

PROPOSED RULES

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

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

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

The Texas Health and Human Services Commission (HHSC) proposes the repeal of §355.113, concerning Reimbursement for Developmental Rehabilitation Therapy Services for Infants and Toddlers with Disabilities or Developmental Delays; §§355.8423 - 355.8426, concerning the cost determination process for the Early Childhood Intervention (ECI) program; and §§355.9001 - 355.9010 and §§355.9012 - 355.9014, concerning the reimbursement methodology for ECI case management services. HHSC also proposes amendments to §355.8421, concerning General Reimbursement Information; and §355.8422, concerning Cost Reporting Procedures.

Background and Justification

The amendments and repeals are proposed to consolidate the reimbursement methodology for the ECI program services related to case management and rehabilitative services into two rules. The proposed amendments incorporate references to the cost determination process rules in Subchapter A of this chapter regarding the reporting of costs.

The Centers for Medicare and Medicaid Services (CMS) informed HHSC that the current monthly unit of service for case management in the ECI program was not acceptable. The proposed amendment to §355.8421 eliminates the monthly unit of service, replaces it with a 15-minute unit of service, and defines two types of units of service. The first type of service is a face-to-face comprehensive plan development visit, and the second is a follow-up telephone visit. CMS has indicated that a 15-minute unit of service is acceptable.

The proposed repeals will help consolidate the rules across Medicaid programs, clarify the reimbursement methodology for ECI, and delete duplicate and outdated information.

Section-by-Section Summary

The sections proposed for repeal that concern the reimbursement methodology for case management and specialized rehabilitation services are replaced by new reimbursement methodologies for those services in amended §355.8421 and §355.8422, respectively. The sections proposed for repeal that concern the cost determination process are replaced by references in §355.8421 and §355.8422 to the cost determination process rules in Chapter 355, Subchapter A.

The changes to §355.8421 are as follows:

The section is renamed "Reimbursement for Case Management Services for Infants and Toddlers with Developmental Disabilities," and all current rule language is stricken and replaced.

Proposed subsection (a) eliminates out-of-date references to the Texas Department of Health and outdated rules and establishes the Department of Assistive and Rehabilitative Services (DARS) as the agency responsible for determining program eligibility. A reference was added to identify where the rate determination authority can be found.

Proposed new subsection (b) adds language indicating that the 15-minute unit of service is prospective and uniform statewide. Paragraphs (1) and (2) specify the types of services provided.

Proposed new subsection (c) describes the reimbursement methodology. Paragraph (1) describes the reimbursement methodology for determining initial rates effective October 1, 2011. Paragraph (2) describes the reimbursement methodology for determining cost report-based rates, which will be implemented after HHSC determines that collected cost data is reliable and sufficient to support development of a cost report-based rate.

Proposed new subsection (d) describes the cost reporting process and references the cost determination process rules that govern cost reporting and adjustments to reported costs.

The changes to §355.8422 are as follows:

The section is renamed "Reimbursement for Specialized Rehabilitation Services for Infants and Toddlers with Developmental Disabilities," and all current rule language is stricken and replaced.

Proposed new subsection (a) adds language to establish DARS as the agency responsible for determining program eligibility. A reference was added to identify where the rate determination authority can be found.

Proposed new subsection (b) adds language indicating that the unit of service is one hour and will be pro-rated for 15-minute intervals on an individual and group basis.

Proposed new subsection (c) describes the reimbursement methodology. Paragraph (1) describes the reimbursement methodology for determining initial rates effective October 1, 2011. Paragraph (2) describes the reimbursement methodology for determining cost report-based rates, which will be implemented after HHSC determines that collected cost data is reliable and sufficient to support development of a cost report-based rate.

Proposed new subsection (d) describes the cost reporting process and references the cost determination process rules that govern cost reporting and adjustments to reported costs.

Fiscal Note

Greta Rymal, Deputy Executive Commissioner for Financial Services, has determined that, during the first five-year period the amended and repealed rules are in effect, there will be no fiscal impact to the state or local governments because the new rates developed under this methodology will be modeled using the current expenditures for delivering this service with a goal of maintaining current expenditures. To maintain budget neutrality, the number of unit-of-service visits that can be billed will be limited through program billing rules or policy guidelines developed by DARS.

Small and Micro-business Impact Analysis

Carolyn Pratt, Director of Rate Analysis, has determined that there will be no adverse economic effect on small or micro-businesses as a result of enforcing or administering the proposed amendments or repeals, because the proposal will not require them to alter their business or administrative practices. There is no anticipated economic cost to persons who are required to comply with the proposed amendments or repeals. There is no anticipated effect on local employment in geographic areas affected by the proposal.

Public Benefit

Carolyn Pratt has also determined that for each year of the first five years the proposal is in effect, the expected public benefit of the repeal of the rules is the elimination of duplicate and obsolete rules. The public benefit of the rule amendments is that HHSC will provide consistency in the cost reporting rules with other HHSC programs that submit cost reports and will define the new reimbursement methodologies for these services.

Regulatory Analysis

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

Takings Impact Assessment

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

Public Comment

Written comments on the proposal may be submitted to Yvonne Moorad, Senior Rate Analyst, Acute Care Services, Rate Analysis Department, Texas Health and Human Services Commission, P.O. Box 85200, MC-H400, Austin, Texas 78708-5200; by fax to (512) 491-1998; or by e-mail to Yvonne.Moorad@hhsc.state.tx.us within 30 days of publication of this proposal in the *Texas Register*.

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.113

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

Statutory Authority

The repeal is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32.

The repeal affects the Texas Human Resources Code, Chapter 32; and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.113. *Reimbursement for Developmental Rehabilitation Therapy Services for Infants and Toddlers with Disabilities or Developmental Delays.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101761

Steve Aragon

Chief Counsel

Texas Health and Human Services Commission

Earliest possible date of adoption: June 26, 2011

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



SUBCHAPTER J. PURCHASED HEALTH SERVICES

DIVISION 22. REIMBURSEMENT

METHODOLOGY FOR THE EARLY

CHILDHOOD INTERVENTION PROGRAM

1 TAC §355.8421, §355.8422

Statutory Authority

The amendments are proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32.

The amendments affect the Texas Human Resources Code, Chapter 32; and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.8421. Reimbursement for Case Management Services for Infants and Toddlers with Developmental Disabilities [General Reimbursement Information].

(a) Authority. Payments are made to qualified providers delivering case management services to Medicaid-eligible individuals who are eligible for services in the Early Childhood Intervention Program (ECI) according to the program rules established by the Department of Assistive and Rehabilitative Services (DARS). The reimbursement determination authority is specified in §355.101 of this title (relating to Introduction). [The Texas Department of Health (department) reimburses Early Childhood Intervention (ECI) Program providers according to the reimbursement methodology in §32.11 of this title (relating to Case Management for Individuals with Mental Retardation or Related Condition). The department will develop a specific reimbursement methodology using cost-based prospective rates after the provider implements service delivery under the ECI program and all cost and statistical data are available.]

(b) Unit of service. Qualified providers are reimbursed based on a 15-minute unit of service that is a prospective and uniform statewide rate for the following types of services:

- (1) face-to-face case management visit; and
- (2) telephone case management visit.

(c) Rate methodology.

(1) Initial rates. The rate effective October 1, 2011, will be the initial statewide rate.

(2) Cost report-based rates. After the Health and Human Services Commission (HHSC) determines that cost data collected as described in subsection (d) of this section is reliable and sufficient to support development of a cost report-based rate, HHSC will develop statewide reimbursement rates using that data to replace the initial rates as follows:

(A) Project each provider's total allowable cost per type of service from the historical cost reporting period to the prospective reimbursement period, using inflation factors according to §355.108 of this title (relating to Determination of Inflation Indices), to arrive at the projected cost per type of service;

(B) For each provider, divide the projected cost per type of service, determined in subparagraph (A) of this paragraph, by the provider's total units of service per type of service delivered during the historical cost reporting period, to arrive at the provider's projected cost per unit of service for each type of service; and

(C) For each type of service:

(i) Arrange all providers' projected cost per unit of service in an array from low to high, with the corresponding total number of units of service for each provider;

(ii) Sum the total number of units of service for each provider in the array progressively from low to high to create a running total;

(iii) Divide the total number of units of service by two;

(iv) Identify the value, from the running total sums calculated in clause (ii) of this subparagraph, that is closest to the result in clause (iii) of this subparagraph; and

(v) Identify the cost per unit of service that corresponds to the value identified in clause (iv) of this subparagraph, to arrive at the recommended rate for that service.

(d) Reporting of costs.

(1) All case management service providers must submit a cost report unless the number of days between the date the first client received services and the fiscal year end is 30 days or fewer. A provider may be excused from submitting a cost report if circumstances beyond the control of the provider make cost-report completion impossible, such as the loss of records due to natural disaster or removal of records from the provider's custody by any governmental entity. Requests to be excused from submitting a cost report must be received by the HHSC Rate Analysis Department before the due date of the cost report as set out in §355.105(c) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(2) Cost reporting. Case management service providers must submit cost report data according to HHSC's specifications. In addition to the requirements of this section, the following cost reporting requirements apply: §355.101 of this title (relating to Introduction), §355.102 of this title (relating to General Principles of Allowable and Unallowable Costs), §355.103 of this title (relating to Specifications for Allowable and Unallowable Costs), §355.104 of this title (relating to Revenues), §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures), §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), §355.107 of this title (relating to Notification of Exclusions and Adjustments), §355.108 of this title (relating to Determination of Inflation Indices), §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs), §355.110 of this title (relating to Informal Reviews and Formal Appeals), and §355.111 of this title (relating to Administrative Contract Violations).

(3) Providers are responsible for reporting only allowable costs on the cost report, except where cost report instructions indicate that other costs are to be reported in specific lines or sections. Only allowable cost information is used to determine recommended rates. To ensure that the database reflects costs and other information that are necessary for the provision of services and is consistent with federal and state regulations, HHSC excludes from rate determination any unallowable expenses included in the cost report and makes the appropriate adjustments to expenses and other information reported by providers.

(4) Individual provider cost reports may not be included in the database used for reimbursement determination if:

(A) there is reasonable doubt as to the accuracy or allowability of a significant part of the information reported; or

(B) an auditor determines that the reported costs are not verifiable.

§355.8422. Reimbursement for Specialized Rehabilitation Services for Infants and Toddlers with Developmental Disabilities [Cost Reporting Procedures].

(a) Authority. Payments are made to qualified providers delivering specialized rehabilitation services to Medicaid-eligible individuals who are eligible for services in the Early Childhood Intervention Program (ECI) according to the program rules established by the Department of Assistive and Rehabilitative Services (DARS). The reimbursement determination authority is specified in §355.101 of this title (relating to Introduction). [Provider agencies must submit to the Texas Department of Health (department) financial and statistical information at least annually on cost report forms provided by the department or on forms which are formatted according to department specifications and are preapproved by the department staff. Providers must complete the cost report according to the rules and specifications set forth in this section. The department determines reimbursement rates as specified

in 40 TAC §24.101 and §24.102 (concerning General Specifications and Methodology).]

{(1) Cost report due date. Unless otherwise notified, provider agencies must submit cost reports to the department no later than 90 days following receipt of the cost report forms.}

{(2) Extension of due date. The department may grant extensions of due dates for good cause. A good cause is defined as one that the provider agency could not reasonably be expected to control. Provider agencies must submit requests for extensions in writing to the department before the cost report due date. Staff of the department's Provider Reimbursement Section respond to requests within 10 work-days of receipt.}

{(3) Reporting period. The provider agency must prepare the cost report to reflect the activities of the provider agency during the previous contract year. Cost reports may be required for other periods at the department's discretion. If a provider agency terminates its contract (provider agreement) with the department, the provider must submit a cost report for that period beginning with the first day not included in a previous cost reporting period and ending with the effective date of termination of its provider agreement.}

{(4) Failure to file an acceptable cost report. If a provider agency fails to file a cost report or cost report supplement according to all applicable rules and instructions, the department may withhold all provider payments until the provider agency submits an acceptable cost report.}

{(5) Accounting requirements. The provider agency must ensure that financial and statistical information submitted in cost reports is based upon the accrual method of accounting, except for governmental institutions operated on the cash method of accounting. The provider agency's treatment of any financial or statistical item must reflect the application of the generally accepted accounting principles (GAAP) approved by the American Institute of Certified Public Accountants.}

{(6) Allocation method. If allocation of cost is necessary, provider agencies must use reasonable methods of allocation. The department adjusts allocated costs if the department considers the allocation method to be unreasonable. The provider agency must retain work papers supporting allocations.}

{(7) Cost report certification. Provider agencies must certify the accuracy of cost reports submitted to the department in the format specified by the department. Provider agencies may be liable for civil and/or criminal penalties in the case of misrepresented or falsified information.}

{(8) Cost report supplements. The department may at times require additional financial and statistical information other than the information contained in the cost report.}

{(9) Review of cost reports. The department staff reviews each cost report to ensure that all financial and statistical information submitted conforms to all applicable rules and instructions. The review of the cost report includes a desk audit. The department reviews all cost reports according to the criteria in 40 TAC §24.201 (concerning Basic Objectives and Criteria for Desk Review of Cost Reports). If a provider agency fails to complete cost reports according to cost report instructions or rules, the department returns the cost reports to the provider agency for proper completion. The department may require information other than that contained in the cost report to substantiate reported information.}

{(10) On-site audits. The department may perform on-site audits on all provider agencies that participate in the ECI program. The

department determines the frequency and nature of audits but ensures that they are not less than that required by federal regulations related to the administration of the program.}

{(11) Notification of exclusions and adjustments. The department notifies providers of exclusions and adjustments to reported expenses made during desk reviews and on-site audits of cost reports as specified in 40 TAC §24.401 (concerning Notification).}

{(12) Access to records. Each provider agency or its designated agent(s) must allow access to any and all records necessary to verify information submitted to the department on cost reports. This requirement includes records pertaining to related-party transactions and other business activities engaged in by the provider agency. If a provider agency does not allow inspection of pertinent records within 30 days following written notice from the department, the department places a hold on vendor payments until access to the records is allowed. If the provider agency continues to deny access to records, the department may cancel the provider agency's contract.}

{(13) Failure to maintain adequate records. If a provider agency fails to maintain adequate records to support the financial and statistical information reported in cost reports, the department allows 90 days for the provider agency to bring recordkeeping into compliance. If a provider agency fails to correct deficiencies within 90 days from the date of notification of the deficiency, the department may cancel the provider agency's contract for services.}

(b) Unit of service. The unit of service is one hour and will be pro-rated for 15-minute intervals for specialized rehabilitation services on an individual and group basis.

(c) Rate methodology.

(1) Initial rates. The rate effective October 1, 2011, will be the initial statewide rate.

(2) Cost report-based rates. After the Health and Human Services Commission (HHSC) determines that cost data collected as described in subsection (d) of this section is reliable and sufficient to support development of a cost report-based rate, HHSC will develop statewide reimbursement rates using that data to replace the initial rates as follows:

(A) Project each provider's total allowable cost per type of service from the historical cost reporting period to the prospective reimbursement period, using inflation factors according to §355.108 of this title (relating to Determination of Inflation Indices), to arrive at the projected cost per type of service;

(B) For each provider, divide the projected cost per type of service, determined in subparagraph (A) of this paragraph, by the provider's total units of service per type of service delivered during the historical cost reporting period, to arrive at the provider's projected cost per unit of service for each type of service; and

(C) For each type of service:

(i) Arrange all providers' projected cost per unit of service in an array from low to high, with the corresponding total number of units of service for each provider;

(ii) Sum the total number of units of service for each provider in the array progressively from low to high to create a running total;

(iii) Divide the total number of units of service by
two;

(iv) Identify the value, from the running total sums calculated in clause (ii) of this subparagraph, that is closest to the result in clause (iii) of this subparagraph; and

(v) Identify the cost per unit of service that corresponds to the value identified in clause (iv) of this subparagraph, to arrive at the recommended rate for that service.

(d) Reporting of costs.

(1) All rehabilitation services providers must submit a cost report unless the number of days between the date the first client received services and the fiscal year end is 30 days or fewer. A provider may be excused from submitting a cost report if circumstances beyond the control of the provider make cost-report completion impossible, such as the loss of records due to natural disasters or removal of records from the provider's custody by any governmental entity. Requests to be excused from submitting a cost report must be received by the HHSC Rate Analysis Department before the due date of the cost report as set out in §355.105(c) of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures).

(2) Cost reporting. Rehabilitation services providers must submit cost report data according to HHSC's specifications. In addition to the requirements of this section, the following cost reporting requirements apply: §355.101 of this title (relating to Introduction), §355.102 of this title (relating to General Principles of Allowable and Unallowable Costs), §355.103 of this title (relating to Specifications for Allowable and Unallowable Costs), §355.104 of this title (relating to Revenues), §355.105 of this title (relating to General Reporting and Documentation Requirements, Methods, and Procedures), §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), §355.107 of this title (relating to Notification of Exclusions and Adjustments), §355.108 of this title (relating to Determination of Inflation Indices), §355.109 of this title (relating to Adjusting Reimbursement When New Legislation, Regulations, or Economic Factors Affect Costs), §355.110 of this title (relating to Informal Reviews and Formal Appeals), and §355.111 of this title (relating to Administrative Contract Violations).

(3) Providers are responsible for reporting only allowable costs on the cost report, except where cost report instructions indicate that other costs are to be reported in specific lines or sections. Only allowable cost information is used to determine recommended rates. To ensure that the database reflects costs and other information that are necessary for the provision of services and is consistent with federal and state regulations, HHSC excludes from rate determination any unallowable expenses included in the cost report and makes the appropriate adjustments to expenses and other information reported by providers.

(4) Individual provider cost reports may not be included in the database used for reimbursement determination if:

(A) there is reasonable doubt as to the accuracy or allowability of a significant part of the information reported; or

(B) an auditor determines that the reported costs are not verifiable.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101762

Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900



1 TAC §§355.8423 - 355.8426

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

Statutory Authority

The repeals are proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32.

The repeals affect the Texas Human Resources Code, Chapter 32; and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

§355.8423. *Reimbursement Rate Determination.*

§355.8424. *Allowable Cost Information.*

§355.8425. *List of Allowable Costs.*

§355.8426. *List of Unallowable Costs.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
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**SUBCHAPTER M. MISCELLANEOUS
MEDICAID PROGRAMS
DIVISION 1. EARLY CHILDHOOD
INTERVENTION: REIMBURSEMENT
METHODOLOGY FOR CASE MANAGEMENT
SERVICES FOR INFANTS AND TODDLERS
WITH DEVELOPMENTAL DISABILITIES**

1 TAC §§355.9001 - 355.9010, 355.9012 - 355.9014

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Health and Human Services Commission or in the Texas

Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

Statutory Authority

The repeals are proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Texas Human Resources Code, Chapter 32.

The repeals affect the Texas Human Resources Code, Chapter 32; and the Texas Government Code, Chapter 531. No other statutes, articles, or codes are affected by this proposal.

- §355.9001. *Reimbursable Services.*
- §355.9002. *General Reimbursement Information.*
- §355.9003. *Methodology.*
- §355.9004. *TAFI Reporting Procedures.*
- §355.9005. *Basic Objectives and Criteria for Desk Review of Time and Financial Information (TAFI) Reports.*
- §355.9006. *Notification.*
- §355.9007. *Reimbursement Rate Determination.*
- §355.9008. *Determination of Inflation Indices.*
- §355.9009. *Adjusting Rates When New Legislation, Regulations, or Economic Factors Affect Costs.*
- §355.9010. *Allowable Cost Information.*
- §355.9012. *List of Allowable Costs.*
- §355.9013. *List of Unallowable Costs.*
- §355.9014. *Reviews and Administrative Hearings.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

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Steve Aragon
Chief Counsel

Texas Health and Human Services Commission

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



TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER D. RECORDS, REPORTS, AND OTHER REQUIRED INFORMATION

16 TAC §25.93

The Public Utility Commission of Texas (commission) proposes amendments to §25.93, relating to Quarterly Wholesale Electricity Transaction Reports. The proposed amendments will eliminate the requirement that the reports are filed quarterly with the commission. Instead, wholesale sellers will retain the wholesale transaction information and submit the information to the commission upon request. The amendments also delete subsection (f), concerning additional information needed during an investigation of market power abuse, because information needed during investigations is addressed in detail in §25.503(l) (relating to Oversight of Wholesale Market Participants). In addition, the amendments also delete subsection (g), concerning confidentiality, because the Public Information Act adequately addresses the treatment of confidential reports provided to the commission. Furthermore, the amendments delete subsection (h), concerning implementation, because this subsection addresses the initial implementation of the rule, which has already occurred, and because the amendments eliminate the submission of periodic reports. This rule is a competition rule subject to judicial review as specified in Public Utility Regulatory Act (PURA) §39.001(e). Project Number 39349 is assigned to this proceeding.

Tony Grasso, Competitive Markets Division, has determined that for each year of the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendments.

Mr. Grasso has determined that for each year of the first five years the proposed amendments are in effect the public benefit anticipated as a result of enforcing the amendments will be savings due to eliminating the mandatory reporting requirements, more efficient reporting of data to the commission, and less material maintained by the commission for recordkeeping purposes. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing these amendments. Therefore, no regulatory flexibility analysis is required. There is no anticipated economic cost to persons who are required to comply with the amendments as proposed; compliance costs are expected to decrease as a result of the amendments.

Mr. Grasso has also determined that for each year of the first five years the proposed amendments are in effect there should be no effect on a local economy, and therefore no local employment impact statement is required under Administrative Procedure Act (APA), Texas Government Code §2001.022.

The commission staff will conduct a public hearing on this rule-making, if requested pursuant to the Administrative Procedure Act, Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701. The request for a public hearing must be received within 31 days after publication.

Initial comments on the proposed amendments may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326, within 31 days after publication. Sixteen copies of comments to the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 45 days after publication. Comments should

be organized in a manner consistent with the organization of the amended rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed amendments. The commission will consider the costs and benefits in deciding whether to adopt the amendments. All comments should refer to Project Number 39349.

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 2008, Supplement 2010) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.001, which requires competitive rather than regulatory methods for achieving the goals of Chapter 39, finds that electric services and their prices should be determined by customer choices and the normal forces of competition, and finds that the competitive process should be protected in a manner that ensures the confidentiality of competitively sensitive information; PURA §39.101, which establishes that customers are entitled to protection from unfair, misleading, or deceptive practices and grants the commission the authority to adopt and enforce rules to carry out this provision and to ensure that retail customer protections are established that afford customers safe, reliable, and reasonably priced electricity; PURA §39.155, which grants the commission the authority to require reporting, in a manner that ensures the confidentiality of competitively sensitive information, by each person, municipally owned utility, electric cooperative, and river authority that owns generation facilities and offers electricity for sale in this state any information necessary for the commission to assess market power or the development of a competitive retail market in the state; PURA §39.157, which requires the commission to monitor market power; PURA §40.004, which authorizes the commission to require reports of municipally owned utility operations to the extent necessary to determine information relating to market power; and PURA §41.004, which authorizes the commission to require reports of electric cooperative operations to the extent necessary to determine information relating to market power.

Cross Reference to Statutes: Public Utility Regulatory Act §§14.002, 39.001, 39.101, 39.155, 39.157, 40.004, and 41.004.

§25.93. *Wholesale Electricity Transaction Information [Quarterly Wholesale Electricity Transaction Reports].*

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

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

(1) (No change.)

(2) Full Report--A [Quarterly] Wholesale Transaction Report that contains all information required by this rule including information that the Wholesale Seller of Electricity claims is confidential or Protected Information. If the Wholesale Seller of Electricity does not claim confidentiality or Protected Information status for any of the information in its Full Report then the Full Report will be treated as a Public Report.

(3) Protected information--Information contained in a [Quarterly] Wholesale Electricity Transaction Report that comports with the requirements for exception from disclosure under the Texas Public Information Act (TPIA).

(4) Public Report--A [Quarterly] Wholesale Transaction Report that contains all information required by this rule except infor-

mation that the Wholesale Seller of Electricity claims is confidential or Protected Information.

(5) - (6) (No change.)

(d) [Quarterly] Wholesale Electricity Transaction Reports.

(1) Wholesale sellers of electricity shall retain [report to the commission] information related to all wholesale electricity transactions with a point of delivery or point of receipt in Texas, including intermediate transactions involving electricity generated in Texas or electricity ultimately delivered to customers in Texas, and report to the commission, within seven days of a request by the Executive Director or the Executive Director's designee, transaction information for a specified period of time. Wholesale sellers of electricity shall retain transaction information as specified in §25.503 of this title (relating to Oversight of Wholesale Market Participants) [Reports shall be submitted quarterly and shall be due not later than 45 days after the last day of the quarter for which transactions are being reported].

(2) Reports shall provide contact information for the reporting entity, information on each wholesale electricity contract, and information on each transaction of electricity from the reporting entity to another party.

(A) (No change.)

(B) Each wholesale seller of electricity must report [file] information on each contract for electricity that is in effect during the reporting period, including those that will continue to be in effect past the end of the reporting period. Information shall include the name of purchaser, contract execution and termination dates, time period over which the contract is in effect, product type, price, and applicable information about where the power was generated, delivered, and received.

(C) Each wholesale seller of electricity must report [file] information on each transaction. Information shall include the time period over which the transaction was conducted; applicable information about where the power was generated, delivered, and received; product name; transaction quantity; price; total transaction charges; and cross-reference to a contract reported under subparagraph (B) of this paragraph. If the period of a transaction extends outside of the [over more than one] reporting period, the [each] report shall include only the portion of the transaction that occurred during the reporting period.

(D) Reporting parties may aggregate the following types of transactions:

(i) A municipally owned utility may aggregate data on the portion of its generation that it used to serve its native load. The aggregated number should be in total MWh for the reporting period [quarter], and need not include price.

(ii) A generation cooperative may aggregate data on cost-based sales to a distribution cooperative. The aggregated number should be in total MWh sold to each distribution cooperative for the reporting period [quarter], and need not include price.

(iii) A river authority may aggregate data on cost-based sales to a wholesale customer. The aggregated number should be in total MWh sold to each wholesale customer for the reporting period [quarter], and need not include price.

(iv) A qualifying facility may aggregate data on sales of electricity to a wholesale customer. The aggregated number should be in total MWh sold to each wholesale customer for the reporting period [quarter], and need not include price.

(v) Any reporting entity may aggregate data on sales of electricity or capacity to an independent system operator for balancing energy service, ancillary capacity services, or other services required by the independent system operator. This subparagraph includes sales by an entity that is qualified to sell the reporting entity's capacity and electricity to the independent system operator. The aggregated number should be in total MWh provided under each type of service for the reporting period [quarter], and need not include price.

(e) Filing procedures. Wholesale sellers of electricity shall file the [Quarterly] Wholesale Electricity Transaction Reports using forms, templates, and procedures approved by the commission. The commission may also approve the use of forms and templates issued by federal agencies for reporting information similar to that required under this section. Reports shall be filed according to §22.71 of this title (relating to Filing of Pleadings, Documents and Other Materials) and §22.72 of this title (relating to Formal Requisites of Pleadings and Documents to be Filed with the Commission) except as specified in this subsection [and subsection (g) of this section].

(1) A Full Report shall be submitted electronically [and on standard-format compact disks (two copies)] without a paper hard copy.

(2) If a Full Report is filed containing information that the Wholesale Seller of Electricity claims is confidential or is Protected Information, a Public Report shall also be submitted electronically [on standard-format compact disks (two copies)].

(3) (No change.)

[(f) Additional information. If during an investigation of market power abuse the commission determines that it needs contract and transaction information not included in the quarterly report, it may require any person or entity subject to this section to provide such additional information.]

[(g) Confidentiality. If a Full Report contains information which the Wholesale Seller of Electricity has claimed is confidential or is Protected Information, commission employees, and its consultants, agents, and attorneys shall treat the Full Report, including the electronic submission, as confidential to the same degree as information properly submitted under §22.71(d) of this title and shall not disclose protected information except as provided in this subsection and in accordance with the provisions of the Texas Public Information Act (TPIA).]

[(1) If the commission receives from a member of the Texas Legislature a request for protected information contained in a report, the commission shall provide the information to the requestor pursuant to the provisions of Texas Government Code Annotated §552.008. If permitted by the requesting member of the Texas Legislature the commission shall notify the reporting entity of the request, the identity of the requestor, and the substance of the request.]

[(2) If the commission receives a written request for protected information, the commission, through its General Counsel's office, shall make a good faith effort to provide notice of the request to the affected reporting entity within three business days of receipt of the request. If the reporting entity objects to the release of the information, the General Counsel's office shall offer to facilitate an informal resolution between the requestor and the reporting entity in conformance with Texas Government Code §552.222. If informal resolution of an information request is not possible, the General Counsel's office will process the request in accordance with the TPIA.]

[(3) In the absence of a request for information, if the commission staff seeks to release protected information, the commission may determine the validity of the asserted claim of confidentiality through a contested-case proceeding. In a contested case proceeding

conducted by the commission pursuant to this subsection, the staff and the entity that provided the information to the commission will have an opportunity to present information or comment to the commission on whether the information is subject to protection from disclosure under the TPIA.]

[(4) Any person who asserts a claim of confidentiality with respect to the information must, at a minimum, state in writing the specific reasons why the information is subject to protection from public disclosure and provide legal authority in support of such assertion.]

[(5) Except as otherwise provided in paragraph (1) of this subsection, if either the commission or the attorney general determines that the disclosure of protected information is permitted, the commission shall provide notice to the reporting entity at least three business days prior to the disclosure of the protected information or, in the case of a valid and enforceable order of a state or federal court of competent jurisdiction specifically requiring disclosure of protected information earlier than within three business days, prior to such disclosure.]

[(h) Implementation. The commission shall establish a detailed implementation process that includes training sessions to educate parties required to file under this section about the data required and the form in which it should be submitted, and technical workshops to permit the commission and filing parties to exchange technical systems information.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 13, 2011.

TRD-201101741

Adriana A. Gonzales

Rules Coordinator

Public Utility Commission of Texas

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 936-7223

TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 13. FINANCIAL PLANNING

SUBCHAPTER H. REPORTING OF TUITION AND FEES

19 TAC §13.142

The Texas Higher Education Coordinating Board proposes amendments to §13.142, concerning Reporting of Tuition and Fees. Specifically, two definitions are added, one for "exemptions" and one for "waivers." The other definitions are renumbered accordingly.

