code §434.010, which provides the Texas Veterans Commission with the authority to establish rules that it considers necessary for the effective administration of the agency; and Texas Government Code §434.017, which authorizes the Commission to establish rules governing the award of grants by the Commission.

The amendments implement the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200.

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For further information, please call: (512) 463-1549



SUBCHAPTER C. CORRECTIVE ACTION

40 TAC §460.31

STATUTORY AUTHORITY

The amended rules are adopted under Texas Government Code §434.010, which provides the Texas Veterans Commission with the authority to establish rules that it considers necessary for the effective administration of the agency; and Texas Government Code §434.017, which authorizes the Commission to establish rules governing the award of grants by the Commission.

The amendments implement the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. Part 200.

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