Mr. Dan Weaver, Assistant Commissioner for Business and Support Services, has determined that for each year of the first five years the amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Mr. Weaver has also determined that, for each year of the first five years the amendments are in effect, the public benefit antic-

ipated as a result of administering the sections will be a clearer understanding of the definitions used in the reporting of tuition and fees. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Dan Weaver, P.O. Box 12788, Austin, Texas 78711, 512-427-6165, dan.weaver@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the 2005 Tex. Sess. Law Serv., 288 (Vernon), which requires the Board to compile data on the tuition and fees charged at each two-year and four-year institution of public higher education and report that data to the Texas Legislature; and Texas Education Code, §54.053, which authorizes the Board to adopt rules to carry out the purposes of Texas Education Code, Chapter 54, Subchapter B.

The amendments affect 2005 Tex. Sess. Law Serv., 288 (Vernon) and Texas Education Code, Chapter 54, Subchapter B.

§13.142. Definitions.

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

(1) - (4) (No change.)

(5) Exemptions--Programs authorized by state statute that allow a resident, and in some cases a nonresident, student to enroll in an institution of higher education and pay a reduced amount of tuition and/or fees.

(6) [~~5~~] General academic teaching institution--An institution included in the provisions of Texas Education Code, §61.003(3).

(7) [~~6~~] Incidental fee--A mandatory fee authorized by the governing board of an institution and collected under Texas Education Code, §55.16 or §130.084, and levied at the discretion of the governing board of an institution that is charged to all students; or a discretionary fee collected under Texas Education Code, §54.504, for particular services provided to students.

(8) [~~7~~] Institution or institution of higher education--Any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in Texas Education Code, §61.003(8).

(9) [~~8~~] Mandatory fee--A fee authorized by statute or the governing board of an institution that is charged to a student upon enrollment. For institutions other than public community colleges, such fees would be required to be paid by the census date or other date as mandated by the state for formula funding purposes. Examples of such fees are: laboratory fees, course and incidental fees collected under Texas Education Code, §55.16(c), and other mandatory fees as authorized by the governing board of the institution. For public community colleges, such fees would include fees collected from students enrolled in state-funded continuing education courses.

(A) Laboratory fee--A mandatory fee that is charged under Texas Education Code, §54.501.

(B) Compulsory fee--A mandatory fee authorized under Texas Education Code, §§54.503, 54.5061, and 54.513.

(10) [~~9~~] Medical and dental unit--An institution included in the provisions of Texas Education Code, §61.003(5).

(11) [~~10~~] Optional fee--Has the same meaning as discretionary fee defined in paragraph (4) of this section.

(12) [~~11~~] Public junior or community college--Any junior or community college certified by the board in accordance with Texas Education Code, §61.063.

(13) [~~12~~] Public technical institute--An institution included in the provisions of Texas Education Code, §61.003(7).

(14) [~~13~~] Required fee--Has the same meaning as mandatory fee defined in paragraph (9) [~~8~~] of this section.

(15) [~~14~~] Tuition--Statutory, designated, and/or board-authorized tuition.

(A) Statutory tuition--A tuition charge authorized under Texas Education Code, §54.051, in an amount determined by the Texas Legislature for resident or nonresident students. This includes the charge for state-funded continuing education courses.

(B) Designated tuition--A tuition charge authorized under Texas Education Code, §54.0513, that institutions other than public community colleges may impose on any graduate or undergraduate, resident or nonresident student, in an amount that the governing board of the institution considers necessary for the effective operation of the institution.

(C) Board authorized tuition--A tuition charge that a general academic teaching institution or a medical and dental unit may impose on any graduate resident or nonresident student in an amount as specified in Texas Education Code, §54.008.

(16) [~~15~~] Tuition fee--Statutory, designated, and/or board-authorized tuition.

(17) Waivers--Programs authorized by state statute that allow a nonresident student to enroll in an institution of higher education and pay a reduced amount of nonresident tuition.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101748

Bill Franz

General Counsel

Texas Higher Education Coordinating Board

Proposed date of adoption: July 28, 2011

For further information, please call: (512) 427-6114



PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

19 TAC §97.1001

(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 19 TAC §97.1001 is not included in the print version of the Texas Register. The

figure is available in the on-line version of the May 27, 2011, issue of the *Texas Register*.)

The Texas Education Agency (TEA) proposes an amendment to §97.1001, concerning accountability. The section describes the state accountability rating system and annually adopts the most current accountability manual. The proposed amendment would adopt applicable excerpts of the *2011 Accountability Manual*. Earlier versions of the manual will remain in effect with respect to the school years for which they were developed.

Legal counsel with the TEA has recommended that the procedures for issuing accountability ratings for public school districts and campuses be adopted as part of the *Texas Administrative Code*. This decision was made in 2000 given a court decision challenging state agency decision making via administrative letter/publications. Given the statewide application of the accountability rating process and the existence of sufficient statutory authority for the commissioner of education to formally adopt rules in this area, portions of each annual accountability manual have been adopted since 2000. The accountability system evolves from year to year so the criteria and standards for rating and acknowledging schools in the most current year differ to some degree over those applied in the prior year. The intention is to annually update 19 TAC §97.1001 to refer to the most recently published accountability manual.

The proposed amendment to 19 TAC §97.1001 would adopt excerpts of the *2011 Accountability Manual* into rule as a figure. The excerpts, *Chapters 2-6, 8, 10-13, and 15-16* of the *2011 Accountability Manual*, specify the indicators, standards, and procedures used by the commissioner of education to determine accountability ratings, both standard and alternative education accountability (AEA) procedures, for districts, campuses, and charter schools. These chapters also specify indicators, standards, and procedures used to determine Gold Performance Acknowledgment (GPA) on additional indicators for Texas public school districts and campuses. The TEA will issue accountability ratings under the procedures specified in the *2011 Accountability Manual* by August 1, 2011. Ratings may be revised as a result of investigative activities by the commissioner as authorized under TEC, §39.074 and §39.075, as those sections existed before amendment by House Bill 3, 81st Texas Legislature, 2009.

In 2011, campuses and districts will be evaluated using five base indicators: Texas Assessment of Knowledge and Skills (TAKS) results, commended performance, the English Language Learners (ELL) progress indicator, completion rates, and annual dropout rates. In 2011, the GPA system will award acknowledgment on up to 15 separate indicators to districts and campuses rated *Academically Acceptable*, *AEA Academically Acceptable*, or higher: Attendance Rate for Grades 1-12; Advanced Course/Dual Enrollment Completion; Advanced Placement/International Baccalaureate Results; College Admissions Test Results; Commended Performance on Reading/English Language Arts (ELA), Mathematics, Writing, Science and/or Social Studies; Recommended High School Program/Distinguished Achievement Program Participation; Comparable Improvement on Reading/ELA and Mathematics; Texas Success Initiative - Higher Education Readiness Component on ELA and/or Mathematics; and College-Ready Graduates.

The proposed amendment would also modify subsection (e) to specify that accountability manuals adopted for school years prior to 2011-2012 will remain in effect with respect to those school years.

The proposed rule action would place the specific procedures contained in *Chapters 2-6, 8, 10-13, and 15-16* of the *2011 Accountability Manual* for annually rating school districts and campuses in the *Texas Administrative Code*. Applicable procedures would be adopted each year as annual versions of the accountability manual are published. The proposed amendment would have no locally maintained paperwork requirements.

Criss Cloudt, associate commissioner for assessment, accountability, and data quality, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be to continue to inform the public of the existence of annual manuals specifying rating procedures for the public schools by including this rule in the *Texas Administrative Code*. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins May 27, 2011, and ends June 27, 2011. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on May 27, 2011.

The amendment is proposed under the Texas Education Code, §§39.051(c)-(d), 39.072(c), 39.0721, 39.073, and 29.081(e), as those sections existed before amendment by House Bill 3, 81st Texas Legislature, 2009, which authorize the commissioner of education to specify the indicators, standards, and procedures used to determine standard accountability ratings and alternative education accountability ratings and to determine acknowledgment on additional indicators. These statutes remain in effect through the 2011-2012 school year.

The amendment implements the Texas Education Code, §§39.051(c)-(d), 39.072(c), 39.0721, 39.073, and 29.081(e), as those sections existed before amendment by House Bill 3, 81st Texas Legislature, 2009.

§97.1001. *Accountability Rating System.*

(a) The rating standards established by the commissioner of education under Texas Education Code (TEC), §39.051(c) and (d) (as that section existed before amendment by House Bill 3, 81st Texas Legislature, 2009), shall be used to evaluate the performance of districts, campuses, and charter schools. The indicators, standards, and procedures used to determine ratings under both standard and alternative education accountability (AEA) procedures will be annually published in official Texas Education Agency publications. These publications will be widely disseminated and cover the following procedures:

(1) indicators, standards, and procedures used to determine district ratings;

(2) indicators, standards, and procedures used to determine campus ratings;

(3) indicators, standards, and procedures used to determine acknowledgment on Additional Indicators; and

(4) procedures for submitting a rating appeal.

(b) The standard and alternative procedures by which districts, campuses, and charter schools are rated and acknowledged for 2011 [~~2010~~] are based upon specific criteria and calculations, which are described in excerpted sections of the 2011 [~~2010~~] *Accountability Manual* provided in this subsection.

Figure: 19 TAC §97.1001(b)

[Figure: 19 TAC §97.1001(b)]

(c) Ratings may be revised as a result of investigative activities by the commissioner as authorized under TEC, §39.074 and §39.075 (as those sections existed before amendment by House Bill 3, 81st Texas Legislature, 2009).

(d) The specific criteria and calculations used in the accountability manual are established annually by the commissioner of education and communicated to all school districts and charter schools.

(e) The specific criteria and calculations used in the annual accountability manual adopted for school years prior to 2011-2012 [~~2010-2011~~] remain in effect for all purposes, including accountability, data standards, and audits, with respect to those school years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101746

Cristina De La Fuente-Valadez

Director, Policy Coordination

Texas Education Agency

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 475-1497



19 TAC §97.1005

(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 19 TAC §97.1005 is not included in the print version of the Texas Register. The figure is available in the on-line version of the May 27, 2011, issue of the Texas Register.)

The Texas Education Agency (TEA) proposes an amendment to §97.1005, concerning accountability and performance monitoring. The section describes the purpose of the Performance-Based Monitoring Analysis System (PBMAS) and manner in which school districts and charter school performance is reported. The section also adopts the most recently published PBMAS Manual. The proposed amendment would adopt applicable excerpts of the Performance-Based Monitoring Analysis System 2011 Manual. Earlier versions of the manual will remain in effect with respect to the school years for which they were developed.

House Bill 3459, 78th Texas Legislature, 2003, added the Texas Education Code (TEC), §7.027, limiting and redirecting monitoring done by the TEA to that required to ensure school district and charter school compliance with federal law and regulations;

financial accountability, including compliance with grant requirements; and data integrity for purposes of the Public Education Information Management System (PEIMS) and accountability under TEC, Chapter 39. Legislation passed in 2005 renumbered TEC, §7.027, to TEC, §7.028. To meet this monitoring requirement, the agency developed the PBMAS, which is used in conjunction with other evaluation systems, to monitor performance and program effectiveness of special programs in school districts and charter schools.

Agency legal counsel has determined that the commissioner of education should take formal rulemaking action to place into the *Texas Administrative Code* procedures related to the PBMAS. Given the statewide application of the PBMAS and the existence of sufficient statutory authority for the commissioner of education to formally adopt rules in this area, portions of each annual PBMAS Manual have been adopted since the first PBMAS Manual was developed in 2004-2005. The PBMAS evolves from year to year, and the intent is to annually update 19 TAC §97.1005 to refer to the most recently published PBMAS Manual.

The proposed amendment to 19 TAC §97.1005 would update the current rule by adopting excerpted sections of the PBMAS 2011 Manual. These excerpted sections describe the specific criteria and calculations that will be used to assign 2011 PBMAS performance levels.

The 2011 PBMAS includes several key changes from the 2010 system. The phase-in of TAKS-Modified and TAKS-Alternate performance results is reflected in the 2011 PBMAS TAKS passing rate indicators as appropriate. Cut-point adjustments have been made for the first time to all annual dropout rate indicators. Required Improvement has been added to all graduation rate indicators. New standards and cut-points are being proposed for several PBMAS indicators, including the 3-5 Year Olds Less Restrictive Environments (LRE) Placement Rate, the 6-11 Year Olds LRE Placement Rate, the 12-21 Year Olds LRE Placement Rate, the Special Education Discretionary Discipline Alternative Education Program (DAEP) Placements, the Special Education Discretionary Placements to In-School Suspension (ISS), and the Special Education Discretionary Placements to Out-of-School Suspension (OSS). The No Child Left Behind, Title I, Part A Recommended High School Program (RHSP)/Distinguished Achievement Program (DAP) Diploma Rate indicator is moving from a "Report Only" indicator to an indicator with performance level assignments.

The "hold harmless" provision that was added in the 2010 PBMAS to two subject-area indicators in both the Career and Technical Education and the Special Education program areas has been removed. The Special Education African American Representation and Hispanic Representation indicators have been modified based on consideration of the new federal race/ethnicity categories in relation to the intent of those indicators. Changes to the PBMAS indicators for 2011 are marked in the manual as "New!" for easy reference.

The proposed amendment would also modify subsection (d) to specify that the PBMAS Manual adopted for the school years prior to 2011-2012 will remain in effect with respect to those school years.

The proposal would establish in rule the PBMAS procedures for assigning the 2011 PBMAS performance levels. Applicable procedures will be adopted each year as annual versions of the PBMAS Manual are published. The proposed amendment would have no locally maintained paperwork requirements.

Criss Cloudt, associate commissioner for assessment, accountability, and data quality, has determined that for the first five-year period the amendment is in effect there will be no additional costs for state or local government as a result of enforcing or administering the amendment.

Dr. Cloudt has determined that for each year of the first five years the amendment is in effect the public benefit anticipated as a result of enforcing the amendment will be to continue to inform the public of the existence of annual manuals specifying PBMA procedures by including this rule in the *Texas Administrative Code*. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

There is no direct adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins May 27, 2011, and ends June 27, 2011. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to rules@tea.state.tx.us or faxed to (512) 463-0028. A request for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 14 calendar days after notice of the proposal has been published in the *Texas Register* on May 27, 2011.

The amendment is proposed under the Texas Education Code (TEC), §7.028, which authorizes the agency to monitor as necessary to ensure school district and charter school compliance with state and federal law and regulations; TEC, §29.001(5), which authorizes the agency to effectively monitor all local educational agencies (LEAs) to ensure that rules relating to the delivery of services to children with disabilities are applied in a consistent and uniform manner, to ensure that LEAs are complying with those rules, and to ensure that specific reports filed by LEAs are accurate and complete; TEC, §29.010(a), which authorizes the agency to adopt and implement a comprehensive system for monitoring LEA compliance with federal and state laws relating to special education, including ongoing analysis of LEA special education data; TEC, §39.051 and §39.052, which authorize the commissioner to determine criteria for accreditation statuses and to determine the accreditation status of each school district and open-enrollment charter school; TEC, §39.054, which authorizes the commissioner to adopt rules to evaluate school district and campus performance, including evaluation against state standards and consideration of the performance of each campus in a school district and each open-enrollment charter school on the basis of the campus's or school's performance on student achievement indicators; TEC, §§39.056-39.058, which authorize the commissioner to adopt procedures relating to on-site and special accreditation investigations; and TEC, §§39.102-39.104, which authorize the commissioner to implement procedures to impose interventions and sanctions for districts, campuses, and open-enrollment charter schools.

The amendment implements the TEC, §§7.028, 29.001(5), 29.010(a), 39.051, 39.052, 39.054, 39.056-39.058, and 39.102-39.104.

§97.1005. *Performance-Based Monitoring Analysis System.*

(a) In accordance with Texas Education Code, §7.028(a), the purpose of the Performance-Based Monitoring Analysis System (PB-

MAS) is to report annually on the performance of school districts and charter schools in selected program areas: bilingual education/English as a Second Language, career and technical education, special education, and certain Title programs under the federal No Child Left Behind Act. The performance of a school district or charter school is reported through indicators of student performance and program effectiveness and corresponding performance levels established by the commissioner of education.

(b) The assignment of performance levels for school districts and charter schools in the 2011 [2010] PBMA is based on specific criteria and calculations, which are described in excerpted sections of the PBMA 2011 [2010] Manual provided in this subsection.

Figure: 19 TAC §97.1005(b)
[Figure: 19 TAC §97.1005(b)]

(c) The specific criteria and calculations used in the PBMA are established annually by the commissioner of education and communicated to all school districts and charter schools.

(d) The specific criteria and calculations used in the annual PBMA manual adopted for the school years prior to 2011-2012 [2010-2011] remain in effect for all purposes, including accountability and performance monitoring, data standards, and audits, with respect to those school years.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101747

Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.21

Introduction. The Texas Board of Nursing (Board) proposes new §217.21 (relating to Remedial Education Course Providers and Remedial Education Courses). This new section is being proposed under the authority of the Occupations Code §§301.303, 301.452, 301.453, and 301.151 and is necessary to create, in rule, an approval process for remedial education course providers (providers) and remedial education courses (courses), including the creation of new fees for the approval and renewal of courses. Additional amendments affecting 22 TAC §223.1 (relating to Fees) are being simultaneously proposed in this issue of the *Texas Register*.

The Board's mission is to protect the health, safety, and welfare of the public. One way in which the Board fulfills this obligation is by regulating the conduct of its licensees. When a licensee commits a violation of the Nursing Practice Act (Occupations Code Chapter 301), the Board is authorized to take disciplinary action

against the licensee. The goal of the disciplinary action is to identify the unsafe, incompetent, or illegal conduct of the licensee and effectuate its remediation. Very often, a licensee's conduct will demonstrate a nursing knowledge, skills, or judgment deficit. If the Board believes that this deficit can be successfully remediated, the Board will routinely require the licensee to complete certain courses. In order for courses to serve their intended purpose, however, the courses must be well developed, based upon sound educational principles, taught by qualified instructors, and offered by qualified providers.

Historical Perspective

The Board has approved relatively few providers over the past several years, approving 6 providers in 2004, 2005, and 2006; 7 providers in 2007; 8 providers in 2008 and 2009; and 10 providers in 2010. Historically, approved providers have been sole proprietors, licensed as registered nurses, the majority holding advanced academic degrees, with varied backgrounds in clinical practice and teaching experience. As a result, these providers offered courses that were well developed and content appropriate. Over the past year, however, Staff has received an increased number of inquiries and applications from individuals seeking to become Board approved providers who lack professional nursing experience, educational experience, and advanced academic degrees. Further, Staff has reviewed several course proposals that were poorly organized, contained inappropriate or inaccurate material, failed to incorporate techniques to address the needs of adult learners, and, in some cases, were mere recitations of information contained on the Board's website. Many applicants simply did not possess the requisite nursing expertise to develop and sponsor quality courses. Courses play a large role in the Board's efforts to correct and prevent nursing errors from re-occurring. The quality of the Board's approved courses and providers are essential in effectuating this goal. As a result, the Board has determined that it is necessary to specify, through rule, the requirements that a course and provider applicant must meet in order to be approved by the Board. Proposed new §217.21 is designed to implement these requirements.

Proposed Requirements

Proposed new §217.21(a) is necessary to set forth the purpose of the proposed new section. Courses can serve as a highly effective form of remediation for a licensee's nursing knowledge, judgment, or skills deficit, provided the courses are well developed, based upon sound educational principles, taught by qualified instructors, and offered by qualified providers. The requirements of the proposed new section are intended to ensure that providers are properly credentialed and qualified to offer quality courses that meet the Board's standards and requirements.

Proposed new §217.21(b) and (c) define the applicability of the proposed new section. Not all courses will be subject to the requirements of the proposal. Likewise, not all providers will be subject to the requirements of the proposal. Proposed new §217.21(b) and (c) make clear that only those courses meeting the following criteria will be subject to the proposal: (i) the course relates to nursing jurisprudence and ethics, medication administration, physical assessment, pharmacology, or nursing documentation; (ii) the course has not already been approved or accredited by a licensing authority or organization recognized by the Board; and (iii) the course is required to be completed as part of a Board disciplinary or eligibility order. If a course meets all of these criteria, it will be subject to the requirements of the proposed new section. If a course does not meet all of these

criteria, it will not be subject to the requirements of the proposed new section.

For example, under the proposal, a course in nursing documentation that has already been approved by another state board of nursing or by the National Council for State Boards of Nursing (NCSBN) will not be subject to the proposal's requirements. In this example, the course has already been reviewed and vetted by an organization whose mission and purpose is similar to that of the Board. As a result, the quality of the course has already been appropriately evaluated by a competent party and does not need to be evaluated a second time. The proposal also does not affect a course that comprises a portion of a "refresher course" under the Board's rules or a course that satisfies a licensee's continuing competency obligations under the Nursing Practice Act. The purpose of a remedial education course differs from the purpose of a continuing competency course or a refresher course. Unlike continuing competency courses, remedial education courses are designed to address targeted deficiencies in a licensee's nursing practice and must be developed and evaluated toward that end. As such, the requirements of the proposed new section apply only to remedial education courses and do not encompass continuing competency courses or refresher courses.

Proposed new §217.21(d) prescribes two sets of requirements. The first set of requirements apply to providers. The second set of requirements apply to course instructors. Under the proposal, a provider must apply for approval by submitting a completed application to the Board. The application must contain requisite contact information and an attestation that the applicant will comply with the requirements of the proposed new section. Further, the applicant must describe its process for evaluating the credentials and teaching competency of its course instructors. This proposed requirement is especially important, as the proposal prescribes several specific qualifications that a course instructor must meet. An applicant must be able to show its ability to adequately assess the qualifications, credentials, and nursing expertise of its instructors prior to receiving approval from the Board. By requiring an applicant to demonstrate its ability to appropriately evaluate the qualifications of its instructors, the Board ensures that approved providers utilize only qualified individuals as course instructors.

Proposed new §217.21(d) also requires the renewal of a provider's initial approval. Pursuant to the proposed new subsection, a provider's approval is valid for a period of up to twenty four months from the date of issuance and expires on the last day of March in odd numbered years. Further, a provider must renew its approval by submitting a completed renewal application to the Board. These proposed requirements allow the Board to review a provider's qualifications on a regular basis to ensure ongoing compliance with the Board's requirements, specifically those regarding instructor qualifications. A provider's continued compliance with the Board's requirements should result in consistently high quality courses.

Proposed new §217.21(d) also exempts certain providers from renewing their approval with the Board. Under the proposed new subsection, a provider that has been previously approved by the Board on, or prior to, the effective date of the new section, will not be required to renew its Board approval. Currently, there are 9 approved providers on the Board's provider list. Of these approved providers, 7 providers meet the requirements of the proposal. Two do not. The two providers that do not meet the proposed requirements, however, have been on the Board's ap-

proved provider list since 2004. Since that time, these providers have consistently demonstrated that they are able to provide competent instruction at a high level. As a result, the Board has determined that these providers should not have to renew their current Board approval based upon their past performance and demonstrated ability to provide competent, quality remedial education instruction. Notwithstanding this exemption, however, the Board has determined that all providers must renew the approval of any courses they offer in order to ensure that the course content remains current, appropriate, and consistent with changes in nursing practice.

Proposed new §217.21(d) also prescribes several requirements that apply to course instructors. First, a course instructor must hold a current license or privilege to practice as a registered nurse in the state in which the course will be provided. Under this proposed requirement, a course may be completed in another state, provided that the provider and the course meet the requirements of the proposed new section and are approved by the Board. This proposed requirement provides additional flexibility to licensees by allowing a licensee to complete a required course in the most convenient and cost effective venue. Second, a course instructor must hold a master's degree in nursing from an approved or accredited institution. Third, a course instructor must show evidence of teaching abilities and maintaining current knowledge, clinical expertise, and safety in the subject matter the instructor will teach. Fourth, a course instructor must have a minimum of five years professional nursing experience. Finally, a course instructor may not be the subject of a current eligibility or disciplinary order from a board of nursing or nursing disciplinary authority or have a history of more than one eligibility or disciplinary order from a board of nursing or nursing disciplinary authority. These proposed requirements serve an important purpose. Collectively, these proposed requirements are designed to ensure that an instructor is appropriately qualified and competent. Instructors with clinical expertise and varied teaching experience are better equipped to provide meaningful instruction to licensees in need of practice remediation. Further, by limiting an instructor's own disciplinary history, the Board is further ensuring that instructors are themselves capable of conforming to the requirements of the Nursing Practice Act and Board rules and policies. Taken together, these proposed requirements should result in higher quality remedial education instructors, which should, in turn, result in higher quality courses and more successful licensee remediation.

Proposed new §217.21(e) prescribes the requirements that apply to courses. Under the proposal, all providers must submit a completed course application to the Board, along with the appropriate non-refundable fee. The amount of the fee is addressed in a separate Board rule, located at 22 TAC §223.1 (relating to Fees), which is being simultaneously proposed for amendment. The application must include a thorough description of the course, including a detailed course content outline and specified, measurable learning objectives. A provider must also identify the skills and/or knowledge that the course is designed to enhance and explain how adult educational and learning principles will be utilized throughout the course. A provider must also describe how a licensee's participation in the course will be monitored, how a licensee's completion of the course will be measured, and how the effectiveness of the course will be evaluated. The proposed new section also makes clear that a course must meet the requirements specified in the Board's eligibility or disciplinary order for the specific type of course. For example, the Board may require a licensee to complete an assessment course that is six

hours in length, but is comprised of a didactic and clinical component. As such, a provider must ensure that its assessment course is comprised of a didactic and clinical component and is at least six hours in length. The content of each course must also be consistent with the Nursing Practice Act and the Board's rules, positions statements, and eligibility and disciplinary policies. These proposed requirements are significant for several reasons.

First, the proposed requirements encourage thoughtful deliberation and course development, which should result in cohesive, comprehensive courses. Second, the proposed requirements ensure that appropriate nursing principles are included in the courses. Third, the proposed requirements encourage providers to stay abreast of changes in nursing practice and procedure. As a whole, the proposed requirements are intended to produce comprehensive, well developed courses.

Because some courses are comprised of didactic or clinical components, or both, proposed new §217.21(f) is necessary to allow courses to be completed in the manner specified by the Board.

Proposed new §217.21(g) prescribes the requirements that apply to a course's renewal. Under the proposed new subsection, the approval of a course is only valid until the approval of the sponsoring provider expires. At that time, the course's approval may be simultaneously renewed with the provider's approval, so long as the course continues to meet the requirements of the proposed new section. This proposed requirement serves two important purposes. First, the proposed requirement simplifies the renewal process for providers. Under the proposal, providers may renew their approval and the approval of their courses at the same time by filing a single renewal application. As a result, renewals should be processed more quickly and efficiently. Second, the proposed requirement ensures that a provider and its courses are reviewed at least every two years to ensure ongoing compliance with the Board's requirements, specifically those related to instructor qualifications and course quality. The ongoing monitoring of providers and courses is one way to prevent inappropriate, ineffective, or outdated course content from appearing in Board approved courses. Finally, the proposal requires providers to pay a non-refundable renewal fee for the renewal of each course they offer. The amount of the fee is addressed in a separate Board rule, located at 22 TAC §223.1 (relating to Fees). That section is being proposed for amendment simultaneously with this proposal.

Proposed new §217.21(h) authorizes the Board to withdraw the approval of any provider that fails to maintain compliance with the requirements of the new section. Further, the proposed new subsection authorizes the Board to withdraw the approval of any course that falls below the standards specified in the proposed new section. Over the years, the Board has received complaints from licensees and other members of the public regarding providers and courses. The proposed requirements authorize the Board to timely take action when a provider or course falls below the minimum standards established by the Board.

By consistently approving only those providers and courses that meet the proposed requirements, by regularly monitoring and reviewing providers and courses for ongoing compliance with the Board's requirements, and by withdrawing Board approval from providers and courses that are unable to consistently meet the Board's requirements, the Board anticipates that better quality courses will be developed and offered by providers.

Section-by-Section Overview. Proposed new §217.21(a) sets forth the purpose of the new section. First, proposed new §217.21(a) states that, in situations where an individual has demonstrated a knowledge, judgment, or skills deficit, the Board believes that remedial education courses can serve as an effective form of remediation provided that the courses are well developed, based on sound educational principles, and taught by qualified instructors. Second, proposed new §217.21(a) establishes the requirements for the approval of such providers and courses.

Proposed new §217.21(b) defines the terms "remedial education course" and "remedial education course provider", as those terms are used in the proposed new section.

Proposed new §217.21(c) states that a provider seeking to offer a course in nursing jurisprudence and ethics, medication administration, physical assessment, pharmacology, and nursing documentation must be approved by the Board prior to offering the course to an individual.

Proposed new §217.21(d) requires a provider applicant to submit a completed application to the Board. Further, proposed new §217.21(d)(1) specifies the items that the Board may require in order to approve or disapprove the application, including: (i) the name, physical address, and mailing address of the provider applicant; (ii) the name and contact information of the provider applicant's designated authorized representative; (iii) the process used by the provider applicant for evaluating the credentials and teaching competency of its instructors; (iv) a statement certifying that the provider applicant will comply with the requirements set forth in the proposed new section; and (v) any other relevant information reasonably necessary to approve or disapprove the application, as specified by the Board.

Proposed new §217.21(d)(2) requires all provider applicants to certify that their course instructors: (i) hold a current license or privilege to practice as a registered nurse in the state in which the course will be provided; (ii) hold a master's degree in nursing from an approved or accredited institution; (iii) have shown evidence of teaching abilities and maintaining current knowledge, clinical expertise, and safety in the subject matter the instructor will teach; (iv) have a minimum of five years professional nursing experience; and (v) are not the subject of a current eligibility or disciplinary order from a board of nursing and/or nursing disciplinary authority or have a history of more than one eligibility or disciplinary order from a board of nursing and/or nursing disciplinary authority.

Proposed new §217.21(d)(3) requires an approved provider to maintain as a part of its records a written statement from each instructor certifying that the instructor is qualified as an instructor, the basis of qualification, and that the instructor agrees to comply with all course requirements outlined in the proposed new section. Further, proposed new §217.21(d)(3) requires an approved provider to maintain verification of an individual's participation and completion of a course and all information described or required under the proposed new section for a period of not less than five years.

Proposed new §217.21(d)(4) sets forth the requirements related to the renewal of a provider's Board approval. First, proposed new §217.21(d)(4) provides that the approval of a provider is valid for a period of up to twenty four months from the date of issuance and shall expire on the last day of the month of March in odd numbered years. Second, proposed new §217.21(d)(4) states that a provider must renew its approval by submitting a

renewal application to the Board in advance of its renewal date. Third, proposed new §217.21(d)(4) states that a provider that has been approved by the Board prior to, or on the effective date of the proposed new section, is not required to renew its approval, but must seek the Board's approval and the renewal of such approval for each course it seeks to offer.

Proposed new §217.21(e) requires a provider to submit a course application to the Board for each course the provider wishes to offer and pay the required fee specified by 22 TAC §223.1 (relating to Fees), which is not refundable.

Further, proposed new §217.21(e)(1) specifies the information that the application must include, such as: (i) a statement identifying the knowledge, skills, or abilities an individual is expected to obtain through completion of the course; (ii) a detailed course content outline, measurable learning objectives, and the length of the course in hours; (iii) a description of how adult educational and learning principles are reflected in the course; (iv) a method of verifying an individual's participation and successful completion of the course; (v) a method of evaluation by which a provider measures how effectively the course meets its objectives and provides for input; and (vi) any other relevant information reasonably necessary to approve or disapprove the application, as specified by the Board.

Proposed new §217.21(e)(2) states that the course content of a course must meet the requirements specified by the Board for each type of course and be consistent with the following: (i) the Occupations Code Chapters 301, 303, 304, and 305; (ii) 22 TAC Chapters 211 - 227; (iii) Board position statements 15.1 - 15.26; (iv) the Board's adopted Eligibility and Disciplinary Sanction Policies regarding Sexual Misconduct; Fraud, Theft and Deception; Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder; and Lying and Falsification; and (v) the Board's adopted Guidelines for Criminal Conduct.

Proposed new §217.21(f) states that courses may consist of classroom, classroom equivalent, or clinical courses, as specified by the Board.

Proposed new §217.21(g) states that, unless withdrawn or otherwise provided, a course is approved until the approval of the sponsoring provider expires. Further, proposed new §217.21(g) states that the approval of a course may be renewed simultaneously with the renewal of the approval of the sponsoring provider if the provider certifies on the renewal application that the course continues to meet the requirements of the proposed new section. The approval of a course that has been approved by the Board prior to, or on the effective date of the proposed new section, will expire on March 31, 2013, and must be timely renewed. Additionally, its renewal will be valid for up to twenty four months from the date of issuance and shall expire on the last day of the month of March in odd numbered years. Finally, proposed new §217.21(g) requires all providers to pay the required course renewal fee specified by 22 TAC §223.1 (relating to Fees), which is not refundable.

Proposed new §217.21(h) authorizes the Board to withdraw the approval of a provider that fails to maintain compliance with the requirements of the proposed new section. Further, proposed new §217.21(h) states that, if the Board withdraws the approval of a provider, the provider shall cease offering all courses upon notice from the Board. Additionally, the Board may withdraw the approval of a course if it fails to comply with the requirements of the proposed new section. If the Board withdraws the approval of a course, the sponsoring provider shall cease offering the course

upon notice from the Board. Finally, proposed new §217.21(h) provides that notice is presumed to be effective on the third day after the date on which the Board mails the notice.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed new section will be in effect, there will be no additional fiscal implications for state or local government as a result of implementing the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed new section is in effect, there will be a public benefit and potential costs associated with complying with the proposed requirements.

Anticipated Public Benefit

The anticipated public benefit will be the adoption of requirements that promote quality nursing care by ensuring that all Board approved courses are offered by qualified providers and taught by qualified instructors. The Board is charged with protecting the health, safety, and welfare of the people of Texas. The Board seeks to fulfill this obligation, in part, by regulating the conduct of its licensees. When a licensee commits a violation of the Nursing Practice Act or the Board's rules, the Board's primary concern is to protect the public from the continuing risk of harm. If a licensee has committed a practice error, the Board will often require the licensee to complete courses designed to address the licensee's particular deficiencies. These courses are intended to re-educate the licensee, with the expectation that the licensee will make changes in his/her nursing practice and avoid future violations of the Nursing Practice Act and Board rules. A licensee's successful remediation depends largely upon the quality of the course. As such, the proposed requirements are designed to ensure that courses are offered by qualified providers, taught by qualified instructors, and contain current, accurate, and comprehensive information. Licensees who successfully complete quality courses will be better equipped to make informed decisions in their nursing practice, to change patterns of unsafe behavior, to identify and correct potential problems, and to seek help when necessary. These changes in practice will ultimately result in safer nursing care for all healthcare consumers.

Potential Costs of Compliance

Under the proposed requirements, any person may submit a provider application to the Board for approval. No person is required by law, however, to do so. For those individuals or entities who choose to become a Board approved provider, there will be associated costs of compliance with the proposed new section. These costs result from the following requirements: (i) completing an application for initial provider approval, renewal of provider approval, initial course approval, and renewal of course approval; (ii) hiring instructors who meet the requirements of the proposed new section; (iii) developing courses that meet the requirements of the proposed new section; and (iv) maintaining course records.

Proposed new §217.21(d)(1), (4), (e)(1), and (g) prescribe requirements related to approval applications and renewal applications. Under proposed new §217.21(d)(1), a provider applicant must include the following information in its initial application: (i) its name, physical address, and mailing address; (ii) the name and contact information of its designated authorized representative; (iii) its process for evaluating the credentials and teaching ability of its instructors; (iv) a statement certifying that it will comply with the requirements of the proposed new

section; and (v) any other relevant information reasonably specified by the Board. The total probable cost of preparing and submitting the information required under proposed new §217.21(d)(1) is less than \$40. This is based upon a provider applicant preparing the information necessary to comply with proposed new §217.21(d)(1) in less than one hour, at the mean salary rate of \$39.68 for an education administrator, as set forth in the May 2009 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm.

Under proposed new §217.21(e)(1), a provider must include the following information in its initial course application: (i) a statement identifying the knowledge, skills, or abilities an individual is expected to obtain through completion of the course; (ii) a detailed course content outline, measurable learning objectives, and the length of the course in hours; (iii) a description of how adult educational and learning principles are reflected in the course; (iv) a method of verifying an individual's participation and successful completion of the course; (v) a method of evaluating the effectiveness of the course; and (vi) any other relevant information reasonably specified by the Board. The total probable cost of preparing and submitting the information required under proposed new §217.21(e)(1) is less than \$40. This is based upon a provider preparing the information necessary to comply with proposed new §217.21(e)(1) in less than one hour, at the mean salary rate of \$39.68 for an education administrator, as set forth in the May 2009 State Occupational Employment and Wage Estimates for Texas published by the U.S. Department of Labor at http://www.bls.gov/oes/current/oes_tx.htm.

Under proposed new §217.21(d)(4), a provider must timely renew its approval by submitting a renewal application to the Board. Under proposed new §217.21(g), the approval of a remedial education course must also be timely renewed. These proposed requirements allow a provider to renew its approval, as well as the approval of the courses it offers, at the same time by filing a single renewal application. The application must include the provider's certification that the remedial education courses it offers continue to meet the requirements of the proposed new section. The Board estimates the probable costs of compliance with these proposed requirements to be minimal.

Proposed new §217.21(d)(2) prescribes the requirements applicable to course instructors. Under proposed new §217.21(d)(2), a course instructor must: (i) hold a current license or privilege to practice as a registered nurse in the state in which the course will be provided; (ii) hold a master's degree in nursing from an approved or accredited institution; (iii) show evidence of teaching abilities and maintaining current knowledge, clinical expertise, and safety in the subject matter the instructor will teach; (iv) have a minimum of five years professional nursing experience; and (v) not be the subject of a current eligibility or disciplinary order from a board of nursing and/or nursing disciplinary authority or have a history of more than one eligibility or disciplinary order from a board of nursing and/or nursing disciplinary authority. The total probable cost of complying with these proposed requirements will vary substantially among providers based upon individual business decisions made by particular providers, including the number of courses a provider chooses to offer; the types of courses a provider chooses to offer; the number of instructors a provider chooses to employ; the manner in which a provider chooses to compensate an instructor; the availability of qualified instructors in a provider's geographical area; and whether a provider already employs instructors meeting the proposed requirements. The proposed requirements relating to instructor

qualifications have been met by the majority of providers approved by the Board in the past. As such, the Board anticipates that the proposed requirements are consistent with prudent business practices and may already be utilized by many provider applicants. Further, under the proposal, each provider is free to choose the most economical means of complying with the requirements of proposed new §217.21(d)(2), and each provider has the information necessary to estimate its own individual compliance costs associated with the proposed requirements.

Proposed new §217.21(e)(2) specifies the requirements applicable to courses. Specifically, proposed new §217.21(e)(2) requires a course to meet the specific requirements detailed by the Board in its eligibility and disciplinary order and to be consistent with the Nursing Practice Act and the Board's rules, position statements, and policies. A provider is solely responsible for developing a course that meets these proposed requirements. The total probable cost of developing a course that complies with these proposed requirements will vary substantially among providers based upon individual business decisions made by particular providers, including the number of courses offered by a provider, the types of courses offered by a provider, the method utilized by a provider in developing a course, and whether a provider has previous experience in developing a course. However, under the proposal, each provider is free to choose the most economical means of complying with the requirements of proposed new §217.21(e)(2), and each provider has the information necessary to estimate its own individual compliance costs associated with the proposed requirements.

Proposed new §217.21(d)(3) prescribes requirements for a provider's record maintenance. First, proposed new §217.21(d)(3) requires a provider to maintain a written statement from each instructor certifying that the instructor is qualified as an instructor, the basis of the qualification, and that the instructor agrees to comply with all course requirements outlined in the proposed new section. Second, proposed new §217.21(d)(3) requires a provider to maintain verification of an individual's participation and completion of a course and all information required under the proposed new section for a period of not less than five years. The total probable cost of complying with these proposed requirements will vary substantially among providers based upon individual business decisions made by particular providers, including choosing among various storage methods for the provider's records, such as utilizing in-house storage and maintenance resources or employing an outside vendor to store and maintain the provider's records. Because the Board considers these proposed requirements to be consistent with prudent business practices, the Board anticipates that many provider applicants may already have a sufficient record maintenance and retention process in place that will meet the proposed requirements. Additionally, because the proposal does not dictate the precise method or manner that must be utilized by a provider, each provider is free to choose the most economical means of complying with the proposed requirements. Further, each provider has the information necessary to estimate its individual compliance costs associated with the proposed requirements.

Finally, the Board anticipates that any costs incurred by providers as a result of the proposal will be passed on to course participants in the form of registration and course fees. The Board does not prescribe or oversee the amount of fees charged by providers for courses. As such, providers are free to determine their own course costs. The Board anticipates that providers will set their fees at a rate that will offset any costs incurred as a re-

sult of the proposed new section. Any other costs to comply with the proposed new section result from the legislative enactment of Chapter 301 and are not a result of the adoption, enforcement, or administration of the proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. Under the Government Code §2006.002(c) and (f), if a proposed rule may have an economic impact on small or micro businesses, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on the small or micro business and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the proposed rule. The Government Code §2006.001(a)(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. The Government Code §2006.001(a)(1) defines "micro business" similarly to "small business," but specifies that a micro business may not have more than 20 employees. The Government Code §2006.001(a)(1) does not specify a maximum level of gross receipts for a "micro business."

The Board has determined that the vast majority, if not all, of the entities that will choose to submit provider applications to the Board will qualify as small or micro businesses under the Government Code §2006.001(a). This estimate is based on the following factors. The Board reviewed each of the provider applications that were approved in 2004 - 2010. In examining the entities that submitted these applications, the Board determined the following: (i) all of the reviewed entities were formed for the purpose of making a profit; (ii) all of the reviewed entities employed less than 100 employees; and (iii) all of the reviewed entities were independently owned or operated. Based upon this review, the Board has determined that all of the currently approved providers, as well as all of the past approved providers, meet the definition of a small or micro business under the Government Code §2006.001(a). Further, the Board has determined that the entities that have been approved as providers in the past are generally representative of the types of entities that the Board anticipates receiving new provider applications from in the future. However, because the proposed rule does not exclude other entities from submitting provider applications to the Board, it is possible for entities that do not qualify as small or micro businesses under the Government Code §2006.001(a) to be approved by the Board. Notwithstanding this fact, the Board continues to anticipate that the vast majority, if not all, of the entities that will submit new provider applications to the Board for approval will qualify as small or micro businesses.

The Board has further determined that the proposal may have an adverse economic impact on these small or micro businesses because the proposed requirements require these businesses to: (i) complete and submit applications for initial provider and course approval and for the renewal of provider and course approval; (ii) hire and retain course instructors who meet the minimum requirements of the proposal; (iii) maintain course records for a period of at least five years; (iv) develop course content that meets the requirements of the proposal. In accordance with the Government Code §2006.002(c-1), the Board has determined that even though the proposed new requirements may have an adverse economic effect on the small or micro businesses that elect to submit provider applications to the Board for approval, and, are therefore required to comply with the proposed require-

ments, the Board is not required to prepare a regulatory flexibility analysis as required in the Government Code §2006.002(c)(2) for the following reasons.

First, small or micro businesses are not required by statute or by the proposed requirements to become providers. Therefore, those small and micro businesses that submit provider applications to the Board for approval do so at their own choice, and as a result, agree to bear any additional costs required for compliance with the proposed requirements. Further, the Board anticipates that any costs incurred by these small or micro businesses as a result of the proposed requirements will be passed on to course participants in the form of course and registration fees. Additionally, the costs outlined in the Public Benefit/Cost Note part of this proposal provide sufficient cost information for small or micro business to make an informed business decision regarding whether to submit a provider application to the Board for approval.

Second, the Government Code §2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on a small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) requires that the regulatory analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Therefore, an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

The Occupations Code §301.453 authorizes the Board to require a licensee to complete a program of education and counseling prescribed by the Board. The purpose of this statute is to provide licensees with an opportunity to correct practice errors through the successful completion of quality courses prescribed by the Board. The proposed new requirements support this purpose by ensuring that all approved providers offer quality courses. A licensee who is required to complete a course has demonstrated a knowledge, skills, or judgment deficit that must be remediated. While courses can serve as an excellent method of addressing specific deficiencies in a licensee's practice, the success of the licensee depends largely on the quality of the course itself. Thus, if a course is well developed, contains comprehensive and current information, is designed to address the needs of an adult learner, and is taught by a qualified and knowledgeable instructor, a licensee is more likely to realize the full benefit of that course, which ultimately results in a safer practitioner. In order to ensure that all licensees are able to fully realize the benefits of courses, the Board must establish minimum requirements that each course and provider must continually adhere to. Due to the large number of eligibility and disciplinary orders issued by the Board annually, the Board recognizes the ever growing need for approved providers. However, if the goal of remedial education is to effectuate a change in a licensee's nursing practice and to prevent errors from recurring, the quality of the Board's approved providers and courses cannot be sacrificed. The purpose of the proposed new requirements and the authorizing statutes are to protect the health, safety, and economic welfare of Texas consumers and the state of Texas. The Board cannot ensure quality nursing care for all Texas consumers without first ensuring quality remedial education instruction. As such, requirements that support the development of credible, compre-

hensive, quality courses are vital to and protective of the health of Texas consumers. As a result, the Board has determined that there are no additional regulatory alternatives to the proposed new requirements that will sufficiently protect the health, safety, and economic interests of Texas consumers and the welfare of the state.

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on June 27, 2011, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.state.tx.us, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Janice Hooper, PhD, RN, Lead Education Consultant, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to janice.hooper@bon.state.tx.us, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The new section is proposed under the Occupations Code §§301.303, 301.452, 301.453, and 301.151.

Section 301.303(a) provides that the Board may recognize, prepare, or implement continuing competency programs for license holders under Chapter 301 and may require participation in continuing competency programs as a condition of renewal of a license. Further, the programs may allow a license holder to demonstrate competency through various methods, including: (i) completion of targeted continuing education programs; and (ii) consideration of a license holder's professional portfolio, including certifications held by the license holder.

Section 301.303(b) provides that the Board may not require participation in more than a total of 20 hours of continuing education in a two-year licensing period.

Section 301.303(c) states that, if the Board requires participation in continuing education programs as a condition of license renewal, the Board by rule shall establish a system for the approval of programs and providers of continuing education.

Section 301.303(e) provides that the Board may adopt other rules as necessary to implement §301.303.

Section 301.303(f) states that the Board may assess each program and provider under §301.303 a fee in an amount that is reasonable and necessary to defray the costs incurred in approving programs and providers.

Section 301.303(g) states that the Board by rule may establish guidelines for targeted continuing education required under Chapter 301. Further, the rules adopted under §301.303(g) must address: (i) the nurses who are required to complete the targeted continuing education program; (ii) the type of courses that satisfy the targeted continuing education requirement; (iii) the time in which a nurse is required to complete the targeted continuing education; (iv) the frequency with which a nurse is required to meet the targeted continuing education requirement; and (v) any other requirement considered necessary by the Board.

Section 301.452(a) defines "intemperate use" as including practicing nursing or being on duty or on call while under the influence of alcohol or drugs.

Section 301.452(b) states that a person is subject to denial of a license or to disciplinary action under Subchapter J for: (i) a violation of Chapter 301, a rule or regulation not inconsistent with

Chapter 301, or an order issued under Chapter 301; (ii) fraud or deceit in procuring or attempting to procure a license to practice professional nursing or vocational nursing; (iii) a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude; (iv) conduct that results in the revocation of probation imposed because of conviction for a felony or for a misdemeanor involving moral turpitude; (v) use of a nursing license, diploma, or permit, or the transcript of such a document, that has been fraudulently purchased, issued, counterfeited, or materially altered; (vi) impersonating or acting as a proxy for another person in the licensing examination required under §301.253 or §301.255; (vii) directly or indirectly aiding or abetting an unlicensed person in connection with the unauthorized practice of nursing; (viii) revocation, suspension, or denial of, or any other action relating to, the person's license or privilege to practice nursing in another jurisdiction; (ix) intemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient; (x) unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public; (xi) adjudication of mental incompetency; (xii) lack of fitness to practice because of a mental or physical health condition that could result in injury to a patient or the public; or (xiii) failure to care adequately for a patient or to conform to the minimum standards of acceptable nursing practice in a manner that, in the Board's opinion, exposes a patient or other person unnecessarily to risk of harm.

Section 301.452(c) provides that the Board may refuse to admit a person to a licensing examination for a ground described under §301.452(b).

Section 301.452(d) states that the Board by rule shall establish guidelines to ensure that any arrest information, in particular information on arrests in which criminal action was not proven or charges were not filed or adjudicated, that is received by the Board under §301.452 is used consistently, fairly, and only to the extent the underlying conduct relates to the practice of nursing.

Section 301.453(a) states that, if the Board determines that a person has committed an act listed in §301.452(b), the Board shall enter an order imposing one or more of the following: (i) denial of the person's application for a license, license renewal, or temporary permit; (ii) issuance of a written warning; (iii) administration of a public reprimand; (iv) limitation or restriction of the person's license, including: (A) limiting to or excluding from the person's practice one or more specified activities of nursing; or (B) stipulating periodic Board review; (v) suspension of the person's license; (vi) revocation of the person's license; or (vii) assessment of a fine.

Section 301.453(b) states that, in addition to or instead of an action under §301.453(a), the Board, by order, may require the person to: (i) submit to care, counseling, or treatment by a health provider designated by the Board as a condition for the issuance or renewal of a license; (ii) participate in a program of education or counseling prescribed by the Board, including a program of remedial education; (iii) practice for a specified period under the direction of a registered nurse or vocational nurse designated by the Board; or (iv) perform public service the Board considers appropriate.

Section 301.453(c) states that the Board may probate any penalty imposed on a nurse and may accept the voluntary surrender of a license. The Board may not reinstate a surrendered

license unless it determines that the person is competent to resume practice.

Section 301.453(d) states that, if the Board suspends, revokes, or accepts surrender of a license, the Board may impose conditions for reinstatement that the person must satisfy before the Board may issue an unrestricted license.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Cross Reference to Statute. The following statutes are affected by this proposal: Occupations Code §§301.303, 301.452, 301.453, and 301.151.

§217.21. Remedial Education Course Providers and Remedial Education Courses.

(a) Purpose. In situations where an individual has demonstrated a knowledge, judgment, or skills deficit, the Board believes that educational courses can serve as an effective form of remediation provided that the courses are well developed, based on sound educational principles, and taught by qualified instructors. This section establishes the requirements for the approval of remedial education course providers and remedial education courses.

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

(1) Remedial education course--An educational course that:

(A) meets the requirements of subsection (e) of this section;

(B) is not currently accredited or approved by a licensing authority or organization recognized by the Board;

(C) is designed to address an individual's competency deficiencies; and

(D) is required to be completed by the Board as part of a disciplinary and/or eligibility order.

(2) Remedial education course provider--An individual or organization that meets the requirements of subsection (d) of this section and is approved by the Board to offer a remedial education course to an individual.

(c) Approval Required. A remedial education course in nursing jurisprudence and ethics, medication administration, physical assessment, pharmacology, and nursing documentation must be approved by the Board. A remedial education course provider seeking to offer one of these remedial education courses must be approved by the Board prior to offering the course to an individual.

(d) Remedial Education Course Providers. A remedial education course provider applicant seeking initial approval from the Board must submit a completed remedial education course provider application to the Board. The provider applicant must verify the application by attesting to the truth and accuracy of the information in the application.

(1) Application. The Board may require the following items in order to approve or disapprove the application:

(A) the name, physical address, and mailing address of the provider applicant;

(B) the name and contact information of the provider applicant's designated authorized representative;

(C) the process used by the provider applicant for evaluating the credentials and teaching competency of its instructors;

(D) a statement certifying that the provider applicant will comply with all requirements set forth in this section; and

(E) any other relevant information reasonably necessary to approve or disapprove the application, as specified by the Board.

(2) Course Instructors. Provider applicants must certify that all course instructors meet the following requirements:

(A) An instructor must hold a current license or privilege to practice as a registered nurse (RN) in the state in which the remedial education course will be provided;

(B) An instructor must hold a master's degree in nursing from an approved or accredited institution;

(C) An instructor must show evidence of teaching abilities and maintaining current knowledge, clinical expertise, and safety in the subject matter the instructor will teach;

(D) An instructor must have a minimum of five years professional nursing experience; and

(E) An instructor may not be the subject of a current eligibility or disciplinary order from a board of nursing and/or nursing disciplinary authority or have a history of more than one eligibility or disciplinary order from a board of nursing and/or nursing disciplinary authority.

(3) Records.

(A) An approved remedial education course provider must maintain as a part of the provider's records a written statement from each instructor certifying that the instructor is qualified as an instructor, the basis of qualification, and that the instructor agrees to comply with all course requirements outlined in this section.

(B) An approved remedial education course provider must maintain verification of an individual's participation and completion of a remedial education course and all information described or required under this section for a period of not less than five years.

(4) Renewal. The Board's approval of a remedial education course provider is valid for a period of up to twenty four months from the date of issuance and shall expire on the last day of the month of March in odd numbered years. A remedial education course provider must renew its Board approval by submitting a renewal application to the Board in advance of its renewal date. A remedial education course provider that has been approved by the Board prior to, or on the effective date of this section, is not required to renew its approval, but must seek the Board's approval and the renewal of such approval for each remedial education course it seeks to offer.

(e) Remedial Education Courses. A remedial education course provider must submit a completed remedial education course application to the Board for each course the provider wishes to offer and pay the required fee specified by §223.1 of this title (relating to Fees), which is not refundable.

(1) Application. A remedial education course application must include the following:

(A) a statement identifying the knowledge, skills, or abilities an individual is expected to obtain through completion of the remedial education course;

(B) a detailed course content outline, measurable learning objectives, and the length of the remedial education course in hours;

(C) a description of how adult educational and learning principles are reflected in the remedial education course;

(D) a method of verifying an individual's participation and successful completion of the remedial education course;

(E) a method of evaluation by which a remedial education course provider measures how effectively the remedial education course meets its objectives and provides for input; and

(F) any other relevant information reasonably necessary to approve or disapprove the application, as specified by the Board.

(2) Course content. The course content must:

(A) meet the requirements specified by the Board for each type of course; and

(B) be consistent with the following:

(i) the Occupations Code Chapters 301, 303, 304, and 305;

(ii) Chapters 211 - 227 of this title;

(iii) Board position statements 15.1 - 15.26;

(iv) the Board's adopted Eligibility and Disciplinary Sanction Policies regarding Sexual Misconduct; Fraud, Theft and Deception; Nurses with Substance Abuse, Misuse, Substance Dependency, or other Substance Use Disorder; and Lying and Falsification; and

(v) the Board's adopted Guidelines for Criminal Conduct.

(f) Remedial education courses may consist of classroom, classroom equivalent, or clinical courses, as specified by the Board.

(g) Renewal. Unless withdrawn or otherwise provided herein, a remedial education course is approved until the approval of the sponsoring remedial education course provider expires. The approval of a remedial education course may be renewed simultaneously with the renewal of the approval of the sponsoring remedial education course provider if the provider certifies on the renewal application that the remedial education course continues to meet the requirements of this section. The approval of a remedial education course that has been approved by the Board prior to, or on the effective date of this section, will expire on March 31, 2013, and must be timely renewed. Its renewal will be valid for up to twenty four months from the date of issuance and shall expire on the last day of the month of March in odd numbered years. All remedial education course providers must pay the required remedial education course renewal fee specified by §223.1 of this title, which is not refundable.

(h) Withdrawal of Approval. The Board may withdraw the approval of a remedial education course provider that fails to maintain compliance with the requirements of this section. If the Board withdraws the approval of a remedial education course provider, the provider shall cease offering all remedial education courses upon notice from the Board. The Board may withdraw the approval of a remedial education course if it fails to comply with the requirements of this section. If the Board withdraws the approval of a remedial education course, the sponsoring remedial education course provider shall cease

offering the course upon notice from the Board. Notice is presumed to be effective on the third day after the date on which the Board mails the notice.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 11, 2011.

TRD-201101728

Jena Abel

Assistant General Counsel

Texas Board of Nursing

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 305-6822



CHAPTER 223. FEES

22 TAC §223.1

Introduction. The Texas Board of Nursing (Board) proposes amendments to §223.1 (relating to Fees). The amendments are proposed under the authority of the Occupations Code §§301.155(a), 301.303, 301.452, 301.453, and 301.151 and are necessary to create new fees for the approval and renewal of remedial education courses.

The Board's mission is to protect the health, safety, and welfare of the public. One way in which the Board fulfills this obligation is by identifying the unsafe, incompetent, or illegal conduct of its licensees and effectuating their remediation. The Board has determined that remedial education courses may serve as one effective form of remediation, so long as the courses are well developed, based upon sound educational principles, taught by qualified instructors, and offered by qualified remedial education course providers. In order to ensure that all Board approved remedial education courses meet these standards, the Board is simultaneously proposing a new process for approving remedial education course providers and remedial education courses in this edition of the *Texas Register*. This proposed new approval process requires all remedial education courses to meet certain, prescribed criteria. Further, the proposed new approval process requires all remedial education course providers to pay a fee for the initial approval and renewal of a remedial education course. These proposed fees are necessary to defray the costs associated with reviewing, approving, and renewing remedial education course providers and remedial education courses. The proposed amendments contained in this proposal are necessary to implement these new fees.

Historical Perspective

In 2004, the Board approved 6 remedial education course providers. In 2007, the Board approved 7 providers. In 2008 and 2009, the Board approved 8 providers. In 2010, the Board approved 10 providers. Currently, 10 providers appear on the Board's approved remedial education course provider list. Based on this historical data, and an increased number of inquiries over the past year from entities interested in becoming Board approved remedial education course providers, the Board anticipates that the number of provider and course applications will continue to increase over the next few years. Remedial education course providers and remedial education courses must be reviewed by Board Staff for initial approval and renewal. Reviewing these applications takes a considerable amount of Staff

time, particularly when an entity has submitted an application or course content outline that is incomplete or contains insufficient information to support Board approval or renewal. Over the past year, Board Staff has received an increased number of remedial education course applications that were poorly organized, contained inappropriate or inaccurate material, failed to incorporate techniques to address the needs of adult learners, and, in some cases, were mere recitations of information contained on the Board's website. Additional Staff time must be spent in reviewing these applications and assisting entities in correcting the outstanding deficiencies in their submissions. Further, all approved remedial education courses must be renewed approximately every two years. Although the renewal of an approved remedial education course is not normally as onerous a process as the initial approval of the course, Board staff must still thoroughly review each course to ensure that it continues to meet the Board's requirements. Currently, on average, each approved provider offers 2-4 remedial education courses. Board staff is not only responsible for reviewing new provider and course applications for approval, but Staff remains responsible for reviewing approximately 20-40 approved remedial education courses for renewal every two years. This review process is in addition to Staff's other assigned duties and responsibilities. The Board anticipates the number of new provider and course applications to increase over the next few years. Further, the Board anticipates the number of existing providers and courses to remain at current levels. As such, it is likely that Board Staff will be required to spend additional time and resources in reviewing new provider and course applications for approval, as well as continuing to review approved provider and course applications for renewal. The Board anticipates that the funds generated by the proposed new fees may be utilized in the future to defray a portion of the costs associated with the review, approval, and renewal of remedial education course providers and remedial education courses. Additionally, the Board anticipates that the proposed fees will encourage the submission of more organized and complete applications, which should further reduce the costs associated with the approval and renewal of providers and courses.

The Board is authorized by the Occupations Code §301.155 to establish fees in amounts reasonable and necessary to cover the costs of administering the Nursing Practice Act. The Board has determined that a \$300 fee for the initial approval of a remedial education course and a \$100 fee for the renewal of a remedial education course is appropriate and reasonable, based upon the following considerations. First, although a remedial education course provider is required to submit an application to the Board for review and initial approval, the provider is not required to submit a filing fee with the application. Additionally, although the provider must also renew its approval approximately every two years, the provider is not required to pay a renewal fee to the Board. Rather, the Board has decided to implement a minimal fee for the initial approval and renewal of each remedial education course a provider chooses to offer. The proposed new fees are directly related to the time and resources spent in reviewing and approving remedial education course applications, whether for initial approval or for renewal. Remedial education course applications include detailed course content outlines, measurable learning objectives, and descriptions detailing the manner in which the courses meet certain Board objectives. In addition to reviewing this information, Staff must also ensure that the proposed courses meet the content specific requirements of the Board's eligibility and disciplinary orders. A comprehensive review is required to ensure that each proposed course meets all

of the Board's prescribed criteria. Further, additional time and resources must be expended when an application is incomplete or when a course has been poorly organized. In these cases, Staff must spend additional time and resources in assisting entities in correcting such deficiencies. The proposed fees are intended to defray a portion of the costs associated with the time intensive review of remedial education course applications. Further, the Board does not regulate the fees that are charged by approved remedial education course providers for their courses. As a result, many providers charge hundreds, and even thousands of dollars, for the courses they offer, particularly if a clinical component is required. As such, the Board fully anticipates that approved providers will be able to successfully offset the minimal fees required by the proposal.

Section-by-Section Overview. Proposed amended §223.1(a)(25) provides that the Board has established reasonable and necessary fees for the administration of its functions and that the fee for the approval of a remedial education course is \$300 for each course. Proposed amended §223.1(a)(26) provides that the Board has established reasonable and necessary fees for the administration of its functions and that the fee for the renewal of a remedial education course is \$100 for each course.

Fiscal Note. Katherine Thomas, Executive Director, has determined that for each year of the first five years the proposed amendments will be in effect, there may be an approximate \$2,000-\$4,000 biannual increase in revenue to state government as a result of the enforcement or administration of the proposal due to estimated fees associated with the approval and renewal of remedial education courses. These estimates are based on the following factors. First, the proposed amendments require each remedial education course provider to pay a fee of \$300 for the approval of a remedial education course and \$100 for the renewal of a remedial education course. Each course must be renewed approximately every two years. Currently, there are 10 Board approved remedial education course providers. Each approved provider currently offers an average of 2-4 approved remedial education courses. If each provider continues to offer an average of 2-4 remedial education courses over the next two years, the Board estimates that there will be an approximate \$2,000-\$4,000 biannual increase in revenue to state government as a result of the proposed amendments. Additionally, for every new remedial education course that the Board approves, the Board estimates that there may be an additional \$300 increase in revenue to state government. Further, the Board estimates that, for every newly approved remedial education course, there may be an additional \$100 increase in revenue to state government for the biannual renewal of the approved course. There will be no anticipated effect on local employment or the local economy as a result of the proposal.

Public Benefit/Cost Note. Ms. Thomas has also determined that for each year of the first five years the proposed amendments are in effect, the anticipated public benefit will be the availability of additional resources that will better enable the Board to ensure that its approved providers offer quality remedial education courses. The proposed amendments to §223.1 require remedial education course providers to pay a fee of \$300 for the approval of a remedial education course and \$100 for the renewal of the course. The Board anticipates that these proposed fees will assist in offsetting a portion of the costs associated with the review, approval, and renewal of provider and course applications. Based on the fact that the Board approved 10 providers in 2010 and 10 providers thus far in 2011, the Board estimates that

it will continue to approve at least 10 providers each year. Further, based upon the fact that each currently approved provider offers an average of 2-4 remedial education courses, the Board estimates that it will continue to approve and/or renew approximately 20-40 remedial education courses each year. Board Staff spends a substantial amount of time reviewing a single remedial education course application. Further, in addition to reviewing applications, Staff spends a substantial amount of time assisting entities in correcting deficient applications and responding to inquiries. The Board expects this trend to continue, which may begin to negatively affect the ability of Board Staff to timely meet their other assigned duties and responsibilities. The Board anticipates that it may utilize the funds generated by the proposed new fees in the future to reduce the workload associated with the review, approval, and renewal of provider and course applications. In doing so, the Board hopes to ensure that its Staff is able to meet all of their assigned duties and responsibilities in a more efficient and effective manner, which should result in better nursing regulation.

Potential Compliance Costs

Under the proposed amendments, an entity may submit a remedial education course application to the Board for approval. No entity is required by law, however, to do so. For those entities who choose to become Board approved providers and offer remedial education courses under the proposal, there will be associated costs of compliance with proposed amended §223.1. The Board estimates that the total probable cost of compliance with proposed amended §223.1 will vary among remedial education providers based upon: (i) the number of remedial education courses the provider wishes to offer that require initial approval; and (ii) the number of remedial education courses the provider wishes to offer that require Board renewal. Under the proposal, for every course that requires initial Board approval, a provider must submit a fee of \$300 to the Board. Further, for every course that requires Board renewal, a provider must submit a fee of \$100 to the Board. This estimate is based upon the following factors. First, all remedial education course providers are subject to the proposed amendments. Thus, each remedial education course provider seeking to offer a remedial education course will be required to submit a fee of \$300 for the course's initial approval and \$100 for the renewal of the course's approval. If an entity chooses to offer more than one remedial education course, a separate fee of \$300 will be required for each course that is submitted to the Board for initial approval and \$100 for each course that is submitted to the Board for renewal. Second, the amount of the proposed approval or renewal fee will not increase or decrease based upon the amount of time that Staff spends reviewing the particular application. As such, the Board estimates that an entity should only incur the proposed approval fee one time for each remedial education course submitted to the Board for initial approval. Further, the Board estimates that an entity should only incur the proposed renewal fee approximately one time every two years for each remedial education course submitted to the Board for renewal. In cases where the Board does not finally approve or renew a particular remedial education course, the entity filing the application may re-file the application at a later date. However, a separate approval fee of \$300 and a separate renewal fee of \$100 will be required at the time the application is re-filed. Each entity has the information necessary to estimate its own individual compliance costs associated with the proposed requirements. Further, any other costs to comply with the proposed amendments result from the legislative enactment

of Chapter 301 and are not a result of the adoption, enforcement, or administration of the proposal.

Economic Impact Statement and Regulatory Flexibility Analysis for Small and Micro Businesses. Under the Government Code §2006.002(c) and (f), if a proposed rule may have an economic impact on small or micro businesses, state agencies must prepare, as part of the rulemaking process, an economic impact statement that assesses the potential impact of the proposed rule on the small or micro business and a regulatory flexibility analysis that considers alternative methods of achieving the purpose of the proposed rule. The Government Code §2006.001(a)(2) defines "small business" as a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit; is independently owned and operated, and has fewer than 100 employees or less than \$6 million in annual gross receipts. The Government Code §2006.001(a)(1) defines "micro business" similarly to "small business," but specifies that a micro business may not have more than 20 employees. The Government Code §2006.001(a)(1) does not specify a maximum level of gross receipts for a "micro business."

The Board has determined that the vast majority, if not all, of the entities that will choose to submit remedial education course applications to the Board, and will thus be subject to the proposed amendments, will qualify as small or micro businesses under the Government Code §2006.001(a). This estimate is based on the following factors. Because the proposal affects remedial education course providers, the Board reviewed all of the remedial education provider applications that were approved from 2004-2010. In examining the entities that submitted these applications, the Board determined the following: (i) all of the reviewed entities were formed for the purpose of making a profit; (ii) all of the reviewed entities employed less than 100 employees; and (iii) all of the reviewed entities were independently owned or operated. Based upon this review, the Board has determined that all of the currently approved remedial education course providers, as well as all of the past approved providers, meet the definition of a small or micro business under the Government Code §2006.001(a). Further, the Board has determined that the entities that have been approved as providers in the past are generally representative of the types of entities that the Board anticipates receiving new provider applications from in the future. However, because the Board's proposed rule does not exclude other entities from submitting provider applications to the Board, it is possible for entities that do not qualify as small or micro businesses under the Government Code §2006.001(a) to be approved by the Board. Notwithstanding this fact, the Board continues to anticipate that the vast majority, if not all, of the entities that will seek Board approval to offer remedial education courses, and will thus be subject to the proposed amendments, will qualify as small or micro businesses.

The Board has further determined that the proposal may have an adverse economic impact on these small or micro businesses because the proposed requirements require these entities to pay a fee of \$300 for the initial approval of a remedial education course and \$100 for the renewal of a remedial education course. In accordance with the Government Code §2006.002(c-1), the Board has determined that even though the proposed amendments may have an adverse economic effect on the small or micro businesses that elect to submit remedial education course applications to the Board for approval and renewal, and, are therefore required to comply with the proposed requirements, the Board is not required to prepare a regulatory flexibility analy-

sis as required in the Government Code §2006.002(c)(2) for the following reasons.

First, no entity is required by statute or by the proposed requirements to become a Board approved remedial education course provider. Therefore, those entities that submit provider and course applications to the Board for approval or renewal do so at their own choice, and as a result, agree to bear any additional costs required for compliance with the proposed requirements. Further, the Board anticipates that any costs incurred by these entities as a result of the proposed requirements will be passed on to course participants in the form of course and registration fees. Additionally, the costs outlined in the Public Benefit/Cost Note part of this proposal provide sufficient cost information for small or micro business to make an informed business decision regarding whether to submit a provider or course application to the Board for approval or renewal.

Second, the Government Code §2006.002(c)(2) requires a state agency, before adopting a rule that may have an adverse economic effect on a small businesses, to prepare a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule. Section 2006.002(c-1) requires that the regulatory analysis "consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses." Therefore, an agency is not required to consider alternatives that, while possibly minimizing adverse impacts on small and micro businesses, would not be protective of the health, safety, and environmental and economic welfare of the state.

The Occupations Code §301.453 authorizes the Board to require a licensee to complete a program of education and counseling prescribed by the Board. The purpose of this statute is to provide licensees with an opportunity to correct practice errors through the successful completion of quality courses prescribed by the Board. The proposed new requirements support this purpose by ensuring that Board Staff is able to thoroughly review all provider and course applications for approval and renewal, as well as continuing to meet all of their other assigned duties and responsibilities. Board Staff is responsible for reviewing every provider and course application that is submitted to the Board for approval and renewal. The proposed amendments are intended to create additional resources for the Board to utilize in ensuring that all provider and course applications are properly reviewed for compliance with Board requirements. The Board recognizes the ever growing need for approved providers and courses. However, their quality cannot be sacrificed. Board Staff must be able to thoroughly review each provider and course application to ensure that it meets the minimum standards prescribed by the Board. The purpose of the proposed new requirements and the authorizing statutes are to protect the health, safety, and economic welfare of Texas consumers and the state of Texas. The Board cannot ensure quality nursing care for all Texas consumers without first ensuring quality remedial education instruction for licensees that are in need of practice remediation. As such, requirements that support the development of credible, comprehensive, quality courses are vital to and protective of the health of Texas consumers. Further, requirements that enable the Board to better manage its resources in order to ensure that credible, comprehensive, quality courses are approved and available to licensees are vital to and protective of the health of Texas consumers. Finally, requirements that enable the Board to offset the costs of reviewing, approving, and renewing reme-

dial education course providers and remedial education courses allow the Board to better manage its resources to ensure that all its regulatory duties can be met in a timely and efficient manner. Permitting the Board to effectively manage its resources results in better nursing regulation as a whole, which benefits and protects Texas consumers. As a result, the Board has determined that there are no additional regulatory alternatives to the proposed new requirements that will sufficiently protect the health, safety, and economic interests of Texas consumers and the welfare of the state.

Takings Impact Assessment. The Board has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

Request for Public Comment. To be considered, written comments on the proposal or any request for a public hearing must be submitted no later than 5:00 p.m. on June 27, 2011, to James W. Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to dusty.johnston@bon.state.tx.us, or faxed to (512) 305-8101. An additional copy of the comments on the proposal or any request for a public hearing must be simultaneously submitted to Janice Hooper, PhD, RN, Lead Education Consultant, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, or by e-mail to janice.hooper@bon.state.tx.us, or faxed to (512) 305-8101. If a hearing is held, written and oral comments presented at the hearing will be considered.

Statutory Authority. The amendments are proposed under the Occupations Code §§301.155(a), 301.303, 301.452, 301.453, and 301.151.

Section 301.155(a) provides that the Board by rule shall establish fees in amounts reasonable and necessary to cover the costs of administering the Occupations Code Chapter 301. Further, §301.155(a) provides that the Board may not set a fee that existed on September 1, 1993, in an amount less than the amount of that fee on that date.

Section 301.303(a) provides that the Board may recognize, prepare, or implement continuing competency programs for license holders under Chapter 301 and may require participation in continuing competency programs as a condition of renewal of a license. Further, the programs may allow a license holder to demonstrate competency through various methods, including: (i) completion of targeted continuing education programs; and (ii) consideration of a license holder's professional portfolio, including certifications held by the license holder.

Section 301.303(b) provides that the Board may not require participation in more than a total of 20 hours of continuing education in a two-year licensing period.

Section 301.303(c) states that, if the Board requires participation in continuing education programs as a condition of license renewal, the Board by rule shall establish a system for the approval of programs and providers of continuing education.

Section 301.303(e) provides that the Board may adopt other rules as necessary to implement §301.303.

Section 301.303(f) states that the Board may assess each program and provider under §301.303 a fee in an amount that is

reasonable and necessary to defray the costs incurred in approving programs and providers.

Section 301.303(g) states that the Board by rule may establish guidelines for targeted continuing education required under Chapter 301. Further, the rules adopted under §301.303(g) must address: (i) the nurses who are required to complete the targeted continuing education program; (ii) the type of courses that satisfy the targeted continuing education requirement; (iii) the time in which a nurse is required to complete the targeted continuing education; (iv) the frequency with which a nurse is required to meet the targeted continuing education requirement; and (v) any other requirement considered necessary by the Board.

Section 301.452(a) defines "intemperate use" as including practicing nursing or being on duty or on call while under the influence of alcohol or drugs.

Section 301.452(b) states that a person is subject to denial of a license or to disciplinary action under Subchapter J for: (i) a violation of Chapter 301, a rule or regulation not inconsistent with Chapter 301, or an order issued under Chapter 301; (ii) fraud or deceit in procuring or attempting to procure a license to practice professional nursing or vocational nursing; (iii) a conviction for, or placement on deferred adjudication community supervision or deferred disposition for, a felony or for a misdemeanor involving moral turpitude; (iv) conduct that results in the revocation of probation imposed because of conviction for a felony or for a misdemeanor involving moral turpitude; (v) use of a nursing license, diploma, or permit, or the transcript of such a document, that has been fraudulently purchased, issued, counterfeited, or materially altered; (vi) impersonating or acting as a proxy for another person in the licensing examination required under §301.253 or §301.255; (vii) directly or indirectly aiding or abetting an unlicensed person in connection with the unauthorized practice of nursing; (viii) revocation, suspension, or denial of, or any other action relating to, the person's license or privilege to practice nursing in another jurisdiction; (ix) intemperate use of alcohol or drugs that the Board determines endangers or could endanger a patient; (x) unprofessional or dishonorable conduct that, in the Board's opinion, is likely to deceive, defraud, or injure a patient or the public; (xi) adjudication of mental incompetency; (xii) lack of fitness to practice because of a mental or physical health condition that could result in injury to a patient or the public; or (xiii) failure to care adequately for a patient or to conform to the minimum standards of acceptable nursing practice in a manner that, in the Board's opinion, exposes a patient or other person unnecessarily to risk of harm.

Section 301.452(c) provides that the Board may refuse to admit a person to a licensing examination for a ground described under §301.452(b).

Section 301.452(d) states that the Board by rule shall establish guidelines to ensure that any arrest information, in particular information on arrests in which criminal action was not proven or charges were not filed or adjudicated, that is received by the Board under §301.452 is used consistently, fairly, and only to the extent the underlying conduct relates to the practice of nursing.

Section 301.453(a) states that, if the Board determines that a person has committed an act listed in §301.452(b), the Board shall enter an order imposing one or more of the following: (i) denial of the person's application for a license, license renewal, or temporary permit; (ii) issuance of a written warning; (iii) administration of a public reprimand; (iv) limitation or restriction of

the person's license, including: (A) limiting to or excluding from the person's practice one or more specified activities of nursing; or (B) stipulating periodic Board review; (v) suspension of the person's license; (vi) revocation of the person's license; or (vii) assessment of a fine.

Section 301.453(b) states that, in addition to or instead of an action under §301.453(a), the Board, by order, may require the person to: (i) submit to care, counseling, or treatment by a health provider designated by the Board as a condition for the issuance or renewal of a license; (ii) participate in a program of education or counseling prescribed by the Board, including a program of remedial education; (iii) practice for a specified period under the direction of a registered nurse or vocational nurse designated by the Board; or (iv) perform public service the Board considers appropriate.

Section 301.453(c) states that the Board may probate any penalty imposed on a nurse and may accept the voluntary surrender of a license. The Board may not reinstate a surrendered license unless it determines that the person is competent to resume practice.

Section 301.453(d) states that, if the Board suspends, revokes, or accepts surrender of a license, the Board may impose conditions for reinstatement that the person must satisfy before the Board may issue an unrestricted license.

Section 301.151 authorizes the Board to adopt and enforce rules consistent with Chapter 301 and necessary to: (i) perform its duties and conduct proceedings before the Board; (ii) regulate the practice of professional nursing and vocational nursing; (iii) establish standards of professional conduct for license holders Chapter 301; and (iv) determine whether an act constitutes the practice of professional nursing or vocational nursing.

Cross Reference to Statute. The following statutes are affected by this proposal: Occupations Code §§301.155(a), 301.303, 301.452, 301.453, and 301.151.

§223.1. *Fees.*

(a) The Texas Board of Nursing has established reasonable and necessary fees for the administration of its functions.

(1) - (22) (No change.)

(23) Disciplinary monitoring fees as stated in a Board order; [and]

(24) Nursing Jurisprudence Examination fee: not to exceed \$25;[-]

(25) approval of remedial education course: \$300 per course; and

(26) renewal of remedial education course: \$100 per course.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.
TRD-201101745

Jena Abel
Assistant General Counsel
Texas Board of Nursing
Earliest possible date of adoption: June 26, 2011
For further information, please call: (512) 305-6822

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS
SUBCHAPTER Q. ADMINISTRATIVE PENALTIES

22 TAC §535.191

The Texas Real Estate Commission proposes amendments to §535.191, concerning Schedule of Administrative Penalties. Section 535.191 is amended to add additional provisions that apply to the schedule and to move an existing provision that should more appropriately fit under a different range.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the section is in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the section. There is no anticipated economic effect on small businesses, micro-businesses, persons, or local or state employment as a result of implementing the section.

Ms. DeHay also has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the consistent, fair and efficient administration of contested cases based upon objective standards, there is no probable economic cost to persons required to comply with the section.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to ensure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101, 1102, and 1303; and Texas Property Code, Chapter 221. No other statute, code or article is affected by the proposed amendments.

§535.191. *Schedule of Administrative Penalties.*

(a) The commission may suspend or revoke a license or take other disciplinary action authorized by Chapter 1101 of the Act in addition to or instead of assessing the administrative penalties set forth in this section.

(b) (No change.)

(c) An administrative penalty range of \$100 - \$1,500 per violation per day may be assessed for violations of the following sections of the Act and Rules:

(1) - (4) (No change.)

(5) 22 TAC §535.91(d) [(e)]; and

[(6) 22 TAC §535.144; and]

(6) [(7)] 22 TAC §535.154.

(d) An administrative penalty range of \$500 - \$3,000 per violation per day may be assessed for violations of the following sections of the Act and Rules:

(1) - (7) (No change.)

(8) §1101.652(b)(30) - (31); [and]

(9) §1101.654(a); [-]

(10) 22 TAC §535.2; and

(11) 22 TAC §535.144.

(e) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 11, 2011.

TRD-201101725

Loretta R. DeHay

General Counsel

Texas Real Estate Commission

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 465-3926



SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §535.219

The Texas Real Estate Commission (TREC) proposes new §535.219, concerning Schedule of Administrative Penalties. The new section establishes a penalty matrix for the assessment of administrative penalties for different violations of the statute and rules governing real estate inspectors. The matrix was drafted in accordance with §1102.403 of the Texas Occupations Code (relating to administrative penalties imposed against inspectors) and Chapter 1101, Subchapter O (relating to administrative penalties assessed by the Commission). As such, the highest category of administrative penalties provides for a maximum penalty of \$5,000 per violation, and each day a violation continues or occurs may be considered a separate violation for purposes of imposing a penalty. The section was developed by the Texas Real Estate Inspector Committee's enforcement subcommittee and endorsed by the Committee.

Devon V. Bijansky, Deputy General Counsel, has determined that, for each year of the first five years the section is in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the section, nor is there any anticipated impact on local or state employment.

Ms. Bijansky has also determined that, for each year of the first five years the section as proposed is in effect, the public benefit anticipated as a result of enforcing the section will be the consistent, fair and efficient administration of contested cases based upon objective standards and that there is no probable economic cost to persons required to comply with the section, as persons against whom administrative penalties will be imposed in accor-

dance with this matrix would already be subject to administrative penalties under §1102.403 of the Texas Occupations Code. There is no anticipated impact on small businesses, micro-businesses, or local or state employment as a result of implementing the section.

Comments on the proposal may be submitted to Devon V. Bijansky, Deputy General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The new section is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of Chapter 1102 to ensure compliance with the provisions of the chapter.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101 and 1102. No other statute, code, or article is affected by the proposed section.

§535.219. Schedule of Administrative Penalties.

(a) The commission may suspend or revoke a license or take other disciplinary action authorized by Chapter 1102 of the Texas Occupations Code in addition to or instead of assessing the administrative penalties set forth in this section.

(b) The administrative penalties set forth in this section take into consideration the criteria listed in §1101.702(b) of the Texas Occupations Code.

(c) An administrative penalty range of \$100 - \$1,500 per violation per day may be assessed for violations of the following sections of the Texas Occupations and Administrative Codes:

(1) §1102.118;

(2) §1102.364;

(3) 22 TAC §535.216(d);

(4) 22 TAC §535.220(a) - (d);

(5) 22 TAC §535.221; and

(6) 22 TAC §535.223.

(d) An administrative penalty range of \$500 - \$3,000 per violation per day may be assessed for violations of the following sections of the Texas Occupations and Administrative Codes:

(1) §1102.301;

(2) 22 TAC §535.222;

(3) 22 TAC §535.224(b)(1) - (3);

(4) 22 TAC §535.226(d) - (e); and

(5) 22 TAC §§535.227 - 535.233.

(e) An administrative penalty of \$1,000 - \$5,000 per violation per day may be assessed for violations of the following sections of the Texas Occupations and Administrative Codes:

(1) §1102.101;

(2) §1102.102;

(3) §1102.103;

(4) §1102.302;

(5) §1102.303;

(6) §1102.304;

- (7) 22 TAC §535.208(f);
- (8) 22 TAC §535.211;
- (9) 22 TAC §535.215;
- (10) 22 TAC §535.220(e)(1), (3) - (7); and
- (11) 22 TAC §535.224(b)(4) - (5).

(f) The commission may assess an administrative penalty of up to two times that outlined under subsections (c), (d), and (e) of this section, subject to the maximum penalties authorized under §1101.702(a) of the Texas Occupations Code, if a person has a history of previous violations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 11, 2011.

TRD-201101726

Devon V. Bijansky

Deputy General Counsel

Texas Real Estate Commission

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 465-3926



CHAPTER 537. PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS

22 TAC §§537.20, 537.28, 537.30 - 537.32, 537.37

The Texas Real Estate Commission (TREC) proposes amendments to 22 TAC §537.20, concerning Standard Contract Form TREC No. 9-8, Unimproved Property Contract; §537.28, concerning Standard Contract Form TREC No. 20-9, One to Four Family Residential Contract (Resale); §537.30, concerning Standard Contract Form TREC No. 23-10, New Home Contract (Incomplete Construction); §537.31, concerning Standard Contract Form TREC No. 24-10, New Home Contract (Completed Construction); §537.32, concerning Standard Contract Form TREC No. 25-7, Farm and Ranch Contract; and §537.37, concerning Standard Contract Form TREC No. 30-8, Residential Condominium Contract (Resale). The amendments propose to adopt by reference six revised contract forms for use by Texas real estate licensees.

Texas real estate licensees are generally required to use forms promulgated by TREC when negotiating contracts for the sale of real property. These forms are drafted by the Texas Real Estate Broker-Lawyer Committee, an advisory body consisting of six attorneys appointed by the President of the State Bar of Texas, six brokers appointed by TREC, and a public member appointed by the governor.

The amendment to §537.20 proposes to adopt by reference Standard Contract Form TREC No. 9-9, Unimproved Property Contract. The proposed revision is the same as that proposed for Form TREC No. 20-10. Also, typographical errors in paragraph 7 are corrected.

The amendments to §537.28 propose to adopt by reference Standard Contract Form TREC No. 20-10, One to Four Family Residential Contract (Resale). Paragraph 15 would be revised to delete subparagraph 15B. This change to all six of the forms

was adopted on an emergency basis at the February meeting of the Commission with an effective date of March 1, 2011.

The amendment to §537.30 proposes to adopt by reference Standard Contract Form TREC No. 23-11, New Home Contract (Incomplete Construction). The proposed revision is the same as that proposed for Form TREC No. 20-10.

The amendment to §537.31 proposes to adopt by reference Standard Contract Form TREC No. 24-11, New Home Contract (Completed Construction). The proposed revision is the same as that proposed for Form TREC No. 20-10. Also, typographical errors in paragraph 7 are corrected.

The amendment to §537.32 proposes to adopt by reference Standard Contract Form TREC No. 25-8, Farm and Ranch Contract. The proposed revision is the same as that proposed for Form TREC No. 20-10.

The amendment to §537.37 proposes to adopt by reference Standard Contract Form TREC No. 30-9, Residential Condominium Contract (Resale). The proposed revision is the same as that proposed for Form TREC No. 20-10.

Loretta R. DeHay, General Counsel, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for the state or for units of local government as a result of enforcing or administering the sections. There is no anticipated impact on small businesses, micro-businesses or local or state employment as a result of implementing the sections. There is no anticipated economic cost to persons who are required to comply with the proposed sections, other than the costs of obtaining copies of the forms, which would be available at no charge through the TREC web site

Ms. DeHay also has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing the sections will be the availability of consistent standard contract forms for use by TREC licensees.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188. The deadline for comments is 30 days after publication in the *Texas Register*.

The amendments are proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its licensees to fulfill the purposes of Chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statute affected by this proposal is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the proposed amendments.

§537.20. Standard Contract Form TREC No. 9-9 [9-8].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 9-9 [9-8] approved by the Texas Real Estate Commission in 2011 [2010] for use in the sale of unimproved property where intended use is for one to four family residences. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.28. Standard Contract Form TREC No. 20-10 [20-9].

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 20-10 [20-9] approved by the Texas Real Estate Commission in 2011 [2010] for use in the resale of residential real

estate. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.30. *Standard Contract Form TREC No. 23-11 [23-10].*

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 23-11 [23-10] approved by the Texas Real Estate Commission in 2011 [2010] for use in the sale of a new home where construction is incomplete. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.31. *Standard Contract Form TREC No. 24-11 [24-10].*

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 24-11 [24-10] approved by the Texas Real Estate Commission in 2011 [2010] for use in the sale of a new home where construction is completed. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.32. *Standard Contract Form TREC No. 25-8 [25-7].*

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 25-8 [25-7] approved by the Texas Real Estate Commission in 2011 [2010] for use in the sale of a farm or ranch. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

§537.37. *Standard Contract Form TREC No. 30-9 [30-8].*

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 30-9 [30-8] approved by the Texas Real Estate Commission in 2011 [2010] for use in the resale of a residential condominium unit. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.trec.state.tx.us.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 11, 2011.

TRD-201101727

Loretta R. DeHay

General Counsel

Texas Real Estate Commission

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For further information, please call: (512) 465-3926



TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 15. COASTAL AREA PLANNING

SUBCHAPTER A. MANAGEMENT OF THE BEACH/DUNE SYSTEM

31 TAC §15.37

The General Land Office (GLO) proposes new §15.37, concerning Certification Status of City of Freeport Dune Protection and Beach Access Plan. New §15.37 certifies as consistent with

state law the City of Freeport's Dune Protection and Beach Access Plan (Plan) that was adopted by the City of Freeport's City Council Members by ordinance number 2010-2263 on October 4, 2010 and was submitted to the GLO for formal certification on February 10, 2011.

The proposed Plan may be viewed on the City's website at: http://www.freeport.tx.us/default.aspx?name=public_notices. Copies of the local government dune protection and beach access plan are available from City of Freeport which can be reached (979) 233-3526.

BACKGROUND

Pursuant to the Open Beaches Act (Texas Natural Resources Code, Chapter 61), the Dune Protection Act (Texas Natural Resources Code, Chapter 63), and the Beach/Dune Rules (31 TAC §§15.1 - 15.21), a local government with jurisdiction over gulf beaches must submit a beach management plan to the GLO for certification. The GLO is required to review the plan and certify by rule that the plan is consistent with the Open Beaches Act, the Dune Protection Act, and the Beach/Dune Rules. The certification by rule reflects the state's approval of the plan, but the text of the plan is not adopted by the GLO, 31 TAC §15.3(o)(4).

City of Freeport is a coastal community in Brazoria County which located 50 miles south of Houston and borders the Gulf of Mexico. The City is bordered by the Brazos River to the southwest and the Cities of Lake Jackson and Clute to the north. The City is bordered by Oyster Creek to the east and the ETJ extends from the eastern city limits of the Village of Surfside Beach to the San Luis Pass on Follets Island. In 2003, the city annexed 3.5 miles (5.6 km) of beach bounded on the north by the Village of Quintana and continuing south to the mouth of the Brazos River. In addition, the City annexed approximately 1000 feet of Gulf facing beach from northeast boundary of the Village of Surfside Beach on Follets Island.

The Gulf beaches and adjacent areas governed by the Plan are the Gulf beaches within the corporate limits of the City of Freeport with respect to administration of the Dune Protection Act. The County has delegated authority to the City of Freeport for administration of the Dune Protection Act pursuant to Texas Natural Resources Code §63.011(a). With respect to administration of the Open Beaches Act, the Gulf beaches within the corporate limits of the City of Freeport will be governed by the City of Freeport's Dune Protection and Beach Access Plan (City's Plan).

THE 2010 CITY OF FREEPORT'S ADOPTION OF THE PLAN

The City of Freeport City Council passes and adopted Ordinance No. 2010-2263 on October 4th, 2010 and was submitted to the GLO on February 10, 2011 for review and certification. The GLO reviewed the Plan and has determined that it meets the minimal standards for certification as required by rules for management of the beach/dune system (31 TAC §§15.1 - 15.21) adopted by the GLO. Accordingly, the GLO proposes to certify the 2010 Plan approved by the City of Freeport's City Council on February 10, 2011, as consistent with state law, in accordance with the Beach/Dune Rules at 31 TAC §15.3(o)(4); §61.015(b) of the Open Beaches Act; and §63.054(c) of the Dune Protection Act

FISCAL AND EMPLOYMENT IMPACTS

Mrs. Helen S. Young, Deputy Commissioner for the GLO's Coastal Resources Program Area, has determined that for each year of the first five years the new section, as proposed, is in effect, there will be fiscal implications for the state government

as a result of enforcing or administering the new section. The effect on state government for the first five-year period will be due to additional time spent by staff reviewing a limited number of local government beachfront construction certificates and dune protection permits as required by the Open Beaches Act and the Dune Protection Act to monitor compliance with state law. Because staff is already performing this function for a number of other jurisdictions, any increase in fiscal implications is expected to be minimal. Specific fiscal impacts cannot be identified as the annual number of permits and certificates reviewed by GLO staff varies according to the rate of construction occurring within the geographic scope of the area regulated by this Plan.

The estimated effect on local governments for the first five-year period the section will be in effect are expected to be minimal. The City of Freeport participates in the Federal Flood Insurance Program, and therefore has adopted ordinances governing beachfront construction, in addition to any local building code requirements. The application requirements in §15.3(s)(4) of this chapter were extracted from various existing requirements for construction applications created by local governments along the Gulf Coast. In addition, this section allows local governments to implement a system for collection of beach user fees which is specifically authorized for expenditures relating to the public beach. The cost of compliance with the section for small and large businesses is best addressed through a discussion of the cost of compliance for individuals, as businesses are considered "individuals" or "persons" pursuant to the definition of the latter term in 31 TAC §15.2. Estimated cost of compliance for individuals is expected to be minimal, based on the cost of providing information required for a dune protection permit and a beachfront construction certificate. Because the information required under the plan largely mirrors those necessary to obtain other authorizations for beachfront construction, the cost is expected to be moderate. However, costs are difficult to estimate since the applicants will have differing capacities for providing the required information and the information required will vary from site to site depending not only on the terrain but also the nature and scope of the proposed project. In general, it is anticipated that smaller projects (e.g., a single-family seasonal residence) would incur significantly lower costs than a large-scale commercial project. In addition to the information costs, costs will be incurred if the applicant proposes damage to dunes or dune vegetation for which mitigation is required. These costs are not predictable on a uniform basis, as they will vary considerably depending on the amount of mitigation required.

PUBLIC BENEFIT

Mrs. Young has determined the public will benefit from the increased services provided by the City under the authority of the dune protection and beach access plan. The City will provide improved beach-related services to the public including: funding for ensuring safe use of and access to and from the public beach, including vehicular controls, management, and parking regulations; acquisition and maintenance of off-beach parking areas and access ways; construction of accessible (ADA) dune walkovers; sanitation and litter control, including providing and servicing trash receptacles and conducting a trash abatement program; beach maintenance, including removal of debris and raking of seaweed; law enforcement; beach/dune system education; beach/dune protection and restoration projects; providing public facilities such as portable and fixed restroom facilities, showers, and picnic areas; and permitting of recreational and refreshment vendors. In addition, Mrs. Young has also determined

that for each year of the first five years the section, as proposed, is in effect the public benefit anticipated as a result of enforcing the section will be increased flood protection for private and public property and beachfront structures; guaranteed preservation and enhancement of public beach use, recreation and access; natural resource and habitat protection; maintenance of the sediment supply to slow erosion; and establishment and maintenance of beach-related facilities and services.

The GLO has determined a local employment impact statement on these proposed regulations is not required, because the proposed regulations will not adversely affect any local economy in a material manner for the first five years they will be in effect.

CONSISTENCY WITH CMP

The proposal to add §15.37 relating to Certification Status of City of Freeport's Dune Protection and Beach Access Plan is subject to the Coastal Management Program (CMP) as provided in Texas Natural Resources Code §33.2053(a)(10) and 31 TAC §505.11(a)(1)(J), relating to the Actions and Rules Subject to the CMP, and must be consistent with the applicable CMP goals and policies under §501.26, relating to Policies and Construction in the Beach/Dune System. The GLO has reviewed the proposed rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council (Council). The proposed action is consistent with the GLO Beach/Dune regulations that the Council has determined to be consistent with the CMP. Consequently, the GLO has determined that the proposed action is consistent with the applicable CMP goals and policies. The proposed new section will be distributed to Council members in order to provide them an opportunity to provide comment on the consistency of the proposed rulemaking during the comment period.

TAKINGS IMPACT ASSESSMENT

The GLO has evaluated the proposed new section to determine whether Texas Government Code Chapter 2007 is applicable and a detailed takings impact assessment required. The GLO has determined the proposed new section does not affect private real property in a manner that requires real property owners to be compensated as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Article I, Sections 17 and 19, of the Texas Constitution. Furthermore, the GLO has determined the proposed new section would not affect any private real property in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the new section being proposed.

ENVIRONMENTAL REGULATORY ANALYSIS

The GLO has evaluated the proposed rulemaking action in light of the regulatory analysis requirements of Texas Government Code §2001.0225, and determined that the action is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the statute. "Major environmental rule" means a rule, the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The proposed new section is not anticipated to adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state because the proposed rulemaking implements legislative requirements in Texas Natural Resources Code §§61.011,

61.015(b), and 61.022(e), which provide the GLO with the authority to adopt rules to preserve and enhance the public's right to use and have access to and from the public beaches of Texas and to certify that plans to impose or increase public beach access, parking, or use fees are consistent with state law.

The new section is proposed under the Texas Natural Resources Code §§61.011, 61.015(b), and 61.022(e) which provide the GLO with the authority to adopt rules to preserve and enhance the public's right to use and have access to and from the public beaches of Texas and to certify that plans are consistent with state law.

PUBLIC COMMENT REQUEST

To comment on the proposed rulemaking or its consistency with the CMP goals and policies, please send a written comment to Mr. Walter Talley, Texas Register Liaison, General Land Office, P.O. Box 12873, Austin, TX 78711, facsimile number (512) 475-1859 or email to Walter.Talley@glo.state.tx.us. Written comments must be received no later than thirty (30) days from the date of publication of this proposal.

STATUTORY AUTHORITY

The new section is proposed under the Texas Natural Resources Code §§61.011, 61.015(b), 61.022(c), and 61.070, which provide the GLO with the authority to adopt rules to preserve and enhance the public's right to use and have access to and from the public beaches of Texas and to certify that plans to impose or increase public beach access, parking, or use fees are consistent with state law. In addition, Texas Natural Resources Code §63.121 provides the GLO with authority to adopt rules for the protection of critical dune areas.

Texas Natural Resources Code §§61.011, 61.015, 61.022, and 63.121 are affected by the proposed new section.

§15.37. Certification Status of City of Freeport Dune Protection and Beach Access Plan.

The City of Freeport has submitted to the General Land Office a dune protection and beach access plan which is certified as consistent with state law. The county's plan was adopted by the City of Freeport's City Council Members by ordinance 2010-2263 on October 4, 2010.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 13, 2011.

TRD-201101735

Trace Finley

Deputy Commissioner, Policy and Governmental Affairs

General Land Office

Earliest possible date of adoption: June 26, 2011

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



PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER N. MIGRATORY GAME BIRD PROCLAMATION

31 TAC §§65.315, 65.318 - 65.321

The Texas Parks and Wildlife Department (the department) proposes amendments to §§65.315 and §§65.318 - 65.321, concerning the Migratory Game Bird Proclamation.

The proposed amendment to §65.315, concerning Open Seasons and Bag and Possession Limits--Early Season, would retain the season structure and bag limits from last year and adjust the season dates for early-season species of migratory game birds to account for calendar shift (i.e., to ensure that seasons open on the desired day of the week, since dates from a previous year do not fall on the same days in following years).

The United States Fish and Wildlife Service (Service) issues annual frameworks for the hunting of migratory game birds. Regulations adopted by individual states may be more restrictive than the federal frameworks, but may not be less restrictive. Prior to 2009, September 20 was the earliest day that the South Zone dove season could be opened under frameworks issued by the Service, except the four days of half-day hunting in the Special White-winged Dove Area (SWWDA). Since hunter and landowner preference historically has been for the season to open on the earliest date possible, irrespective of where that day falls during the week, this structure resulted in the periodic occurrence of opening day on days other than a Friday, the preferred choice of hunters and landowners for opening the season. In 2009, the Service authorized the department to open the South Zone on the Friday nearest September 20, but no earlier than September 17. The intent was to insure that the season always opened on the Friday closest to September 20. However, this formulation results in the periodic occurrence (including 2011) of the Friday closest to September 20 falling on September 16. To address this anomaly the department has requested Service approval to set the opening day for the South Zone dove season on the Friday before the third Saturday in September. In this fashion, the season would always open on a Friday and would never open later than September 20. Although this proposal would set an opening date of September 23, if the Service approves an earlier opener the department will consider adoption of an opening day of September 16.

The proposed amendment to §65.315 also would implement a 16-day statewide teal season to run from September 10 - 25, 2011, which must be approved by the Service before it can be implemented. If the Service does not approve a 16-day season, the department proposes to adopt a 9-day season to run September 17 - 25, 2011. The department cautions that the federal frameworks could close the season on teal if population data warrant. By federal law, the number of days in the September teal season count against the 107 days of total hunting opportunity allowed for ducks, coots, and mergansers.

The proposed amendment to §65.318, concerning Open Seasons and Bag and Possession Limits--Late Season, retains the season structure and bag limits from last year, with the exception of a 16-day early season for non-migratory Canada geese; however, the season dates for geese in the Eastern Goose Zone and ducks in all zones have been shifted to occur one week later in comparison to last year. Prior to 2009, the department followed hunter preference and selected season dates that run to the last day of the federal frameworks. Beginning in 2009, the department adopted seasons that closed with one week left in the framework in an attempt to increase nesting success. This season structure is not popular with waterfowl hunters, especially if adjustments based solely on calendar shift cause the season to open in late October. Therefore, the department proposes a season this year that would begin in November, in an attempt

to balance the preferences of waterfowl hunters with preserving the opportunity for the resource to benefit from some time without hunting pressure prior to migration to the nesting areas. The proposed amendment would adjust the remaining late-season migratory game bird seasons to account for calendar shift.

Populations of non-migratory Canada geese have been growing in northeast Texas, primarily in and along the Red River valley. Non-migratory geese are geese that do not exhibit the characteristically long north-south seasonal migration flights, instead remaining resident in a single general area on a year-round basis. In other parts of the country, particularly in the Atlantic Flyway, populations of non-migratory geese have exploded, causing nuisance damage, navigation hazards, crop depredation, and other undesirable effects. Although Canada geese populations in Texas are not at levels similar to those in the Atlantic Flyway, they have become numerous enough for the department to propose a 16-day September Canada goose season in the East Goose Zone, to run concurrently with September teal season. The intent of the proposed new season is to manage non-migratory Canada geese while creating additional hunting opportunity.

The proposed amendment to §65.319, concerning Extended Falconry Season--Early Season Species, adjusts season dates to consolidate, where possible, seasons for woodcock, gallinules, rails, and moorhens with the extended falconry season for ducks. The proposed amendment adjusts falconry seasons for dove to reflect calendar shift.

The proposed amendment to §65.320, concerning Extended Falconry Season--Late Season Species, adjusts season dates for the take of late-season species of migratory game birds by means of falconry to reflect calendar shift and will be one week later than last year.

The proposed amendment to §65.321, concerning Special Management Provisions, would adjust the dates for the conservation season on light geese so that they occur one week later, for reasons explained in the discussion of the proposed amendment to §65.318.

The proposed amendments are generally necessary to implement commission policy to provide the greatest hunter opportunity possible, consistent with hunter and landowner preference for starting dates and segment lengths, under frameworks issued by the Service. The Service has not issued regulatory frameworks for the 2011-2012 hunting seasons for migratory game birds; thus, the department cautions that the proposed regulations are tentative and may change significantly, depending on federal actions prior to the release of the early-season frameworks in late June and the late-season frameworks in August. However, it is the policy of the commission to adopt the most liberal provisions possible, consistent with hunter preference, under the Service frameworks in order to provide maximum hunter opportunity.

Clayton Wolf, Wildlife Division Director, has determined that for the first five years that the amendments as proposed are in effect, there will be no additional fiscal implications to state or local governments of enforcing or administering the rules as proposed.

Mr. Wolf also has determined that for each of the first five years the proposed rules are in effect, the public benefit anticipated as a result of enforcing the rules as proposed will be the department's discharge of its statutory obligation to manage and conserve the state's populations of migratory game birds for the

use and enjoyment of the public, consistent with the principles of sound biological management.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. The department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services.

The department has determined that the proposed rules regulate various aspects of recreational license privileges that allow individual persons to pursue and harvest migratory game bird resources in this state and therefore do not directly affect small businesses or micro-businesses. Therefore, neither the economic impact statement nor the regulatory flexibility analysis described in Government Code, Chapter 2006, is required.

There also will be no adverse economic effect on persons required to comply with the rules as proposed.

The department has not filed a local impact statement with the Texas Workforce Commission as required by Government Code, §2001.022, as the department has determined that the rules as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2008, as a result of the proposed rules.

Comments on the proposed rules may be submitted to Robert Macdonald, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4775 or 1-800-792-1112 (e-mail: robert.macdonald@tpwd.state.tx.us).

The amendments are proposed under Parks and Wildlife Code, Chapter 64, which authorizes the Commission and the Executive Director to provide the open season and means, methods, and devices for the hunting and possessing of migratory game birds.

The proposed amendments affect Parks and Wildlife Code, Chapter 64.

§65.315. Open Seasons and Bag and Possession Limits--Early Season.

(a) Rails.

(1) Dates: September 10 - 25, 2011 and November 5 - December 28, 2011 [~~September 11 - 26, 2010 and October 30 - December 22, 2010~~].

(2) Daily bag and possession limits:

(A) king and clapper rails: 15 in the aggregate per day; 30 in the aggregate in possession.

(B) sora and Virginia rails: 25 in the aggregate per day; 25 in the aggregate in possession.

(b) Dove seasons.

(1) North Zone.

(A) Dates: September 1 - October 23, 2011 and December 23, 2011 - January 8, 2012 [~~September 1 - October 24, 2010 and December 25, 2010 - January 9, 2011~~].

(B) Daily bag limit: 15 mourning doves, white-winged doves, and white-tipped (white-fronted) doves in the aggregate, including no more than two white-tipped doves per day.[:]

(C) Possession limit: 30 mourning doves, white-winged doves, and white-tipped doves in the aggregate, including no more than four white-tipped doves in possession.

(2) Central Zone.

(A) Dates: September 1 - October 23, 2011 and December 23, 2011 - January 8, 2012 [~~September 1 - October 24, 2010 and December 25, 2010 - January 9, 2011~~].

(B) Daily bag limit: 15 mourning doves, white-winged doves, and white-tipped (white-fronted) doves in the aggregate, including no more than two white-tipped doves per day.[:]

(C) Possession limit: 30 mourning doves, white-winged doves, and white-tipped doves in the aggregate, including no more than four white-tipped doves in possession.

(3) South Zone.

(A) Dates: Except in the special white-winged dove area as defined in §65.314 of this title (relating to Zones and Boundaries for Early Season Species), September 23 - October 30, 2011 and December 23, 2011 - January 23, 2012 [~~September 17 - October 31, 2010 and December 25 - January 18, 2011~~].

(B) Daily bag limit: 15 mourning doves, white-winged doves, and white-tipped (white-fronted) doves in the aggregate, including no more than two white-tipped doves per day.[:]

(C) Possession limit: 30 mourning doves, white-winged doves, and white-tipped doves in the aggregate, including no more than four white-tipped doves in possession.

(4) Special white-winged dove area.

(A) Dates: September 3, 4, 10, and 11, 2011 [~~September 4, 5, 11, and 12, 2010~~].

(i) Daily bag limit: 15 white-winged doves, mourning doves, and white-tipped (white-fronted) doves, in the aggregate to include no more than four mourning doves and two white-tipped doves per day;

(ii) Possession limit: 30 white-winged doves, mourning doves, and white-tipped doves in the aggregate to include no more than eight mourning doves and four white-tipped doves in possession.

(B) Dates: September 23 - October 30, 2011 and December 23, 2011 - January 19, 2012 [~~September 17 - October 31, 2010 and December 25, 2010 - January 14, 2011~~].

(i) Daily bag limit: 15 white-winged doves, mourning doves, and white-tipped (white-fronted) doves, in the aggregate to include no more than two white-tipped doves per day;

(ii) Possession limit: 30 white-winged doves, mourning doves, and white-tipped doves in the aggregate to include no more than four white-tipped doves in possession.

(c) Gallinules.

(1) Dates: September 10 - 25, 2011 and November 5 - December 28, 2011 [~~September 11 - 26, 2010 and October 30 - December 22, 2010~~].

(2) Daily bag and possession limits: 15 in the aggregate per day; 30 in the aggregate in possession.

(d) September teal-only season.

(1) Dates: September 10 - 25, 2011 [~~September 11 - 26, 2010~~].

(2) Daily bag and possession limits: four in the aggregate per day; eight in the aggregate in possession.

(e) Red-billed pigeons, and band-tailed pigeons. No open season.

(f) Shorebirds. No open season.

(g) Woodcock: December 18, 2011 - January 31, 2012 [~~December 18, 2010 - January 31, 2011~~]. The daily bag limit is three. The possession limit is six.

(h) Wilson's snipe (Common snipe): November 5, 2011 - February 19, 2012 [~~October 30, 2010 - February 13, 2011~~]. The daily bag limit is eight. The possession limit is 16.

§65.318. *Open Seasons and Bag and Possession Limits--Late Season.*

Except as specifically provided in this section, the possession limit for all species listed in this section shall be twice the daily bag limit.

(1) Ducks, mergansers, and coots. The daily bag limit for ducks is six, which may include no more than five mallards (only two of which may be hens); three wood ducks; two scaup (lesser scaup and greater scaup in the aggregate); two redheads; two pintail; one canvasback; and one "dusky" duck (mottled duck, Mexican like duck, black duck and their hybrids) during the seasons established in subparagraphs (A)(ii), (B)(ii), and (C)(ii) of this paragraph. For all other species not listed, the bag limit shall be six. The daily bag limit for coots is 15. The daily bag limit for mergansers is five, which may include no more than two hooded mergansers.

(A) High Plains Mallard Management Unit:

(i) all species other than "dusky ducks": October 29 - 30, 2011 and November 4, 2011 - January 29, 2012 [~~October 23 - 24, 2010 and October 29, 2010 - January 23, 2011~~].

(ii) "dusky ducks": November 7, 2011 - January 29, 2012 [~~November 1, 2010 - January 23, 2011~~].

(B) North Zone:

(i) all species other than "dusky ducks": November 5 - 27, 2011 and December 10, 2011 - January 29, 2012 [~~October 30 - November 28, 2010 and December 11, 2010 - January 23, 2011~~].

(ii) "dusky ducks": November 10 - 27, 2011 and December 10, 2011 - January 29, 2012 [~~November 4, 2010 - November 28, 2010 and December 11, 2010 - January 23, 2011~~].

(C) South Zone:

(i) all species other than "dusky ducks": November 5 - 27, 2011 and December 10, 2011 - January 29, 2012 [~~October 30 - November 28, 2010 and December 11, 2010 - January 23, 2011~~].

(ii) "dusky ducks": November 10 - 27, 2011 and December 10, 2011 - January 29, 2012 [~~November 4, 2010 - November 28, 2010 and December 11, 2010 - January 23, 2011~~].

(2) Geese.

(A) Western Zone.

(i) Light geese: November 5, 2011 - February 5, 2012 [~~November 6, 2010 - February 6, 2011~~]. The daily bag limit for light geese is 20, and there is no possession limit.

(ii) Dark geese: November 5, 2011 - February 5, 2012 [~~November 6, 2010 - February 6, 2011~~]. The daily bag limit for dark geese is five, to include not more than one white-fronted goose.

(B) Eastern Zone.

(i) Light geese: November 5, 2011 - January 29, 2012 [~~October 30, 2010 - January 23, 2011~~]. The daily bag limit for light geese is 20, and there is no possession limit.

(ii) Dark geese:

(I) White-fronted geese: November 5, 2011 - January 15, 2012 [~~October 30, 2010 - January 9, 2011~~]. The daily bag limit for white-fronted geese is two.

(II) Canada geese: September 10 - 25, 2011 and November 5, 2011 - January 29, 2012 [~~October 30, 2010 - January 23, 2011~~]. The daily bag limit for Canada geese is three.

(3) Sandhill cranes. A free permit is required of any person to hunt sandhill cranes in areas where an open season is provided under this proclamation. Permits will be issued on an impartial basis with no limitation on the number of permits that may be issued.

(A) Zone A: November 5, 2011 - February 5, 2012 [~~November 6, 2010 - February 6, 2011~~]. The daily bag limit is three. The possession limit is six.

(B) Zone B: November 25, 2011 - February 5, 2012 [~~November 26, 2010 - February 6, 2011~~]. The daily bag limit is three. The possession limit is six.

(C) Zone C: December 24, 2011 - January 29, 2012 [~~December 18, 2010 - January 23, 2011~~]. The daily bag limit is two. The possession limit is four.

(4) Special Youth-Only Season. There shall be a special youth-only waterfowl season during which the hunting, taking, and possession of geese, ducks, mergansers, and coots is restricted to licensed hunters 15 years of age and younger accompanied by a person 18 years of age or older, except for persons hunting by means of falconry under the provisions of §65.320 of this chapter (relating to Extended Falconry Season--Late Season Species). Bag and possession limits in any given zone during the season established by this paragraph shall be as provided for that zone by paragraph (1) of this section. Season dates are as follows:

(A) High Plains Mallard Management Unit: October 22 - 23, 2011 [~~October 16 - 17, 2010~~];

(B) North Zone: October 29 - 30, 2011 [~~October 23 - 24, 2010~~]; and

(C) South Zone: October 29 - 30, 2011 [~~October 23 - 24, 2010~~].

§65.319. *Extended Falconry Season--Early Season Species.*

(a) It is lawful to take the species of migratory birds listed in this section by means of falconry during the following Extended Falconry Seasons:

(1) mourning doves and white-winged doves: November 16 - December 22, 2011 [~~November 18 - December 24, 2010~~].

(2) rails and gallinules: January 30 - February 13, 2012 [~~December 25, 2010 - January 30, 2011~~].

(3) woodcock: January 30 - February 13, 2012 [~~November 23 - December 16, 2010~~].

(b) The daily bag and possession limits for migratory game birds under this section shall not exceed three and six birds respectively, singly or in the aggregate.

§65.320. *Extended Falconry Season--Late Season Species.*

It is lawful to take the species of migratory birds listed in this section by means of falconry during the following Extended Falconry Seasons.

(1) Ducks, coots, and mergansers:

(A) High Plains Mallard Management Unit: no extended season;

(B) North Duck Zone: January 30 - February 13, 2012 [~~January 24 - February 7, 2011~~];

(C) South Duck Zone: January 30 - February 13, 2012 [~~January 24 - February 7, 2011~~].

(2) The daily bag and possession limits for migratory game birds under this section shall not exceed three and six birds, respectively, singly or in the aggregate.

§65.321. *Special Management Provisions.*

The provisions of paragraphs (1) - (3) of this section apply only to the hunting of light geese. All provisions of this subchapter continue in effect unless specifically provided otherwise in this section; however, where this section conflicts with the provisions of this subchapter, this section prevails.

(1) Means and methods. The following means and methods are lawful during the time periods set forth in paragraph (4) of this section:

(A) shotguns capable of holding more than three shells; and

(B) electronic calling devices.

(2) Possession. During the time periods set forth in paragraph (4) of this section:

(A) there shall be no bag or possession limits; and

(B) the provisions of §65.312 of this title (relating to Possession of Migratory Game Birds) do not apply; and

(C) a person may give, leave, receive, or possess legally taken light geese or their parts, provided the birds are accompanied by a wildlife resource document (WRD) from the person who killed the birds. A properly executed WRD satisfies the tagging requirements of 50 CFR Part 20. The WRD is not required if the possessor lawfully killed the birds; the birds are transferred at the personal residence of the donor or donee; or the possessor also possesses a valid hunting license, a valid waterfowl stamp, and is HIP certified. The WRD shall accompany the birds until the birds reach their final destination, and must contain the following information:

(i) the name, signature, address, and hunting license number of the person who killed the birds;

(ii) the name of the person receiving the birds;

(iii) the number and species of birds or parts;

(iv) the date the birds were killed; and

(v) the location where the birds were killed (e.g., name of ranch; area; lake, bay, or stream; county).

(3) Shooting hours. During the time periods set forth in paragraph (4) of this section, shooting hours are from one half-hour before sunrise until one half-hour after sunset.

(4) Special Light Goose Conservation Period.

(A) From January 30 - March 25, 2012 [~~January 24 - March 27, 2011~~], the take of light geese is lawful in Eastern Zone as defined in §65.317 of this title (relating to Zones and Boundaries for Late Season Species).

(B) From February 6 - March 25, 2012 [~~February 7 - March 27, 2011~~], the take of light geese is lawful in the Western Zone as defined in §65.317 of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 10, 2011.

TRD-201101710

Ann Bright

General Counsel

Texas Parks and Wildlife Department

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 389-4775



TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER B. NATURAL GAS

34 TAC §3.24

The Comptroller of Public Accounts proposes new §3.24, concerning exemption of gas incidentally produced in association with the production of geothermal energy. The proposal provides a description of the tax credit for gas incidentally produced in association with the production of geothermal energy and the process for filing an application for approval of the credit. This section is being proposed pursuant to House Bill 4433, 81st Legislature, 2009.

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

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by providing guidance to taxpayers seeking tax credits for natural gas incidentally produced in association with the production of geothermal energy. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This new rule is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new rule implements Tax Code, §201.060.

§3.24. Exemption of Gas Incidentally Produced in Association with the Production of Geothermal Energy.

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

(1) Commission--The Railroad Commission of Texas.

(2) Operator--The person responsible under law or commission rules for the physical operation of a lease.

(3) Geothermal energy--The energy extracted from heat stored in the earth.

(4) Incidentally produced--The amount of gas produced is less than or equal to 60 mcf of gas per day per lease. The three-month period prior to the exemption beginning date will be used to determine the amount of production per day per lease.

(b) For each lease qualifying under this section, the comptroller will require the following information from the operator of the lease.

(1) A copy of the monthly production report made to the commission for the lease for the three-month period prior to the exemption beginning date.

(2) A list of the producing wells on the lease and supporting documentation to show the number of days each well was producing during the three-month period, the API number for each well and the monthly production amounts per well.

(3) A completed comptroller exemption application for the lease.

(4) A statement as to the name and what type of geothermal energy project the gas is being incidentally produced with.

(c) Producers and purchasers reporting a geothermal energy exemption shall designate the gas as being qualified geothermal energy exemption gas, according to instructions contained on the natural gas tax reports.

(d) If the tax is paid at the full rate provided by Tax Code, Chapter 201, on gas produced on or after the effective date of the tax exemption but before the date the comptroller approves an application for the tax exemption, the operator is entitled to a credit on taxes due under Tax Code, Chapter 201, in an amount equal to the credit approved for that period. To receive a credit, the operator or the party remitting the tax must apply to the comptroller by filing amended reports. If a party other than the operator has remitted the tax, the operator must provide the party remitting the tax a copy of the comptroller's approval letter for the exemption identifying the lease that qualifies for the tax exemption.

(e) If the amount of gas produced is greater than 60 mcf of gas per day of production per lease for a three-month period after the exemption beginning date, the exemption will be revoked.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 13, 2011.

TRD-201101736

Ashley Harden
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: June 26, 2011
For further information, please call: (512) 475-0387



SUBCHAPTER C. CRUDE OIL PRODUCTION TAX

34 TAC §3.32

The Comptroller of Public Accounts proposes new §3.32, concerning exemption of oil incidentally produced in association with the production of geothermal energy. The proposal provides a description of the tax credit for crude oil incidentally produced in association with the production of geothermal energy and the process for filing an application for approval of the credit. This section is being proposed pursuant to House Bill 4433, 81st Legislature, 2009.

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

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be by providing guidance to taxpayers seeking tax credits for crude oil incidentally produced in association with the production of geothermal energy. This rule is proposed under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This new rule is proposed under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new rule implements Tax Code, §202.063.

§3.32. Exemption of Oil Incidentally Produced in Association with the Production of Geothermal Energy.

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

- (1) Commission--The Railroad Commission of Texas.
- (2) Operator--The person responsible under law or commission rules for the physical operation of a lease.
- (3) Geothermal energy--The energy extracted from heat stored in the earth.
- (4) Incidentally Produced--The amount of oil produced is less than or equal to 10 barrels of oil per day of production per well. The three-month period prior to the exemption beginning date will be used to determine the average amount of production per day per well.

(b) For each oil well qualifying under this section, the comptroller will require the following information from the operator of the well.

(1) A copy of the monthly production report made to the commission for the lease for the three-month period prior to the exemption beginning date.

(2) A list of the producing wells on the oil lease and supporting documentation to show the number of days each well was producing during the three-month period, the API number for each well and the monthly production amounts per well.

(3) A completed comptroller exemption application for the well.

(4) A statement as to the name and what type of geothermal energy project the oil is being incidentally produced with.

(c) Producers and purchasers reporting a geothermal energy exemption shall designate the oil as being qualified geothermal energy exemption oil, according to instructions contained on the crude oil tax reports.

(d) If the tax is paid at the full rate provided by Tax Code, Chapter 202, on oil produced on or after the effective date of the tax exemption but before the date the comptroller approves an application for the tax exemption, the operator is entitled to a credit on taxes due under Tax Code, Chapter 202, in an amount equal to the credit approved for that period. To receive a credit, the operator or the party remitting the tax must apply to the comptroller by filing amended reports for each well. If a party other than the operator has remitted the tax, the operator must provide the party remitting the tax a copy of the comptroller's approval letter for the exemption identifying the lease that qualifies for the tax exemption.

(e) If the amount of oil produced is greater than 10 barrels of oil per day of production per well for a three-month period after the exemption beginning date, the exemption will be revoked.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 13, 2011.

TRD-201101737
Ashley Harden
General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387



CHAPTER 19. STATE ENERGY CONSERVATION OFFICE SUBCHAPTER C. ENERGY CONSERVATION DESIGN STANDARDS

34 TAC §§19.31 - 19.34

The Comptroller of Public Accounts proposes amendments to §§19.31 - 19.34, concerning energy and water conservation design standards for new state buildings or major renovations. These amendments are in compliance with Government Code, §447.004(a), which requires the State Energy Conservation Office (SECO) to biennially review and update the energy and water conservation design standards previously adopted by SECO.

Proposed amendments to §19.31 eliminate subsection (b), which currently identifies an effective date for the rules, because separate implementation dates will be made by amendments in §19.32.

Proposed amendments to §19.32 implement new energy and water conservation standards by adopting by reference updated energy standards published by the International Energy Code Council for low-rise residential buildings and by the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) / Illuminating Engineering Society of North America (IESNA) for all other buildings. The amendments to this section also adopt by reference water standards published by SECO. Additionally, the section is amended to insure the existing standards are effective until the new standards become effective and to create separate effective dates for the new standards. These amendments also explicitly require these standards to be posted on the comptroller's web site.

Proposed amendments to §19.33 amend the definition of major renovations so that the determination of a major renovation is based on the initial implementation cost estimate.

Proposed amendments to §19.34 are made to maintain consistency with Government Code, §447.004 and to provide greater clarity.

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

Mr. Heleman also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be by providing an easily identifiable reference regarding energy and water efficiency standards. The proposed amendments would have no fiscal impact on small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rules.

Comments on the proposed rules may be submitted to Dub Taylor, Director, State Energy Conservation Office, Comptroller of Public Accounts, Post Office Box 13528, Capitol Station, Austin, Texas 78711-3528.

These amendments are proposed pursuant to Government Code, §447.004.

These amendments implement Government Code, §447.004.

§19.31. Requirement to Use Design Standards.

[(a)] Pursuant to Government Code, §447.004, state agencies and institutions of higher education shall use the energy and water conservation design standards that the State Energy Conservation Office (SECO) has adopted under this chapter, when constructing new state buildings or conducting major renovations of existing state buildings.

[(b) This subchapter applies to the construction of new state buildings or major renovations of existing state buildings, where the assignment for design has been entered into after the effective date of this rule.]

§19.32. Energy and Water Conservation Design Standards.

(a) The State Energy Conservation Office (SECO) adopts by reference the following standards for new construction or major renovation projects:

(1) for any new construction or major renovation project, except low-rise residential buildings, with a design assignment made

prior to September 1, 2011, the energy conservation design standard of the American Society of Heating, Refrigerating and Air Conditioning Engineers (ASHRAE) / Illuminating Engineering Society of North America (IESNA), Energy Standard for Buildings [Except Low-Rise Residential Buildings], ASHRAE/IESNA Standard 90.1-1999; ~~or the most current adopted version~~];

(2) for any new construction or major renovation project of a [¶] public low rise residential buildings with a design assignment made prior to June 1, 2011, the energy conservation design standard of the International [Energy] Code Council as published in the International Energy Conservation Code for 2000; ~~or the most current adopted version~~];

(3) for any new construction or major renovation project, except low-rise residential buildings, with a design assignment made on or after September 1, 2011, the energy conservation design standard of the ASHRAE/IESNA, Energy Standard for Buildings, ASHRAE/IESNA Standard 90.1-2010; and

(4) for any new construction or major renovation project of a low-rise residential building with a design assignment made on or after June 1, 2011, the residential chapter of the International Code Council as published in the International Energy Conservation Code for 2009.

(b) Effective September 1, 2011, SECO adopts by reference the "Water Efficiency Standards for State Buildings and Institutions of Higher Education Facilities" prepared by the Office of the Comptroller, State Energy Conservation Office dated January 2011 as the water conservation design standards ~~[SECO shall adopt guidelines for the design of water conservation measures]~~ for new state buildings and major renovation projects. ~~[All water conservation measures must comply with current local, state, and federal construction, plumbing, and environmental codes and regulations.]~~

(c) Copies of the standards are published by the comptroller and are available at the offices of ~~[on file with]~~ SECO, 111 E. 17th Street, LBJ State Office Building, Suite 1114, Austin, Texas 78774, where they ~~[and]~~ may be viewed during normal office hours as well as on the comptroller's website www.txbuildingenergycode.com.

§19.33. Major Renovation Projects.

For the purposes of 34 TAC~~[-]~~ Chapter 19, Subchapter C, a major renovation project is a building renovation or improvement where the implementation cost is \$2 million or more, based on the initial cost estimate ~~[that affects the energy or water use of the facility]~~.

§19.34. Submission of Certification and Compliance Documentation.

Before beginning construction of a new state building or a major renovation project including a new building or major renovation project of a state-supported institution of higher education, a state agency or an institution of higher education shall submit to the State Energy Conservation Office (SECO) a copy of the certification by the design architect or engineer that verifies to the agency or institution that the construction or renovation complies with the standards that are established under this chapter, including engineering documentation.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 12, 2011.
TRD-201101730



TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 3. ADMINISTRATIVE RESPONSIBILITIES OF STATE FACILITIES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), new Chapter 3, Administrative Responsibilities of State Facilities, consisting of Subchapter A, concerning definitions, Subchapter B, concerning criminal history checks and registry clearances, and Subchapter C, concerning abuse, neglect, and exploitation.

BACKGROUND AND PURPOSE

These rules establish a separate chapter for state supported living centers (SSLCs) and the ICF/MR component of the Rio Grande State Center to distinguish responsibilities of those facilities from other entities formerly associated with the Texas Department of Mental Health and Mental Retardation. Subchapter A provides definitions for the chapter. Subchapter B outlines the process by which criminal history checks are conducted for applicants for employment or volunteer status in state facilities. Subchapter C sets forth requirements related to reporting and responding to allegations and findings related to abuse, neglect, and exploitation. These provisions are designed to protect and provide a secure environment for residents of state facilities.

SECTION-BY-SECTION SUMMARY

Proposed new §3.101 provides definitions for the chapter.

Proposed new §3.201 specifies the requirement that a facility conduct a pre-employment or pre-assignment criminal history check and registry clearance before hiring an employee or assigning a volunteer.

Proposed new §3.202 describes the process for emergency employment pending a criminal history check.

Proposed new §3.203 specifies the requirement that a facility inform applicants of the criminal history check and registry clearance process.

Proposed new §3.204 specifies requirements for self-reporting and subsequent criminal history checks and registry clearances.

Proposed new §3.205 specifies facility responsibilities regarding unpaid professional interns.

Proposed new §3.301 explains that abuse, neglect, and exploitation are defined and classified by the Texas Department of Family and Protective Services (DFPS) and establishes that abuse, neglect, and exploitation are prohibited in DADS facilities.

Proposed new §3.302 requires abuse, neglect, and exploitation to be reported to DFPS and disciplinary actions to be taken

against an employee who does not properly report abuse, neglect, and exploitation or who interferes with an investigation of abuse, neglect, and exploitation.

Proposed new §3.303 prohibits retaliation against persons who report abuse, neglect, or exploitation.

Proposed new §3.304 delineates the responsibilities of the director of a state facility while an allegation of abuse, neglect, or exploitation is being investigated by DFPS.

Proposed new §3.305 sets forth requirements to be followed after an investigation is complete, including those related to appeal rights and notifications.

Proposed new §3.306 delineates requirements for contractors with regard to abuse, neglect, and exploitation.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed new sections are in effect, enforcing or administering the new sections does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed new sections will not have an adverse economic effect on small businesses or micro-businesses, because the rules apply only to state facilities, which are not small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Chris Adams, DADS Assistant Commissioner for State Supported Living Centers, has determined that, for each year of the first five years the new sections are in effect, the public benefit expected as a result of enforcing the new sections is greater clarity regarding responsibilities of state facilities regarding abuse, neglect, and exploitation and that criminal history and registry clearances in programs managed by DADS will be conducted uniformly.

Mr. Adams anticipates that there will not be an economic cost to persons who are required to comply with the new sections. The new sections will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Diana Williams at (512) 438-3169 in DADS State Supported Living Centers Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-9R033, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) post-marked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight

on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 9R033" in the subject line.

SUBCHAPTER A. DEFINITIONS

40 TAC §3.101

STATUTORY AUTHORITY

The new section is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The new section implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§3.101. Definitions.

The following words and terms, when used in this chapter (relating to Administrative Responsibilities of State Facilities), have the following meanings, unless the context clearly indicates otherwise:

(1) Allegation--A report by a person suspecting or having knowledge that an individual has been or is in a state of abuse, neglect, or exploitation as defined in this chapter.

(2) Applicant--A person who has applied to be an employee, volunteer, or unpaid professional intern.

(3) CANRS--The client abuse and neglect reporting system maintained by DADS Consumer Rights and Services.

(4) Child--An individual less than 18 years of age who is not and has not been married and who has not had the disabilities of minority removed pursuant to the Texas Family Code, Chapter 31.

(5) Clinical practice--The demonstration of professional competence in nursing, dental, pharmacy, or medical practice as described in the relevant chapter of the Texas Occupations Code.

(6) Confirmed--Term used to describe an allegation that DFPS determines is supported by a preponderance of the evidence.

(7) Contractor--A person who contracts with a facility to provide services to an individual, including an independent school district that provides educational services at the facility.

(8) Conviction--The adjudication of guilt for a criminal offense.

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

(10) Deferred adjudication--Has the meaning given to "community supervision" in Texas Code of Criminal Procedure, §42.12, Section 2.

(11) DFPS--Department of Family and Protective Services.

(12) Director--The director of a facility or the director's designee.

(13) Employee--A person employed by DADS whose assigned duty station is at a facility.

(14) Facility--A state supported living center or the ICF/MR component of the Rio Grande State Center.

(15) Guardian--An individual appointed and qualified as a guardian of the person under the Texas Probate Code, Chapter XII.

(16) Inconclusive--Term used to describe an allegation leading to no conclusion or definite result by DFPS due to lack of witnesses or other relevant evidence.

(17) Individual--A person with a developmental disability receiving services from a facility.

(18) Mental health services provider--Has the meaning assigned in the Texas Civil Practice and Remedies Code, Chapter 81.

(19) Peer review--A review of clinical or professional practice of a doctor, pharmacist, licensed vocational nurse, or registered nurse conducted by his or her professional peers.

(20) Person--Includes a corporation, organization, governmental subdivision or agency, or any other legal entity.

(21) Perpetrator--A person who has committed an act of abuse, neglect, or exploitation.

(22) Preponderance of the evidence--The greater weight of evidence, or evidence that is more credible and convincing to the mind.

(23) Primary contact--The person designated as the primary contact of an alleged victim of abuse, neglect, or exploitation, if the alleged victim is an adult with an intellectual disability who is unable to authorize the disclosure of protected health information and does not have a guardian.

(24) Registries--

(A) the Nurse Aide Registry maintained by DADS in accordance with 40 Texas Administrative Code (TAC) §94.10 (relating to Registry, Findings, and Inquiries); and

(B) the Employee Misconduct Registry maintained by DADS in accordance with 40 TAC Chapter 93 (relating to Employee Misconduct Registry (EMR)).

(25) Reporter--A person who reports an allegation of abuse, neglect, or exploitation.

(26) Retaliation--An action intended to inflict emotional or physical harm or inconvenience on a person that is taken because the person has reported abuse, neglect, or exploitation, including harassment, disciplinary action, discrimination, reprimand, threat, and criticism.

(27) SSLC--A state supported living center.

(28) Unconfirmed--Term used to describe an allegation that DFPS determines is not supported by the preponderance of evidence.

(29) Unfounded--Term used to describe an allegation that DFPS determines is spurious or patently without factual basis.

(30) Volunteer--A person who is not part of a visiting group, who has active, direct contact with an individual, and who does not receive compensation from DADS other than reimbursement for actual expenses.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.
TRD-201101754

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**SUBCHAPTER B. CRIMINAL HISTORY
CHECKS AND REGISTRY CLEARANCES**

40 TAC §§3.201 - 3.205

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §533.007, which provides that rules relating to the use of criminal history record information by DADS shall be adopted.

The new sections implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §533.007.

§3.201. Pre-employment or Pre-assignment Checks and Clearances.

(a) Before employment or assignment, a facility must conduct a criminal history check and registry clearance of an applicant for employment or volunteer status consisting of:

- (1) a criminal history check obtained directly from the Texas Department of Public Safety;
- (2) a criminal history check obtained through the Federal Bureau of Investigation using a complete set of fingerprints; and
- (3) searches of the registries and CANRS.

(b) A facility may not employ or assign volunteer status to an applicant who:

- (1) has been convicted of or has received deferred adjudication for any of the criminal offenses listed in Texas Health and Safety Code (HSC) §250.006(a);
- (2) has been convicted of or has received deferred adjudication for any of the criminal offenses listed in HSC §250.006(b) within five years preceding the date of employment or assignment of volunteer status;
- (3) has been convicted of or has received deferred adjudication for a criminal offense that DADS has determined to be a contraindication to employment or volunteer status pursuant to HSC §533.007;
- (4) is listed as revoked in the Nurse Aide Registry;
- (5) is listed as unemployable in the Employee Misconduct Registry; or
- (6) has a confirmation of abuse or neglect in CANRS.

(c) Pursuant to HSC §533.007(b), a facility may not take an adverse personnel action based on an arrest warrant or wanted persons information.

§3.202. Emergency Employment Pending Criminal History Check.

(a) A facility may employ an applicant on a temporary basis pending the results of a criminal history check if:

(1) the facility has searched the registries and CANRS and determined that the applicant:

- (A) is not listed as revoked in the Nurse Aide Registry;
- (B) is not listed as unemployable in the Employee Misconduct Registry; and
- (C) does not have a finding of abuse or neglect in CANRS; and

(2) an emergency exists in which, as a result of unfilled positions, the health and safety of individuals is at risk or the operations of the facility are severely impaired.

(b) The facility must initiate a criminal history check of a person employed on a temporary basis as described in §3.201(a)(1) - (2) of this subchapter (relating to Pre-employment or Pre-assignment Checks and Clearances) within 72 hours after the applicant is employed.

(c) If a facility employs a person pending a criminal history check, the facility must ensure that the person has no direct contact with an individual until the facility obtains the person's criminal history record information and verifies the person's employability as required by §3.201 of this subchapter.

(d) A facility must immediately discharge or dismiss an employee whose criminal history check reveals a conviction or deferred adjudication for any of the criminal offenses listed in §3.201(b)(1) - (3) of this subchapter.

§3.203. Notification to Applicants.

A facility must provide the following information to applicants in writing at the time an application is made:

- (1) that the facility will conduct a criminal history check and registry clearance;
- (2) that conviction of or deferred adjudication for certain criminal offenses may constitute a bar to employment or volunteer status;
- (3) that being listed as revoked in the Nurse Aide Registry or being listed as unemployable in the Employee Misconduct Registry is a bar to employment or volunteer status; and
- (4) that a confirmation of abuse or neglect in CANRS is a bar to employment or volunteer status.

§3.204. Self-Reporting and Subsequent Criminal History Checks and Registry Clearances.

(a) At any time while employed by or assigned to a facility, an employee, volunteer, or unpaid professional intern must report to the designated person within five calendar days any of the following events:

- (1) the employee's, volunteer's, or intern's conviction, arrest, indictment, adjudication of guilt, plea of guilty or nolo contendere, assessment of probation, pretrial diversion, or deferred adjudication for any criminal offense; or a dismissal, acquittal, or similar final outcome for any criminal offense that does not involve a plea of guilty or nolo contendere; and
- (2) any listing of the employee, volunteer, or intern as revoked in the Nurse Aide Registry or as unemployable in the Employee Misconduct Registry.

(b) If an employee, volunteer, or unpaid professional intern fails to report information in accordance with subsection (a) of this

section, DADS may take disciplinary action, including termination, against the employee, volunteer, or intern.

(c) A facility must conduct subsequent criminal history checks and registry clearances for an employee or volunteer annually. A facility may conduct subsequent criminal history checks and registry clearances more frequently at the facility's discretion.

(d) If DADS finds from a subsequent criminal history check or registry clearance that an employee or volunteer meets any of the criteria that constitute a bar to employment or assignment as described §3.201(b) of this subchapter (relating to Pre-employment or Pre-assignment Checks and Clearances), DADS may take disciplinary action, including termination, against the employee or volunteer.

§3.205. Unpaid Professional Interns.

(a) A facility may not allow an unpaid professional intern to have direct contact with an individual if that intern:

(1) has been convicted of or received deferred adjudication for any of the criminal offenses listed in HSC §250.006(a);

(2) has been convicted of or received deferred adjudication for any of the criminal offenses listed in HSC §250.006(b) within five years preceding the date of assignment;

(3) has been convicted of or received deferred adjudication for a criminal offense that DADS has determined to be a contraindication to assignment pursuant to HSC §533.007;

(4) is listed as revoked in the Nurse Aide Registry;

(5) is listed as unemployable in the Employee Misconduct Registry; or

(6) has a confirmation of abuse or neglect in CANRS.

(b) A facility must have a written agreement with the unpaid professional intern's sponsoring university or college. The written agreement must include:

(1) a statement that the facility retains responsibility for the care of the individuals; and

(2) a statement that the sponsoring college or university will conduct and fund a criminal history check and registry clearance of the unpaid professional intern that complies with §3.201 of this subchapter (relating to Pre-employment or Pre-assignment Checks and Clearances).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101755

Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 438-3734



SUBCHAPTER C. ABUSE, NEGLECT, AND EXPLOITATION

40 TAC §§3.301 - 3.306

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The new sections implement Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§3.301. Prohibition of Abuse, Neglect, and Exploitation.

(a) Abuse, neglect, and exploitation have the meanings and classifications assigned in Chapter 711 of this title (relating to Investigations in DADS Mental Retardation and DSHS Mental Health Facilities and Related Programs).

(b) Abuse, neglect, and exploitation of an individual are prohibited.

(c) If an aggressive action by an individual, including non-consensual sexual activity between individuals, occurs as a result of possible neglect, the facility must report the action as neglect.

§3.302. Reporting Abuse, Neglect, and Exploitation to DFPS.

(a) A person who knows or suspects an individual has been abused, neglected, or exploited must immediately report the alleged abuse, neglect, or exploitation to DFPS within one hour of learning of or suspecting the incident by calling 1-800-647-7418. Abuse, neglect, or exploitation may occur before an individual is admitted to a facility, during an absence from a facility, or while in residence at the facility.

(b) A facility must report incidents identified as abuse, neglect, or exploitation during the course of a facility investigation or peer review.

(c) If the person with knowledge or suspicion of abuse, neglect, or exploitation is not an employee or contractor, an employee must assist the person in making a report, if necessary.

(d) DADS may take disciplinary action, including termination, against an employee who is found to have:

(1) failed to report as required by this section within the allotted time period without sufficient justification; or

(2) made a false statement of fact, refused to cooperate, or destroyed evidence during an investigation.

§3.303. Prohibition Against Retaliation.

(a) A facility may not retaliate against a person who in good faith reports an allegation.

(b) A person who believes he or she has been subjected to retaliation as a result of reporting an allegation, or who believes an allegation has been ignored, may contact the director of the facility where the alleged abuse, neglect, or exploitation occurred or DADS state office. The person may also contact:

(1) The Office of the Attorney General at (512) 463-2185 (Consumer Protection Division);

(2) The Office of Inspector General at 1-800-436-6184; or

(3) DFPS at 1-800-647-7418.

(c) DADS may take disciplinary action, including termination, against an employee who engages in retaliation.

§3.304. During an Investigation.

(a) Immediately after receiving notification of an allegation from a DFPS investigator, the director receiving the notification must take measures to protect the alleged victim of abuse, neglect, or exploitation in accordance with DADS operational procedures.

(b) The director must arrange for immediate and on-going medical and psychological attention for an alleged victim and any other individual involved in the incident, as necessary.

(c) The director must:

(1) ensure that required reports are made to DFPS, DADS Regulatory Services Division, and law enforcement;

(2) in accordance with the Civil Practice and Remedies Code, Chapter 81, report allegations of sexual exploitation committed by a mental health services provider to the prosecuting attorney in the county where the alleged sexual exploitation occurred and any state licensing board with responsibility for the mental health services provider's licensing; and

(3) notify the following persons of the allegation immediately, but in no case more than 24 hours, after being notified of an allegation:

(A) the alleged victim, unless contraindicated based on clinical evaluation; and

(B) the alleged victim's guardian or primary contact, or parent if the alleged victim is a child.

(d) The director must cooperate with a DFPS investigator by:

(1) preserving and safeguarding evidence, if any, of the alleged abuse, neglect, or exploitation, including taking precautionary measures necessary to prevent physical evidence from loss, destruction, or tampering; and

(2) ensuring the availability of employees, records, keys, private interview space, and a private telephone upon request by the investigator.

§3.305. Completion of an Investigation.

(a) A director may not change a confirmed finding by DFPS. However, a director may change an unconfirmed, inconclusive, or unfounded finding to a confirmed finding. If the director changes a finding to confirmed, the confirmed finding may not be appealed to DFPS.

(b) A facility has the appeal and review rights specified in Chapter 711, Subchapter K, of this title (relating to Requesting a Review of Finding If You Are the Administrator or Contractor CEO). The final finding is a finding that is uncontested by the facility.

(c) A director must ensure that an alleged victim, the alleged victim's guardian or primary contact, or the parent if the alleged victim is a child is promptly notified of:

(1) a final finding;

(2) the method of appealing the final finding as described in Chapter 711, Subchapter M, of this title (relating to Requesting an Appeal If You Are the Reporter, Alleged Victim, Legal Guardian, or With Advocacy, Incorporated), if the final finding was not made by the director; and

(3) the right to receive a copy of the investigative report upon request.

(d) A director must inform a perpetrator or alleged perpetrator of a final finding.

(e) If an employee is confirmed to have abused, neglected, or exploited an individual, the director of the facility at which the person is employed must take disciplinary action against the employee in accordance with DADS operational procedures.

(f) A facility must establish and implement a mechanism to evaluate problematic patterns or trends identified by a DFPS investigator or the facility.

(g) A director must ensure that a victim, guardian, or primary contact, or parent if the victim is a child is promptly notified of:

(1) the disciplinary action taken against the perpetrator;

(2) an employee's right to request a grievance hearing to dispute disciplinary action; and

(3) the opportunity to be informed if an employee files a grievance.

(h) If the state's protection and advocacy organization informs a director that it represents the victim of confirmed Class I abuse, the director must notify the protection and advocacy organization if a perpetrator requests a grievance hearing.

(i) If DFPS confirms abuse, neglect, or exploitation and the perpetrator is a licensed professional, the director of the facility where the perpetrator is employed must ensure that the appropriate licensing board is notified of the confirmation.

(j) If an alleged perpetrator is a physician, registered nurse, licensed vocational nurse, or pharmacist, and the DFPS investigator determines that the allegation involves clinical practice rather than abuse, neglect, or exploitation, the facility where the alleged perpetrator is employed must conduct peer review and ensure that the appropriate licensing board is notified in accordance with DADS operational procedures.

(k) Upon request, a director must provide a copy of an investigative report to the alleged victim or guardian with the identities of other persons served and any information determined confidential by law concealed. The director may charge a reasonable fee for providing a copy of the investigative report.

(l) A facility must report a confirmed finding of abuse, neglect, or exploitation against an employee of the facility to CANRS.

§3.306. Contractors.

(a) A director is responsible for requiring the facility's contractors to comply with this subchapter (relating to Abuse, Neglect, and Exploitation).

(b) A director must ensure that a contractor is provided a copy of DFPS rules in 40 TAC Chapter 711 (relating to Investigations in DADS Mental Retardation and DSHS Mental Health Facilities and Related Programs).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101756

Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 438-3734



CHAPTER 4. RIGHTS AND PROTECTION OF INDIVIDUALS RECEIVING MENTAL RETARDATION SERVICES

SUBCHAPTER K. CRIMINAL HISTORY AND REGISTRY CLEARANCES

40 TAC §§4.501 - 4.509

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Aging and Disability Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), the repeal of Subchapter K, consisting of §§4.501 - 4.509, concerning criminal history and registry clearances, in Chapter 4, Rights and Protection of Individuals Receiving Mental Retardation Services.

BACKGROUND AND PURPOSE

The purpose of the repeal is to update rules concerning criminal history and registry clearances. New rules concerning criminal history and registry checks for a mental retardation authority (MRA) or community center are proposed elsewhere in this issue of the *Texas Register*. Separate new rules concerning criminal history and registry checks for a state supported living center are also proposed in this issue of the *Texas Register*.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §4.501 deletes the description of the purpose of Subchapter K.

The proposed repeal of §4.502 deletes the description of the application of Subchapter K.

The proposed repeal of §4.503 deletes definitions used in Subchapter K.

The proposed repeal of §4.504 deletes provisions concerning pre-employment and pre-assignment clearance.

The proposed repeal of §4.505 deletes provisions concerning obtaining and requesting criminal history record information and checking registries.

The proposed repeal of §4.506 deletes provisions concerning criminal history record information and registry information.

The proposed repeal of §4.507 deletes provisions concerning self-reporting and subsequent criminal history and registry checks.

The proposed repeal of §4.508 deletes the description of documents referenced in Subchapter K.

The proposed repeal of §4.509 deletes provisions concerning distribution of the subchapter.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years after the repeal, there are no foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed repeal will have no adverse economic effect on small businesses or micro-businesses, because the rules apply only to MRAs and community centers, which are not formed for the purpose of making a profit.

PUBLIC BENEFIT AND COSTS

Gary Jessee, DADS Assistant Commissioner for Access and Intake, has determined that, for each year of the first five years after the repeal, the public benefit expected as a result of repealing the sections is that new rules governing criminal history checks and registry clearances in MRAs, community centers, and state supported living centers may be adopted.

Mr. Jessee anticipates that there will not be an economic cost to persons who are affected by the repeal. The repeal will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Marcia Shultz at (512) 438-3532 in DADS Access and Intake. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-9R032, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, TX 78714-9030 or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 9R032" in the subject line.

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §533.007, which provides that rules relating to the use of criminal history record information by an MRA shall be adopted.

The repeal implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §533.007.

§4.501. Purpose.

§4.502. Application.

§4.503. Definitions.

§4.504. Pre-employment and Pre-assignment Clearance.

§4.505. Obtaining or Requesting Criminal History Record Information and Checking Registry.

§4.506. *Criminal History Record Information and Registry Information.*

§4.507. *Self-Reporting and Subsequent Criminal History and Registry Checks.*

§4.508. *References.*

§4.509. *Distribution.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101759

Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 438-3734



SUBCHAPTER K. CRIMINAL HISTORY AND REGISTRY CHECKS FOR MRAS AND COMMUNITY CENTERS

40 TAC §§4.501 - 4.503, 4.505, 4.507, 4.509, 4.511, 4.513

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), new Subchapter K, §§4.501 - 4.503, 4.505, 4.507, 4.509, 4.511, and 4.513, governing Criminal History and Registry Checks for Mental Retardation Authorities and Community Centers, in Chapter 4, Rights and Protection of Individuals Receiving Mental Retardation Services.

BACKGROUND AND PURPOSE

The purpose of the new subchapter is to clarify the role and responsibilities of a mental retardation authority (MRA) or a community center with regard to Texas Health and Safety Code, Chapter 250, concerning nurse aide registry and criminal history checks of employees and applicants for employment in certain facilities serving the elderly, persons with disabilities, or persons with terminal illnesses, and Chapter 253, concerning employee misconduct registry. These requirements are intended to ensure that persons whose duties may put them in direct contact with individuals receiving services from an MRA or community center do not have a criminal conviction that is a contraindication to such duties and that they are not listed as unemployable in the employee misconduct or nurse aide registry.

SECTION-BY-SECTION SUMMARY

Proposed new §4.501 establishes that the purpose of the subchapter is to require an MRA or a community center to establish procedures for conducting criminal history checks and registry checks on employees, contractors, and volunteers. In addition, MRAs and community centers must require employees, contractors, and volunteers to report a conviction or charge of a criminal offense or a registry listing. They must also require contract agencies to conduct criminal history and registry checks on applicants, employees, contractors, and volunteers as required by §4.513.

Proposed new §4.502 states that the subchapter applies to an MRA and a community center.

Proposed new §4.503 provides definitions for terms used in the subchapter.

Proposed new §4.505 establishes prohibitions to employment or contractual or volunteer status based on a criminal history or a listing as unemployable in the employee misconduct or nurse aide registry.

Proposed new §4.507 establishes requirements for conducting criminal history and registry checks. Criminal history information must be obtained from the Department of Public Safety and, if the applicant has lived outside the state of Texas during the two years prior to making an application, from the Federal Bureau of Investigation. MRAs and community centers must conduct checks of the employee misconduct and nurse aide registries before hiring, contracting with, or offering employment status to applicants and annually on employees, contractors, and volunteers. An MRA or community center may also conduct a criminal history or registry check any time it determines it is necessary.

Proposed new §4.509 requires MRAs and community centers to require an employee, volunteer, or contractor to report a criminal offense that the person is charged with or convicted of after starting employment or volunteer status or after the execution of the contractor's contract. In addition, an employee, volunteer, or contractor must report a listing in a registry as unemployable after starting employment or volunteer status or after execution of a contractor's contract.

Proposed new §4.511 establishes requirements for MRA and community center policies related to criminal history and registry checks. The policies must include provisions that address the confidentiality of information, procedures for notifying persons of the results of criminal history and registry checks, procedures for documenting criminal history and registry checks, procedures for maintaining a copy of annual registry checks, procedures for destroying criminal history information, and procedures for responding to information received through reporting by employees, volunteers, and contractors.

Proposed new §4.513 establishes requirements for a contract agency related to criminal history and registry checks of its applicants, employees, contractors, and volunteers. It also addresses prohibitions placed on employment, contracting, and volunteer status with a contract agency.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed new sections are in effect, enforcing or administering the new sections does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed new sections will not have an adverse economic effect on small businesses or micro-businesses, because the rules apply only to MRAs and community centers, which are not formed for the purpose of making a profit.

PUBLIC BENEFIT AND COSTS

Gary Jessee, DADS Assistant Commissioner for Access and Intake, has determined that, for each year of the first five years the new sections are in effect, the public benefit expected as a result of enforcing the new sections is that rules governing criminal

history and registry checks for MRAs and community centers will be made more clear.

Mr. Jessee anticipates that there will not be an economic cost to persons who are required to comply with the new sections. The new sections will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Marcia Shultz at (512) 438-3532 in DADS Access and Intake. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-9R032, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 9R032" in the subject line.

STATUTORY AUTHORITY

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, §533.007, which provides that rules relating to the use of criminal history record information by an MRA or community center shall be adopted; Texas Health and Safety Code, §250.002, which provides that rules relating to information requested or obtained under Chapter 250 may be adopted; and Texas Health and Safety Code, §253.009, which provides that rules relating to notification to employees about the employee misconduct registry shall be adopted.

The new sections implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§250.002, 253.009, and 533.007.

§4.501. Purpose.

The purpose of this subchapter is to require a mental retardation authority (MRA) or a community center to:

(1) have an effective procedure for conducting criminal history and registry checks on an applicant, employee, contractor, or volunteer of the MRA or community center;

(2) have an effective procedure for requiring an employee, contractor, or volunteer of the MRA or community center to self-report a conviction or charge of a criminal offense or a registry listing; and

(3) require a contract agency to conduct criminal history and registry checks on an applicant, employee, contractor, or volunteer of the contractor agency in accordance with this subchapter.

§4.502. Application.

This subchapter applies to:

(1) an MRA; and

(2) a community center.

§4.503. Definitions.

The following words and terms, when used in this subchapter (relating to Criminal History and Registry Checks for MRAs and Community Centers), have the following meanings, unless the context clearly indicates otherwise:

(1) Applicant--A person to whom an MRA, community center, or contract agency intends to offer employment, a contract, or volunteer status.

(2) Community center--A community mental health and mental retardation center established under the Texas Health and Safety Code, Title 7, Chapter 534, Subchapter A.

(3) Contract--An agreement between an MRA, community center, or contract agency and a contractor whose contractual duties may put the contractor in direct contact with an individual.

(4) Contract agency--A person that contracts with an MRA or community center to provide an employee or contractor whose duties may put the employee or contractor in direct contact with an individual.

(5) Contractor--A person who contracts with an MRA, community center, or contract agency and whose contractual duties may put the person in direct contact with an individual.

(6) Conviction--The adjudication of guilt for a criminal offense. The term does not include deferred adjudication community supervision as described in Texas Health and Safety Code, §250.006(d).

(7) DADS--The Department of Aging and Disability Services.

(8) Employee--A person who is employed by an MRA, community center, or contract agency and whose duties may put the person in direct contact with an individual.

(9) Individual--A person receiving services that are funded by or through DADS and provided by an MRA or community center or provided by a contract agency through a contract with an MRA or community center.

(10) MRA--Mental retardation authority. An entity designated in accordance with Texas Health and Safety Code, §533.035(a).

(11) Registry--

(A) The employee misconduct registry maintained by DADS in accordance with Texas Health and Safety Code, Chapter 253, and Chapter 93 of this title (relating to Employee Misconduct Registry (EMR)); or

(B) The nurse aide registry maintained by DADS in accordance with §94.10 of this title (relating to Registry, Findings, and Inquiries).

(12) Volunteer--A person who provides services to an MRA, community center, or contract agency without compensation from the MRA, community center, or contract agency, other than

reimbursement for actual expenses, and whose duties may put the person in direct contact with an individual.

§4.505. Prohibition to Employment or Contractual or Volunteer Status.

(a) An MRA or community center may not hire, enter into a contract with, or assign volunteer status to an applicant with the MRA or community center who:

(1) has a conviction of an offense listed in Texas Health and Safety Code §250.006(a);

(2) has a conviction of an offense listed in Texas Health and Safety Code §250.006(b), during the five years before the proposed employment or contractual or volunteer status;

(3) has a conviction of an offense that the MRA or community center determines is a contraindication to employment or contractual or volunteer status; or

(4) is listed as unemployable in a registry.

(b) An MRA or community center may not continue to employ, contract with, or give volunteer status to a person who:

(1) has a conviction of an offense listed in Texas Health and Safety Code §250.006(a);

(2) has a conviction of an offense listed in Texas Health and Safety Code §250.006(b), during the five years before the MRA or community has knowledge of the conviction;

(3) has a conviction of an offense that the MRA or community center determines is a contraindication to employment or contractual or volunteer status; or

(4) is listed as unemployable in a registry.

(c) An MRA or community center must give an applicant with the MRA or community center the following information, in writing, when the applicant makes an application for employment or contractual or volunteer status:

(1) that criminal history and registry checks will be conducted on the applicant;

(2) the types of criminal offenses for which a conviction prohibits employment by law;

(3) that a conviction of other types of criminal offenses may be considered a contraindication to employment or contractual or volunteer status;

(4) that a registry check will be conducted to determine if an applicant is listed as unemployable; and

(5) that a registry check will be conducted annually to determine if an employee, contractor, or volunteer is listed as unemployable.

§4.507. Conducting Criminal History and Registry Checks.

(a) Criminal history check.

(1) Before making an offer of employment or contractual or volunteer status to an applicant, an MRA or community center must conduct a criminal history check by:

(A) obtaining criminal history record information from the Texas Department of Public Safety (TDPS); and

(B) if the applicant has lived outside the State of Texas at any time during the two years before making the application for employment or contractual or volunteer status with an MRA or community

center, obtaining criminal history information from the Federal Bureau of Investigation.

(2) An MRA or community center may conduct a criminal history check on an employee, contractor, or volunteer of the MRA or community center at any time the MRA or community center determines it is necessary.

(b) Registry check.

(1) Before making an offer of employment or contractual or volunteer status to an applicant, an MRA or community center must conduct a registry check by searching both registries listed in §4.503(11) of this subchapter (relating to Definitions) to determine if the applicant is listed as unemployable.

(2) An MRA or community center must conduct a registry check annually to ensure that an employee, contractor, or volunteer of the MRA or community center is not listed as unemployable. The MRA and community center must retain a copy of the results of an annual registry check.

(3) An MRA or community center may conduct a registry check to determine if an employee, contractor, or volunteer of the MRA or community center is listed as unemployable at any time the MRA or community center determines it is necessary.

§4.509. Self-Reporting a Criminal Offense Charge or Conviction.

An MRA or community center must require an employee, contractor, or volunteer of the MRA or community center to report to a staff person designated by the MRA or community center:

(1) a criminal offense that the employee, contractor, or volunteer is charged with or convicted of after starting employment or volunteer status or after the execution of the contractor's contract; or

(2) a listing of the employee, contractor, or volunteer as unemployable in a registry after starting employment or volunteer status or after the execution of the contractor's contract.

§4.511. MRA and Community Center Policies Related to Criminal History and Registry Checks.

(a) An MRA or community center must have written procedures consistent with this subchapter (relating to Criminal History and Registry Checks for MRAs and Community Centers) that describes how information obtained through criminal history and registry checks is processed, including:

(1) procedures that protect the confidentiality of criminal history record information pursuant to Texas Health and Safety Code §250.007 and Texas Government Code §411.115;

(2) procedures for notifying an applicant, employee, volunteer, or contractor if:

(A) the criminal history record information of the applicant, employee, volunteer, or contractor identifies a conviction that prohibits or contraindicates employment or contractual or volunteer status; or

(B) the applicant, employee, or volunteer is listed as unemployable in a registry;

(3) procedures for notifying an applicant, employee, volunteer, or contractor how to address inaccuracies in criminal history record information (i.e., the opportunity to be heard by Texas Department of Public Safety) if the person believes he or she has been unjustly denied employment or contractual or volunteer status as a result of criminal history record information that is incorrect or relates to another person;

(4) procedures for documenting the results of criminal history and registry checks of an applicant, employee, volunteer, or contractor;

(5) procedures for maintaining a copy of the results of the annual registry checks in the file of an employee, contractor, or volunteer of the MRA or community center;

(6) procedures for destroying all criminal history record information obtained in accordance with this subchapter immediately after an employment or volunteer decision has been made or personnel action has been taken, as required by Texas Government Code §411.115(e); and

(7) procedures for destroying all criminal history record information related to a contractor of the MRA or community center obtained in accordance with this subchapter immediately after execution of the contract.

(b) An MRA or community center must develop written procedures consistent with this subchapter describing how it will respond to information obtained through self-reporting and subsequent criminal history and registry checks.

(1) Pursuant to the Texas Health and Safety Code, §533.007(b), an MRA or community center may not take adverse personnel action against an employee of the MRA or community center if the information received pertains to an arrest warrant or wanted persons information. However, the MRA or community center may reassign the employee until resolution of the matter relating to the arrest warrant or wanted persons information.

(2) If the information obtained by self-reporting or from a criminal history check states that the employee, contractor, or volunteer of an MRA or community center has a conviction for an offense described in §4.505(b)(1) - (3) of this subchapter (relating to Prohibition to Employment or Contractual or Volunteer Status), the MRA or community center may consider a contention by the employee, contractor, or volunteer that the information is incorrect or that it relates to another person. The MRA or community center may give the employee, contractor, or volunteer a reasonable period of time to have the information corrected, but the MRA or community center must reassign the employee, contractor, or volunteer to duties that are not contraindicated by the conviction. If the employee, contractor, or volunteer fails to get the information corrected as provided by Texas Health and Safety Code §250.005(b), the MRA or community center must immediately discharge the employee or volunteer or terminate the contractor's contract.

(3) If the information obtained by self-reporting or a registry check states that an employee, contractor, or volunteer of the MRA or community center is listed as unemployable in a registry, the MRA or community center must immediately discharge the employee or volunteer or terminate the contractor's contract.

§4.513. Contract Agency.

(a) An MRA or community center must require a contract agency to conduct criminal history and registry checks on an applicant with the contract agency.

(b) An MRA or community center must require a contract agency to annually conduct a registry check on an employee, contractor, or volunteer with the contract agency.

(c) An MRA or community center must require a contract agency to require an employee, contractor, or volunteer of the contract agency to report to the contract agency:

(1) a criminal offense that the employee, contractor, or volunteer is convicted of or charged with after starting employment or volunteer status or after the execution of the contractor's contract; and

(2) a listing of the employee, contractor, or volunteer as unemployable in a registry after starting employment or volunteer status or after the execution of the contractor's contract.

(d) An MRA or community center must require a contract agency to conduct criminal history and registry checks on an employee, contractor, or volunteer of the contract agency if the contract agency has reason to believe the employee, contractor, or volunteer may have a criminal history that makes the employee, contractor, or volunteer unqualified or unsuitable for employment or contractual or volunteer status or may be listed as unemployable on a registry.

(e) An MRA or community center must prohibit a contract agency from allowing an employee, contractor, or volunteer of the contract agency to have direct contact with an individual if the contract agency becomes aware that:

(1) a criminal history check indicates that the employee, contractor, or volunteer is not qualified or suitable; or

(2) the employee, contractor, or volunteer is listed as unemployable in a registry.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101758

Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 438-3734



CHAPTER 7. DADS ADMINISTRATIVE RESPONSIBILITIES

SUBCHAPTER K. ABUSE, NEGLECT, AND EXPLOITATION IN TDMHMR FACILITIES

40 TAC §§7.501 - 7.505, 7.507 - 7.518

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Aging and Disability Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), the repeal of Subchapter K, consisting of §§7.501 - 7.505 and 7.507 - 7.518, concerning abuse, neglect, and exploitation in Texas Department of Mental Health and Mental Retardation (TDMHMR) facilities, in Chapter 7, DADS Administrative Responsibilities.

BACKGROUND AND PURPOSE

A separate chapter for state facility rules, which can be found elsewhere in this issue of the *Texas Register*, is being proposed, making rules in Chapter 7, Subchapter K unnecessary.

SECTION-BY-SECTION SUMMARY

The proposed repeal of §7.501 removes rules regarding the purpose of Subchapter K, concerning ANE in TDMHMR facilities, in Chapter 7.

The proposed repeal of §7.502 removes rules regarding the application of Subchapter K in Chapter 7.

The proposed repeal of §7.503 removes rules regarding definitions in Subchapter K of Chapter 7.

The proposed repeal of §7.504 removes rules regarding prohibition and definitions of ANE.

The proposed repeal of §7.505 removes rules regarding reporting responsibilities of all TDMHMR employees, agents, and contractors.

The proposed repeal of §7.507 removes rules regarding prohibition against retaliatory action.

The proposed repeal of §7.508 removes rules regarding responsibilities of the head of the facility.

The proposed repeal of §7.509 removes rules regarding peer review.

The proposed repeal of §7.510 removes rules regarding completion of the investigation.

The proposed repeal of §7.511 removes rules regarding confidentiality of investigative process and report.

The proposed repeal of §7.512 removes rules regarding classifications and disciplinary actions.

The proposed repeal of §7.513 removes rules regarding contractors.

The proposed repeal of §7.514 removes rules regarding TDMHMR administrative responsibilities.

The proposed repeal of §7.515 removes rules regarding staff training in identifying, reporting, and preventing ANE.

The proposed repeal of §7.516 removes rules regarding exhibits.

The proposed repeal of §7.517 removes rules regarding references.

The proposed repeal of §7.518 removes rules regarding distribution.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed repeal is in effect, enforcing or administering the repeal does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed repeal will not have an adverse economic effect on small businesses or micro-businesses, because the rules apply only to state facilities, which are not small businesses or micro-businesses.

PUBLIC BENEFIT AND COSTS

Chris Adams, DADS Assistant Commissioner for State Supported Living Centers, has determined that, for each year of the first five years the repeal is in effect, the public benefit expected as a result of enforcing the repeal is the elimination of rules that will be unnecessary with the adoption of new rules regarding the findings and results of investigations of abuse, neglect, and exploitation.

Mr. Adams anticipates that there will not be an economic cost to persons who are required to comply with the repeal. The repeal will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Diana Williams at (512) 438-3169 in DADS SSLC/Quality Assurance Unit. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-9R033, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 9R033" in the subject line.

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The repeal implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§7.501. *Purpose.*

§7.502. *Application.*

§7.503. *Definitions.*

§7.504. *Prohibition and Definitions of Abuse, Neglect, and Exploitation.*

§7.505. *Reporting Responsibilities of All TDMHMR Employees, Agents, and Contractors: Reports to Texas Department of Protective and Regulatory Services (TDPRS).*

§7.507. *Prohibition Against Retaliatory Action.*

§7.508. *Responsibilities of the Head of the Facility.*

§7.509. *Peer Review.*

§7.510. *Completion of the Investigation.*

- §7.511. *Confidentiality of Investigative Process and Report.*
- §7.512. *Classifications and Disciplinary Actions.*
- §7.513. *Contractors.*
- §7.514. *TDMHMR Administrative Responsibilities.*
- §7.515. *Staff Training in Identifying, Reporting, and Preventing Abuse, Neglect, and Exploitation.*
- §7.516. *Exhibits.*
- §7.517. *References.*
- §7.518. *Distribution.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101757

Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 438-3734



CHAPTER 11. QUALITY ASSURANCE FEE

40 TAC §§11.2 - 11.4

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§11.2 - 11.4, concerning definitions, quality assurance fee determination methodology, and required reports, in Chapter 11, Quality Assurance Fee.

BACKGROUND AND PURPOSE

The Tax Relief and Health Care Act of 2006 temporarily reduced the threshold for health care-related taxes referred to as a quality assurance fee (QAF), from six to five and one-half percent, from January 1, 2008, through September 30, 2011. Effective October 1, 2011, the amendments will restore the threshold to six percent of total revenue, as allowed by federal law.

The amendments also require providers to pay QAF for all days of paid leave on a monthly basis, rather than at the end of the reconciliation process, and exclude durable medical equipment (DME) claims from total revenue calculations.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §11.2 revises the definition of gross receipts to exclude DME, effective September 1, 2009. The definition of total patient days is revised to clarify that it includes all days that a facility receives payment for services from DADS, not just the first three days of paid therapeutic leave. The changes mean that: 1) providers will not pay QAF on revenue from DME starting September 1, 2009; and 2) providers will pay QAF for all days of therapeutic leave on a monthly basis after this rule becomes effective.

The proposed amendment to §11.3 changes the quality assurance fee for a facility from five and one-half percent to six percent of gross receipts as permitted by federal law. The amendment also allows DADS to conduct QAF reviews on an annual basis, as currently allowed, or on a schedule determined by DADS. A review of a time period other than 12 months may be necessary because the QAF threshold is changing from five and one-half percent to six percent one month after the start of a

state fiscal year. This may require DADS to conduct 13-month and 11-month reviews.

The proposed amendment to §11.4 allows DADS to change the QAF reporting period and reporting date if the percent of total gross receipts to be paid as QAF changes during a reporting period, as it will on October 1, 2011. The amendment also clarifies that, when DADS calculates total gross receipts, DADS uses the amounts on file with the Claims Management System for daily rate claims and applied income and the amounts reported by the facility for private-pay payments and bed-hold revenue.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years the proposed amendments are in effect is an estimated increase in revenue of \$4,116,000 in fiscal year (FY) 2012; \$4,491,000 in FY 2013; \$4,491,000 in FY 2014; \$4,491,000 in FY 2015; and \$4,491,000 in FY 2016.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments may have an adverse economic effect on small businesses and micro-businesses, because providers will have to pay an increased fee to DADS as a result of the increased QAF tax from five and one-half percent to six percent.

DADS estimates that the number of small businesses and micro-businesses subject to the proposed amendments is approximately 159. The projected economic impact for small businesses and micro-businesses is \$4,116,000 in fiscal year (FY) 2012; \$4,491,000 in FY 2013; \$4,491,000 in FY 2014; \$4,491,000 in FY 2015; and \$4,491,000 in FY 2016.

No alternatives were considered in determining how to accomplish the objectives of the proposed rules because, to be permissible under federal law, a health care-related tax must be imposed at a uniform rate across a class of providers. Therefore, the threshold percentage cannot vary depending on the size of the entity that operates a facility. DADS could leave the threshold percentage at five and one-half percent of total revenue for all facilities, but that would not generate the necessary revenue for the state. To minimize the impact of the increased tax, DADS is proposing the discontinuation of collecting revenues on durable medical equipment.

PUBLIC BENEFIT AND COSTS

Gordon Taylor, DADS Chief Financial Officer, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that ICF/MR providers would not have durable medical equipment reimbursements counted as part of their total gross receipts, thus lowering the amount of QAF owed to DADS by those providers who file claims for durable medical equipment. The proposed amendments also require ICF/MR providers to pay QAF on all therapeutic leave days instead of only the first three days; however, this change does not affect the total amount paid by providers, only the timing of payment submission. In addition, the amendments generate revenue needed

by the state as a health care-related tax to increase federal payments for the ICF/MR program.

Mr. Taylor anticipates that there will be an economic cost to persons who are required to comply with the amendments. The probable economic cost to persons required to comply with the amendments for each year of the first five years the amendments are in effect will be \$4,116,000 in fiscal year (FY) 2012; \$4,491,000 in FY 2013; \$4,491,000 in FY 2014; \$4,491,000 in FY 2015; and \$4,491,000 in FY 2016. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Cathy Belliveau at (512) 438-3597 in DADS CFO Process Improvement. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-10R02, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 10R02" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§11.2. Definitions.

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

- (1) DADS--The Department of Aging and Disability Services.
- (2) Facility--Any of the following:
 - (A) an intermediate care facility for the mentally retarded or the corporate parent of an intermediate care facility for the

mentally retarded licensed under Chapter 252, Health and Safety Code; or

(B) a facility operated according to the requirements of Chapter 252, Health and Safety Code, and owned and/or operated by a community mental health and mental retardation center as described in Chapter 534, Subchapter A, Health and Safety Code; or

(C) a facility owned by DADS.

(3) Total gross [~~Gross~~] receipts--Money paid to a facility [~~as compensation~~] for services provided to residents, including daily rate claims, applied income, payments from private-pay residents, and bed-hold revenue. Effective September 1, 2009, the term [~~resident participation; but~~] does not include payments for durable medical equipment [~~charitable contributions to a facility~~]. Gross receipts are defined as accrued payments and not as cash received].

(4) Total patient days--The sum of the total number of residents for which a facility receives payment for services from DADS or another source on behalf of a resident on each day of the month. [~~Computed on a monthly basis; of the following:~~]

~~[(A) the total number of residents occupying a facility bed immediately before midnight on each day of the month; and]~~

~~[(B) the total number of beds that are on hold on each day of the month and that have been placed on hold for a period not to exceed three consecutive calendar days during which a resident is on therapeutic leave during the month; and]~~

~~[(C) the total number of days a resident is discharged from a facility are not counted in the calculation of the total patient days under this chapter.]~~

§11.3. Quality Assurance Fee Determination Methodology.

(a) Quality assurance fee. Effective October 1, 2011 [~~January 1, 2008~~], the quality assurance fee for a facility is six [~~five and one-half~~] percent of a facility owner's total gross receipts.

(b) Quality assurance fee review. Every twelve months or on a schedule determined by DADS, DADS will review each facility owner's quality assurance fee payments from all of the owner's facilities combined. A facility owner's liability for the quality assurance fee may be adjusted following this review to ensure that the quality assurance fee equals six [~~five and one-half~~] percent of total [~~annual~~] gross receipts from all facilities.

§11.4. Required Reports.

(a) The following reports must be filed by a facility in accordance with DADS instructions:

(1) the monthly patient day report required under subsection (c) of this section; and

(2) the [~~annual~~] report of total gross receipts required under subsection (d) of this section.

(b) Amended reports.

(1) A facility may amend a report required under subsection [~~subsections~~] (c) or (d) of this section.

(2) An amended monthly patient day report must be filed no later than 20 calendar days after the last day of the month for which the report was filed.

(3) An amended report of gross receipts must be filed no later than 10 calendar days after the filing of the report required under subsection (d) of this section.

(c) Monthly patient day report.

(1) A facility must report, not later than the 10th calendar day after the last day of a month, the total number of patient days for the facility during the preceding month.

(2) A facility must file the report required by this subsection on forms or in the format and according to the instructions prescribed by DADS.

(d) Reporting of gross receipts.

(1) A facility must report, no later than October 31 of each year, money paid to the facility by private-pay residents and bed-hold revenue [~~money paid to the facility for bed-hold fees~~] for the period of September 1 through August 31 immediately preceding the report. Notwithstanding the previous sentence, DADS may change a reporting period and reporting date if the percent of total gross receipts to be paid as QAF changes during a reporting period. DADS notifies a provider in writing if DADS changes a reporting period or reporting date in accordance with this subsection. DADS uses [will use] the [Durable Medical Equipment and Applied Income] amounts on file with the Claims Management System for daily rate claims and applied income, and the amounts reported by the facility for private-pay payments and bed-hold revenue to determine the total gross receipts.

(2) A facility must file the report required by this subsection on forms or in the format and according to the instructions prescribed by DADS.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101760

Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 438-3734



CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§19.1001, 19.1002, 19.1510, and 19.1601, concerning nursing services, additional nursing services staffing requirements, emergency medication kits, and infection control, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

BACKGROUND AND PURPOSE

The purpose of the proposed amendments to §19.1001 and §19.1002 is to make the rule consistent with the federal requirements for posting nurse staff information. Proposed amendments to §19.1601 reorganize the rule, clarify the rule, and update the rule to reflect current guidelines of the Center for Disease Control and Prevention relating to the documentation and screening of employees for certain communicable diseases. The amendment to §19.1510 updates a reference to Texas Board of Pharmacy rules. Other amendments update the agency name from the Department of Human Services (DHS) to the Department of Aging and Disability Services (DADS)

and update section references. The amendments to §19.1601 also update the rule to make it more consistent with federal requirements, including the requirement to provide information to a resident relating to the benefits and potential side effects of influenza and pneumococcal immunizations provided by the facility.

SECTION-BY-SECTION SUMMARY

Proposed amendments to §19.1001 add a new subsection (b) that contains requirements related to posting nurse staffing requirements. Paragraphs (1) - (3) are consistent with Code of Federal Regulations (CFR), Title 42, §483.30, and specify the information and the manner in which nurse staffing information must be posted. They also require a facility to make accessible to the public, upon request, posted nurse staffing data for review, at a cost not to exceed the community standard rate. Paragraph (4) addresses nurse staffing data retention requirements currently addressed in §19.1002(b).

Proposed deletion of §19.1002(b) removes the requirement for posting of nursing personnel information. This information is now clarified in §19.1001(b)(1) - (4).

Proposed amendment to §19.1510(1), regarding emergency medications kits, updates the reference to Texas Board of Pharmacy rules from Texas Administrative Code (TAC), Title 22, §291.20(b) to §291.121(b).

Proposed amendments to §19.1601 make significant changes to the lettering and numbering of the section. Amendments to the content of the section are explained based on the section, as proposed.

Section 19.1601(a) clarifies that a facility must include an infection control program specifically for influenza, pneumococcal pneumonia and tuberculosis.

Section 19.1601(b)(4) corrects a citation and clarifies that a facility must report a resident's name and disease to the appropriate authority, if required under 25 TAC §§97.1 - 97.14.

Section §19.1601(c) adds a requirement that a facility must implement, not just have, written policies for the control of communicable diseases.

Section 19.1601(c)(1)(A) requires that a facility conduct and document an annual review for tuberculosis that assesses its current risk classification, as determined by the current Centers for Disease Control Guidelines for Preventing the Transmission of Mycobacterium Tuberculosis in Health Care Settings.

Section 19.1601(c)(1)(B) clarifies that all employees and persons providing services under an outside resource contract must have a tuberculosis screening prior to providing services in a facility and the facility must document or keep a copy of the evidence provided.

Section 19.1601(c)(1)(C) requires that if the facility determines or suspects that an employee or person providing services under an outside resource contract has a positive screening for a communicable disease, the facility must respond according to the latest CDC guidelines and keep documentation of the action taken.

Section 19.1601(c)(1)(D) requires that if the facility determines that an employee or person providing services under an outside resource contract has been exposed to communicable disease, the facility must reassess the employee or person's risk clas-

sification and perform a subsequent screening based upon the reassessed risk classification.

Section 19.1601(c)(1)(E) clarifies that a facility must screen all residents for tuberculosis at admission and according to the attending physician's recommendations and current CDC guidelines.

Section 19.1601(c)(2)(A) clarifies that a facility must include a method for identifying employees at risk of directly contracting hepatitis B through blood or potentially infectious material.

Section 19.1601(c)(2)(B) clarifies that a facility must offer the hepatitis B vaccination for employees identified as at risk of contracting the disease in §19.1601(c)(2)(A).

Section 19.1601(d)(1)(A) requires a facility to develop and implement policies and procedures to ensure that the resident or resident's legal representative receives education regarding the benefits and potential side effects of the pneumococcal vaccination. This is consistent with 42 CFR §483.25.

Section 19.1601(d)(1)(B) requires a facility to give a second pneumococcal immunization after five years based on an assessment and practitioner recommendation, unless medically contraindicated or the resident or resident's legal representative refuses. This is consistent with 42 CFR §483.25.

Section 19.1601(d)(2)(A) requires the influenza vaccination be given to employees hired or residents admitted through March, rather than February, of each year, unless medically contraindicated by a physician or the employee or resident refused the vaccination. This language is consistent with 25 TAC §97.202, Required Immunizations.

Section 19.1601(d)(2)(C) requires a facility to develop and implement policies and procedures that ensure the resident or resident's legal representative receives education on the benefits and potential side effects of the influenza vaccination. This language is consistent with 42 CFR §483.25.

Section 19.1601(d)(3)(C) clarifies that the resident's medical record must show that a resident did not receive the annual influenza vaccination or pneumococcal vaccination due to medical contraindication.

Section 19.1601(d)(3)(D) requires the resident's medical record document that a resident or resident's legal representative was provided education regarding the benefits and potential side effects of the influenza and pneumococcal vaccination. This is consistent with Title 42 CFR §483.25.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because the rules will not require additional resources to meet any of the new requirements.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years

the amendments are in effect, the public benefit expected as a result of enforcing the amendments is greater access to information for nursing facility residents, advocacy groups, and other stakeholders about staffing information in nursing facilities across the state.

Ms. Durden anticipates that there will be no economic cost to persons who are required to comply with the amendments because no additional resources will be required to meet the new requirements.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Justin Eaton at (512) 438-2133 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-8R034, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 8R034" in the subject line.

SUBCHAPTER K. NURSING SERVICES

40 TAC §19.1001, §19.1002

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The amendments implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§242.001 - 242.906.

§19.1001. Nursing Services.

(a) The facility must have sufficient staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care. Nursing services to children must be provided by staff who have been instructed and have demonstrated competence in the care of children. Care and services are to be provided as specified in §19.901 of this chapter [title] (relating to Quality of Care).

(1) Sufficient staff.

(A) The facility must provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans:

(i) ~~[except when waived under paragraph (3) of this section,]~~ licensed nurses, except when waived under paragraph (3) of this subsection; and

(ii) other nursing personnel.

(B) ~~The [Except when waived under paragraph (3) of this section, the]~~ facility must designate a licensed nurse to serve as a charge nurse on each shift, except when waived under paragraph (3) of this subsection [tour of duty].

(2) Registered nurse.

(A) ~~The [Except when waived under paragraph (3) or (4) of this section, the]~~ facility must use the services of a registered nurse for at least eight consecutive hours a day, seven days a week, except when waived under paragraph (3) or (4) of this subsection.

(B) ~~The [Except when waived under paragraph (4) of this section, the]~~ facility must designate a registered nurse to serve as the director of nursing on a full-time basis, 40 hours per week, except when waived under paragraph (4) of this subsection.

(C) The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.

(3) Waiver of requirement to provide licensed nurses on a 24-hour basis.

(A) To the extent that a facility is unable to meet the requirements of paragraphs (1)(B) and (2)(A) of this subsection ~~[section]~~, the state may waive these requirements with respect to the facility, if:

(i) the facility demonstrates to the satisfaction of the Texas Department of Aging and Disability ~~[Human]~~ Services (DADS) ~~[(DHS)]~~ that the facility has been unable, despite diligent efforts (including offering wages at the community prevailing rate for nursing facilities), to recruit appropriate personnel;

(ii) DADS ~~[(DHS)]~~ determines that a waiver of the requirement will not endanger the health or safety of individuals staying in the facility;

(iii) the state finds that, for any periods in which licensed nursing services are not available, a registered nurse or a physician is obligated to respond immediately to telephone calls from the facility; and

(iv) the waived facility has a full-time registered or licensed vocational nurse on the day shift seven days a week. For purposes of this requirement, the starting time for the day shift must be between 6 a.m. and 9 a.m. The facility must specify in writing the schedule that it follows.

(B) A waiver granted under the conditions listed in this paragraph is subject to annual state review.

(C) In granting or renewing a waiver, a facility may be required by the state to use other qualified, licensed personnel.

(D) The state agency granting a waiver of these requirements provides notice of the waiver to the state long term care ombudsman (established under §307(a)(12) of the Older Americans Act of 1965) and the protection and advocacy system in the state for the mentally ill and mentally retarded.

(E) The nursing facility that is granted a waiver by the state notifies residents of the facility (or, when appropriate, the guardians or legal representatives of the residents) and members of their immediate families of the waiver.

(4) Waiver of the requirement to provide services of a registered nurse for more than 40 hours a week in a Medicare skilled nursing facility (SNF).

(A) The secretary of the U.S. Department of Health and Human Services (secretary) may waive the requirement that a Medicare SNF provide the services of a registered nurse for more than 40 hours a week, including a director of nursing specified in paragraph (2) of this subsection ~~[section]~~, if the secretary finds that:

(i) the facility is located in a rural area and the supply of Medicare SNF services in the area is not sufficient to meet the needs of individuals residing in the area;

(ii) the facility has one full-time registered nurse who is regularly on duty at the facility 40 hours a week; and

(iii) the facility either has:

(I) only residents whose physicians have indicated (through physician's orders or admission notes) that they do not require the services of a registered nurse or a physician for a 48-hour period; or

(II) made arrangements for a registered nurse or a physician to spend time at the facility, as determined necessary by the physician, to provide necessary skilled nursing services on days when the regular full-time registered nurse is not on duty.

(B) The secretary provides notice of the waiver to the state long term care ombudsman (established under §307(a)(12) of the Older Americans Act of 1965) and the protection and advocacy system in the state for the mentally ill and mentally retarded.

(C) The SNF that is granted a waiver by the state notifies residents of the facility (or, when appropriate, the guardians or legal representatives of the residents) and members of their immediate families of the waiver.

(D) A waiver of the registered nurse requirement under subparagraph (A) of this paragraph is subject to annual renewal by the secretary.

(5) Request for waiver concerning staffing levels. The facility must request a waiver through the local DADS Regulatory Services Division ~~[(DHS Long Term Care Regulatory unit)]~~, in writing, at any time the administrator determines that staffing will fall, or has fallen, below that required in paragraphs (1) and (2) of this subsection ~~[section]~~ for a period of 30 days or more out of any 45 days.

(A) The following information must be included in the request/notification:

(i) beginning date when facility was/is unable to meet staffing requirements;

(ii) type waiver requested (24-hour licensed nurse or seven-day-per-week RN);

(iii) projected number of hours per month staffing reduced for 24-hour licensed nurse waiver or seven-day-per-week RN waiver; and

(iv) staffing adjustments made due to inability to meet staffing requirements.

(B) Waivers for licensed-only or certified facilities will be granted by DADS Regulatory Services Division ~~[(Long Term Care-~~

~~Regulatory~~ staff. Waivers for a Medicare SNF receive final approval from the Centers for Medicare and Medicaid Services [~~Health Care Financing Administration~~].

(C) If a facility, after requesting a waiver, is later able to meet the staffing requirements of paragraphs (1) and (2) of this subsection [~~section~~], DADS Regulatory Services Division [~~Long Term Care-Regulatory~~] staff must be notified, in writing, of the effective date that staffing meets requirements.

(D) Verification that the facility appropriately made a request and notification will be done at the time of survey.

(E) Amounts paid to Medicaid-certified facilities in the per diem payment to meet the staffing requirements of paragraphs (1) and (2) of this subsection [~~section~~] may be adjusted if staffing requirements are not met.

(6) Duration of waiver. Approved waivers are valid throughout the facility licensure or certification period, unless approval is withdrawn. During the relicensure or recertification survey, the determination is made for approval or denial for the next facility licensure or certification period if a waiver continues to be necessary. The facility requests a redetermination for a waiver from DADS Regulatory Services Division [~~the Long Term Care-Regulatory~~] staff at the time the survey is scheduled. At other times if a request is made, DADS [~~the Long Term Care-Regulatory~~] staff may schedule a visit for waiver determination.

(7) Requirements for waiver approval. To be approved for a waiver, the nursing facility must meet all of the requirements stated in this subchapter and the requirements specified throughout this chapter. In some instances, the survey agency may require additional conditions or arrangements such as:

(A) an additional licensed vocational nurse on day-shift duty when the registered nurse is absent;

(B) modification of nursing services operations; and

(C) modification of the physical environment relating to nursing services.

(8) Denial or withdrawal of a waiver. Denial or withdrawal of a waiver may be made at any time if any of the following conditions exist:

(A) requirements for a waiver are not met on a continuing basis;

(B) the quality of resident care is not acceptable; or

(C) justified complaints are found in areas affecting resident care.

(9) Requirement that SNFs be in a rural area. A SNF (Medicare) must be in a rural area for waiver consideration, as specified in paragraph (4) of this subsection [~~section~~]. A rural area is any area outside the boundaries of a standard metropolitan statistical area. Rural areas are defined and designated by the federal Office of Management and Budget; are determined by population, economic, and social requirements; and are subject to revisions.

(b) Nurse staffing information.

(1) Data requirements. The facility must post the following information:

(A) on a daily basis:

(i) the facility name;

(ii) the current date;

(iii) the resident census; and

(iv) the specific shifts for the day; and

(B) at the beginning of each shift, the total number of hours and actual time of day to be worked by the following licensed and unlicensed nursing staff, including relief personnel directly responsible for resident care:

(i) RNs;

(ii) LVNs; and

(iii) CNAs.

(2) Posting requirements. The nursing facility must post the data described in paragraph (1) of this subsection:

(A) in a clear and readable format; and

(B) in a prominent place readily accessible to residents and visitors.

(3) Public access to posted nurse staffing data. The facility must, upon oral or written request, make copies of nurse staffing data available to the public for review at a cost not to exceed the community standard rate.

(4) Facility data retention requirements. The facility must maintain the posted daily nurse staffing data for the period of time specified by facility policy or for at least two years following the last day in the schedule, whichever is longer.

§19.1002. Additional Nursing Services Staffing Requirements.

(a) (No change.)

~~{(b) The facility must maintain continuous time schedules showing the number and classification of nursing personnel, including relief personnel, who are scheduled or who worked in each unit during each tour of duty. The time schedules must be maintained for the period of time specified by facility policy or for at least two years following the last day in the schedule.}~~

(b) ~~{(e)}~~ A graduate vocational nurse who has a temporary work permit must work under the direction of a licensed vocational nurse, registered nurse, or licensed physician who is physically present in the facility. The graduate ~~{(registered)}~~ nurse who has a temporary work permit must work under the direction of a registered nurse until registration has been achieved.

(c) ~~{(d)}~~ If the facility uses licensed temporary nursing personnel, the temporary personnel must have the same qualifications that permanent facility employees do. If temporary personnel are used for afternoon or night shifts, a full-time, licensed nurse must be on call and immediately available by telephone. The on-call nurse must be a registered nurse unless the facility has a current waiver from DHS and is not required to provide daily RN coverage.

(d) ~~{(e)}~~ Consultative pediatric nursing services must be available to facility staff if the facility has a pediatric resident.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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SUBCHAPTER P. PHARMACY SERVICES

40 TAC §19.1510

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§242.001 - 242.906.

§19.1510. *Emergency Medication Kits.*

Stocks of inventoried emergency medications may be kept in facilities.

(1) Emergency medication kits must be maintained in compliance with 22 TAC §291.121(b) [~~§291.20(b)~~] (relating to Remote Pharmacy Services), with the exception of emergency medication kits in veterans homes, as defined by Natural Resources Code, §164.002. In veterans homes, a United States Department of Veterans Affairs pharmacy or another federally operated pharmacy may maintain emergency medication kits.

(2) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER Q. INFECTION CONTROL

40 TAC §19.1601

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which

provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The amendment implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§242.001 - 242.906.

§19.1601. *Infection Control.*

(a) Infection Control Program. The facility must establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment and to help prevent the development and transmission of disease and infection, including influenza, pneumococcal pneumonia, and tuberculosis. Under the program, the facility must: [-]

~~(1) Infection control program.~~ The facility must establish an infection control program under which it:]

(1) ~~[(A)] investigate, control, and prevent~~ [~~investigates, controls, and prevents~~] infections in the facility;

(2) ~~[(B)] decide~~ [~~decides~~] what procedures, such as isolation, should be applied to an individual resident; and

(3) ~~[(C)] maintain~~ [~~maintains~~] a record of incidents and corrective actions related to infections.

(b) ~~[(2)] Preventing spread of infection.~~

(1) ~~[(A)] If the facility~~ [~~When the infection control program~~] determines in accordance with its infection control program, that a resident needs isolation to prevent the spread of infection, the facility must isolate the resident. Residents with communicable disease must be provided acceptable accommodations according to current practices and policies for infection control. See §19.1(b)(4)(I) of this title (relating to Basis and Scope) for information concerning the Centers for Disease Control (CDC) Guidelines publications.

(2) ~~[(B)]~~ The facility must prohibit employees with a communicable disease or infected skin lesions from direct contact with residents or their food, if direct contact will transmit the disease.

(3) ~~[(C)]~~ The facility must require staff to wash their hands after each direct resident contact for which handwashing is indicated by accepted professional practice.

(4) ~~[(D)]~~ The name of any resident with a reportable disease as specified in 25 Texas Administrative Code §§97.1 - 97.14 [~~§§97.1-97.14~~] (relating to Control of Communicable Diseases) must be reported immediately to the city health officer, county health officer, or health unit director having jurisdiction, and appropriate infection control procedures must be implemented as directed by the local health authority.

(c) ~~[(E)] Communicable Diseases.~~ The facility must have and implement written policies for the control of communicable diseases in employees and residents and must maintain evidence of compliance with local and [~~and/or~~] state health codes and [~~or~~] ordinances regarding employee and resident health status.

(1) ~~[(1)] Tuberculosis.~~

(A) The facility must conduct and document an annual review that assesses the facility's current risk classification according to the current CDC Guidelines for Preventing the Transmission of Mycobacterium Tuberculosis in Health Care Settings.

(B) [(4)] The facility must screen all employees before providing services in the facility, [for tuberculosis within two weeks of employment and annually,] according to (CDC) [Center for Disease Control (CDC)] guidelines. The facility must require all [All] persons providing services under an outside resource contract to [must, upon request of the nursing facility,] provide evidence of a current tuberculosis screening prior to providing services in the facility. The facility must document or keep a copy of the evidence provided [compliance with this requirement].

(C) If the facility determines or suspects that an employee or person providing services under an outside resource contract has been exposed to or has a positive screening for a communicable disease, the facility must respond according to the current CDC guidelines and keep documentation of the action taken.

(D) If the facility determines that an employee or a person providing services under an outside resource contract has been exposed to a communicable disease, the facility must conduct and document a reassessment of the risk classification. The facility must conduct and document subsequent screening based upon the reassessed risk classification.

(E) The facility must screen all residents at admission in accordance with the attending physician's recommendations and current CDC guidelines. If the facility determines or suspects that a resident has been exposed to a communicable disease or has a positive screening, the facility must respond according to the current CDC guidelines and attending physician's recommendations, and keep documentation of the response.

[(H) All residents should be screened upon admission and after exposure to tuberculosis, in accordance with the attending physician's recommendations and CDC guidelines.]

(2) [(ii)] Hepatitis B.

(A) [(4)] The facility's policy regarding hepatitis B vaccinations must address all circumstances requiring [warranting theses] vaccinations and include a method to identify employees at risk of directly contacting blood or potentially infectious materials.

(B) [(4)] The facility must offer all of the [All these] employees identified in subparagraph (A) of this paragraph [must be offered] hepatitis B vaccinations within 10 days of employment. If the employee initially declines the hepatitis B vaccination but at a later date, while still at risk of directly contacting blood or potentially infectious materials, decides to accept the vaccination, the facility must make the vaccination available at that time.

(d) [(3)] Vaccinations. A facility must [Facilities are required to] offer vaccinations in accordance with an immunization schedule adopted by the Texas Department of State Health Services.

(1) [(A)] Pneumococcal vaccine for residents. The facility must offer pneumococcal vaccination to all residents 65 years of age or older who have not received this immunization and to residents younger than 65 years of age, who have not received this vaccine, but are candidates for vaccination because of chronic illness. Pneumococcal vaccine must be offered both to residents who currently reside in the facility and to new residents upon admission. Vaccination must be completed unless a physician has indicated that the vaccine is medically contraindicated [by a physician] or the resident refuses the vaccine. Vaccine administration must be in accordance with the recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention at the time of the vaccination.

(A) The facility must develop and implement policies and procedures to ensure that the resident or resident's legal representative receives education regarding the benefits and potential side effects of the pneumococcal vaccination.

(B) Based on an assessment and practitioner recommendation, a second pneumococcal immunization may be given five years after the first pneumococcal immunization, unless medically contraindicated or the resident or the resident's legal representative refuses the second immunization.

(2) [(B)] Influenza vaccinations for residents and employees. The facility must offer influenza vaccine to residents and employees in contact with residents, unless the vaccine is medically contraindicated by a physician or the employee or resident has refused the vaccine.

(A) [(i)] Influenza vaccinations for all residents and employees in contact with residents must be completed by November 30 of each year. Employees hired or residents admitted after this date and during the influenza season (through March [February] of each year) must receive influenza vaccinations, unless medically contraindicated by a physician or the employee or resident refuses the vaccine.

(B) [(ii)] Vaccine administration must be in accordance with the recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention at the time of the most recent vaccination.

(C) The facility must develop and implement policies and procedures that ensure that the resident or resident's legal representative receives education regarding the benefits and potential side effects of the influenza vaccination.

(3) [(C)] Documentation of receipt, [of] refusal, or contraindication of vaccination.

(A) Immunization records must be maintained for each employee in contact with residents and must show the date of the receipt or refusal of each annual influenza vaccination.

(B) Except as provided in subparagraph (C) of this paragraph, the [The] medical record for each resident must show the date of the receipt or refusal of the annual influenza vaccination and the pneumococcal vaccine.

(C) If a resident does not receive or refuse a vaccination, the resident's medical record must show the resident did not receive the annual influenza vaccination or the pneumococcal vaccination due to medical contraindication.

(D) The medical record for each resident must show the resident or resident's legal representative was provided education regarding the benefits and potential side effects of the influenza and pneumococcal vaccination.

(e) [(4)] Linens. Personnel must handle, store, process, and transport linens so as to prevent the spread of infection.

(f) [(5)] The Quality Assessment and Assurance Committee as described in §19.1917 of this title (relating to Quality Assessment and Assurance) will monitor the infection control program.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-201101751

Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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CHAPTER 30. MEDICAID HOSPICE PROGRAM

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §30.16, concerning election of hospice care, and §30.60, concerning Medicaid hospice payments and limitations, in Chapter 30, Medicaid Hospice Program.

BACKGROUND AND PURPOSE

The purpose of the amendments is to allow children, under 21 years of age, who are enrolled in Medicaid or the Children's Health Insurance Program to elect hospice treatment services without waiving their rights to treatment for their terminal illnesses. The Federal Patient Protection and Affordable Care Act (PPACA) requires states to allow children under 21 years of age to make the election. Therefore, §30.16 is amended in accordance with PPACA. Before PPACA, all Medicaid recipients who elected to enroll in the Medicaid Hospice Program were required to waive the right to acute care Medicaid treatments related to the terminal condition for which they elected hospice.

In addition, the amendments allow the Department of Aging and Disability Services (DADS) to adjust the percentage of the facility rate paid to hospice providers for room and board for clients residing in a nursing facility (NF) or Intermediate Care Facility for Persons with Mental Retardation (ICF/MR). Currently DADS reimburses Medicaid hospice providers 95% of the Medicaid NF or ICF/MR rate, for each hospice recipient in a facility. Effective February 1, 2011, the Medicaid NF and ICF/MR rates will decrease by two percent. Section 30.60(c) and (d) are amended to allow the state to reimburse Medicaid Hospice providers more than 95% of the facility rate. This will enable hospice providers to continue receiving the current reimbursement rate.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §30.16 clarifies that only individuals 21 years of age or older are required to waive their rights to acute care Medicaid treatments related to their terminal condition when enrolled in the Medicaid Hospice Program.

The proposed amendment to §30.60 adds the phrase "no less than" to subsections (c) and (d) to allow DADS to reimburse Medicaid Hospice providers more than 95% of the facility rate.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, there are foreseeable implications relating to costs or revenues of state and federal governments.

The effect on state government for the first five years the proposed amendments are in effect is an estimated additional cost of \$15,604 in fiscal year (FY) 2011; \$200,358 in FY 2012; \$214,384 in FY 2013; \$229,392 in FY 2014; and \$245,451 in FY 2015.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that the proposed amendments will not have an adverse economic effect on small businesses or micro-businesses, because hospice providers will continue to receive the current reimbursement rate.

PUBLIC BENEFIT AND COSTS

Gary Jessee, DADS Assistant Commissioner for Access and Intake, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is hospice providers will maintain their current level of reimbursement and children under 21 years of age will be allowed to continue with curative treatment for a terminal illness.

Mr. Jessee anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

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

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Pam Lovell at (512) 438-3519 in DADS Access and Intake. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-10R04, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 10R04" in the subject line.

SUBCHAPTER B. ELIGIBILITY REQUIREMENTS

40 TAC §30.16

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§30.16. *Election of Hospice Care.*

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

(d) Waiver of other benefits. For the duration of an election of hospice care, an individual 21 years of age or older waives all rights to Medicaid payments for the following services:

(1) - (2) (No change.)

(e) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

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SUBCHAPTER F. REIMBURSEMENT

40 TAC §30.60

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§30.60. *Medicaid Hospice Payments and Limitations.*

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

(c) Medicaid hospice-nursing facility per diem rates. The Medicaid Hospice Program pays the Medicaid hospice provider a hospice-nursing facility rate that is no less than 95% of the Medicaid nursing facility rate for each hospice recipient in a nursing facility to take into account the room and board furnished by the facility. When the hospice-nursing facility rate is paid to the hospice provider, Medicaid vendor payment to the nursing facility is not paid. Room and board services include performance of personal care services, including assistance in the activities of daily living, in socializing activities, administration of medication, maintaining the cleanliness of a resident's room, and supervision and assisting in the use of durable medical equipment and prescribed therapies.

(d) Medicaid hospice-intermediate care facilities for persons with mental retardation or related conditions (ICF/MR-RC) per diem

rates. The Medicaid Hospice Program pays the Medicaid hospice provider a hospice-ICF/MR-RC rate that is no less than 95% of the ICF/MR-RC rate for each hospice recipient in an ICF/MR-RC to take into account the room and board furnished by the facility. When the hospice-ICF/MR-RC rate is paid to the hospice provider, Medicaid vendor payment to the ICF/MR-RC is not paid. Room and board services include performance of personal care services, including assistance in the activities of daily living, in socializing activities, administration of medication, maintaining the cleanliness of a resident's room, and supervision and assisting in the use of durable medical equipment and prescribed therapies.

(e) - (i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens

General Counsel

Department of Aging and Disability Services

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For further information, please call: (512) 438-3734



PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 108. DIVISION FOR EARLY CHILDHOOD INTERVENTION SERVICES

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), proposes to amend the DARS rules in Title 40, Part 2, Chapter 108, Division for Early Childhood Intervention Services, by repealing Subchapters A, B, C, and G, and adopting new: Subchapter A, General Rules; Subchapter B, Procedural Safeguards and Due Process Procedures; Subchapter C, Staff Qualifications; Subchapter G, Referral, Pre-Enrollment, and Developmental Screening; Subchapter I, Evaluation and Assessment; Subchapter J, Individualized Family Service Plan (IFSP); Subchapter K, Service Delivery; Subchapter L, Transition; Subchapter M, Child and Family Outcomes; Subchapter O, Public Outreach; and Subchapter P, Contract Requirements. Specifically, DARS proposes the repeal of §§108.1, 108.3, 108.5, 108.7, 108.9, 108.11, 108.13, 108.15, 108.17, 108.19, 108.71, 108.73, 108.76, 108.77, 108.101, 108.103, 108.105, 108.107, 108.109, 108.111, 108.113, 108.115, 108.117, 108.119, 108.121, 108.123, 108.125, 108.127, 108.129, 108.131, 108.133, 108.135, 108.137, 108.139, 108.301, 108.303, 108.306, 108.307, 108.309, 108.311, 108.313, 108.315, 108.317, 108.319, 108.321, 108.701, 108.703, 108.705, 108.707, 108.709, and 108.711. DARS proposes new §§108.101, 108.103, 108.105, 108.107, 108.201, 108.203, 108.205, 108.207, 108.209, 108.211, 108.213, 108.215, 108.217, 108.219, 108.221, 108.223, 108.225, 108.227, 108.229, 108.231, 108.233, 108.235, 108.237, 108.239, 108.241, 108.303, 108.305, 108.307, 108.309, 108.311, 108.313, 108.315, 108.317, 108.319, 108.701, 108.703, 108.705, 108.707, 108.709, 108.901, 108.903, 108.905, 108.907, 108.909, 108.911,

108.913, 108.915, 108.917, 108.1001, 108.1003, 108.1005, 108.1007, 108.1009, 108.1011, 108.1013, 108.1015, 108.1017, 108.1019, 108.1021, 108.1103, 108.1105, 108.1107, 108.1109, 108.1111, 108.1201, 108.1203, 108.1205, 108.1207, 108.1209, 108.1211, 108.1213, 108.1215, 108.1217, 108.1219, 108.1221, 108.1301, 108.1303, 108.1501, 108.1503, 108.1505, 108.1507, 108.1509, 108.1511, 108.1513, 108.1515, 108.1601, 108.1603, 108.1605, 108.1607, 108.1609, 108.1611, 108.1613, 108.1615, and 108.1617.

Chapter 108 is being extensively restructured and expanded from seven subchapters to fifteen subchapters in order to move requirements from the *ECI Standards Manual for Contracted Programs* into rule and to increase clarity and minimize duplication of or conflicts with federal statutes and rules. The *ECI Standards Manual for Contracted Programs* will be discontinued effective September 1, 2011.

The following subchapters and sections in Title 40, Chapter 108, are to be repealed:

Subchapter A, Early Childhood Intervention Service Delivery, and the following sections are to be repealed: §108.1, Purpose; §108.3, Definitions; §108.5, Service Delivery Requirements for Early Intervention Services; §108.7, Client Eligibility; §108.9, Primary Referral Requirements; §108.11, Referral and Pre-Enrollment; §108.13, Assessment and Evaluation; §108.15, Health Standards for Early Intervention Services; §108.17, Individualized Family Service Plan (IFSP); §108.19, Required Early Intervention Services; §108.71, Service Coordination; §108.73, Transition; §108.76, Public Outreach; and §108.77, Safety Regulations. The subject matter of these rules is moved to several of the new subchapters with changes intended to minimize duplication of or conflicts with federal statutes and rules. The subject matter of §§108.1, 108.3, 108.15, 108.71, and 108.77 is in new Subchapter A. The subject matter of §108.5 is applied to specific subjects in several new rules. The subject matters of §108.7 is moved to new Subchapter H, Eligibility, which is proposed in a separate rulemaking action. The subject matter of §108.9 and §108.76 is moved to new Subchapter O.

The subject matter of §108.11 is moved to new Subchapter G. The subject matter of §108.13 is moved to new Subchapter I. The subject matter of §108.17 is moved to new Subchapter J. The subject matter of §108.19 is moved to new Subchapter K. The subject matter of §108.73 is moved to new Subchapter L.

Subchapter B, Procedural Safeguards and Due Process Procedures, and the following sections are to be repealed: §108.101, Purpose; §108.103, Responsibilities; §108.105, Prior Notice; §108.107, Parental Consent; §108.109, Surrogate Parents; §108.111, Early Childhood Intervention Procedures for Filing Complaints; §108.113, Early Childhood Intervention Procedures for Investigation and Resolution of Complaints; §108.115, Confidentiality Notice to Parents; §108.117, Access Rights; §108.119, Fees for Records; §108.121, Amendment of Records at Parent's Request; §108.123, Opportunity for a Hearing; §108.125, Minimum Requirements for Conducting a Hearing; §108.127, Results of Hearing; §108.129, Release of Personally Identifiable Information; §108.131, Safeguards; §108.133, Record Retention Period; §108.135, Destruction of Information; §108.137, Release of Records; and §108.139, Enforcement. The subject matter of §§108.101, 108.103, 108.105, 108.107, 108.109, 108.111, 108.113, 108.115, 108.117, 108.119, 108.121, 108.123, 108.125, 108.127, 108.129, 108.131, 108.133, 108.135, and 108.137 are moved to new Subchapter B. The subject matter of §108.139 is not replaced. New

Subchapter B is a renumbering of the moved sections with added sections concerning parent rights in the IFSP process and parent hierarchy in situations where more than one person meets the definition of "parent" as defined in 20 USC §1401.

Subchapter C, Early Childhood Intervention Staff Qualifications, and the following sections are to be repealed: §108.301, Staff Health Regulations; §108.303, Professional Requirements; §108.306, Criminal Background; §108.307, Early Intervention Specialist (EIS) Professional; §108.309, Supervision of Entry Level EIS Professionals; §108.311, Fully Qualified EIS Professional Requirements; §108.313, Continuing Professional Education Requirements; §108.315, Registry; §108.317, Grievance Process; §108.319, Early Intervention Specialist Code of Ethics; and §108.321, Violations of the EIS Code of Ethics. The subject matter of all sections is reorganized and moved to new Subchapter C.

Subchapter G, Contract Requirements, and the following sections are to be repealed: §108.701, Application and Program Requirements for Comprehensive Services; §108.703, Contract Award; §108.705, Contract; §108.707, Remedial Contract Actions; §108.709, Financial Management and Recordkeeping Requirements; and §108.711, Data Collection and Reporting. New Subchapter P is a renumbering of these sections with added sections for definitions, performance management, and local reporting.

The following are the proposed new subchapters of Chapter 108:

New Subchapter A, General Rules, consists of the following new rules: §108.101, Purpose; §108.103, Definitions; §108.105, Safety Regulations; and §108.107, Health Standards for Early Childhood Intervention Services. New Subchapter A moves portions of the subject matter of the *ECI Standards Manual for Contracted Programs*, Chapter 23: Health, Safety, and Reporting Abuse, Neglect, and Exploitation, into rule. New Subchapter A also adds new definitions for Developmental Screenings, EIS, High Probability of Resulting in Developmental Delay, LPHA, and Specialized Skills Training (Developmental Services).

New Subchapter B, Procedural Safeguards and Due Process Procedures, consists of the following new rules: §108.201, Purpose; §108.203, Responsibilities; §108.205, Prior Notice; §108.207, Parental Consent; §108.209, Parent Rights in the IFSP Process; §108.211, Parent; §108.213, Surrogate Parents; §108.215, Early Childhood Intervention Procedures for Filing Complaints; §108.217, Procedures for Investigation and Resolution of Complaints; §108.219, Confidentiality Notice to Parents; §108.221, Access Rights; §108.223, Fees for Records; §108.225, Amendment of Records at Parent's Request; §108.227, Opportunity for a Hearing; §108.229, Minimum Requirements for Conducting a Hearing; §108.231, Results of Hearing; §108.233, Release of Personally Identifiable Information; §108.235, Safeguards; §108.237, Record Retention Period; §108.239, Destruction of Information; and §108.241, Release of Records. New Subchapter B moves portions of the subject matter of the *ECI Standards Manual for Contracted Programs*, Chapter 14: Procedural Safeguards into rule.

New Subchapter C, Staff Qualifications, consists of the following new rules: §108.303, Definitions; §108.305, Employment Records; §108.307, Personnel Grievances; §108.309, Minimum Requirements for All Direct Service Staff; §108.311, Licensed Professionals; §108.313, Early Intervention Specialist (EIS); §108.315, Service Coordinator; §108.317, Staff Who Do Not Hold a License or EIS Credential and Provide Early Childhood

Intervention Services to Children and Families; and §108.319, EIS Code of Ethics. New Subchapter C also adds definitions for active and inactive statuses for early intervention specialists and service coordinators. Additionally new Subchapter C increases the minimum qualifications, establishes requirements to achieve and maintain an EIS credential, and establishes "active" and "inactive" statuses for service coordinators and EISs.

New Subchapter G, Referral, Pre-Enrollment, and Developmental Screening, consists of the following new rules: §108.701, Referral Requirements; §108.703, Child Referred Who Is Not Eligible; §108.705, Child Referred before Birth; §108.707, Pre-Enrollment Activities; and §108.709, Optional Developmental Screenings. The proposed new Subchapter G moves portions of the subject matter of the *ECI Standards Manual for Contracted Programs*, Chapter 16: Referrals and the Pre-Enrollment Process and Chapter 17: Screenings, Evaluations, and Assessments, into rule.

New Subchapter I, Evaluation and Assessment, consists of the following new rules: §108.901, Definitions; §108.903, Evaluations; §108.905, Determination of Hearing and Auditory Status; §108.907, Determination of Vision Status; §108.909, Comprehensive Needs Assessment; §108.911, Ongoing Assessment; §108.913, Identifying Nutritional Needs; §108.915, Identifying Assistive Technology Needs; and §108.917, Autism Screening. The proposed new Subchapter I moves portions of the subject matter of the *ECI Standards Manual for Contracted Programs*, Chapter 17: Screenings, Evaluations, and Assessments, into rule.

New Subchapter J, Individualized Family Service Plan (IFSP), consists of the following new rules: §108.1001, Definitions; §108.1003, IFSP; §108.1005, Medical Review for Early Childhood Intervention Services; §108.1007, Interim IFSP; §108.1009, Participants in Initial and Annual Meetings to Evaluate the IFSP; §108.1011, Participants in Meetings for a Child with Auditory or Visual Impairments; §108.1013, Participants in Periodic Reviews; §108.1015, Content of the IFSP; §108.1017, Periodic Review; §108.1019, Annual Meeting to Evaluate the IFSP; and §108.1021, Partial Review of the IFSP. The proposed new Subchapter J moves the subject matter of the *ECI Standards Manual for Contracted Programs*, Chapter 16: Individualized Family Service Plan (IFSP), into rule.

New Subchapter K, Service Delivery, consists of the following new rules: §108.1103, Early Childhood Intervention Services Delivery; §108.1105, Capacity to Provide Early Childhood Intervention Services; §108.1107, Group Services; §108.1109, Co-visits; and §108.1111, Service Delivery Documentation Requirements. The proposed new Subchapter K moves the subject matter of the *ECI Standards Manual for Contracted Programs*, Chapter 20: Required Early Intervention Services and Service Delivery, into rule.

New Subchapter L, Transition, consists of the following new rules: §108.1201, Purpose; §108.1203, Definitions; §108.1205, Transition Education and Information for the Family; §108.1207, Transition Planning; §108.1209, LEA Child Find Notification; §108.1211, LEA Notification of Potentially Eligible for Special Education Services; §108.1213, LEA Notification Opt Out; §108.1215, Reporting Late LEA Notifications of Potentially Eligible for Special Education Services; §108.1217, LEA Transition Conference; §108.1219, Transition to LEA Services; and §108.1221, Transition Into the Community. The proposed new Subchapter L moves the subject matter of the *ECI Standards*

Manual for Contracted Programs, Chapter 21: Transition, into rule.

New Subchapter M, Child and Family Outcomes, consists of the following new rules: §108.1301, Child Outcomes; and §108.1303, Family Outcomes. The proposed new Subchapter M moves the subject matter of the *ECI Standards Manual for Contracted Programs*, Chapter 9: Outcomes, into rule.

New Subchapter O, Public Outreach, consists of the following new rules: §108.1501, Public Outreach; §108.1503, Child Find; §108.1505, Public Awareness; §108.1507, Publications; §108.1509, Interagency Coordination with Texas Education Agency; §108.1511, Interagency Coordination with Head Start and Early Head Start; §108.1513, Interagency Coordination with the Texas Department of Family and Protective Services (DFPS); and §108.1515, Interagency Coordination with Local Agencies. The proposed new Subchapter O moves the subject matter of the *ECI Standards Manual for Contracted Programs*, Chapter 11: Public Outreach, into rule.

New Subchapter P, Contract Requirements, consists of the following new rules: §108.1601, Definitions; §108.1603, Application and Program Requirements for Early Childhood Intervention Services; §108.1605, Contract Award; §108.1607, Contract; §108.1609, Performance Management; §108.1611, Remedial Contract Actions; §108.1613, Financial Management and Recordkeeping Requirements; §108.1615, Data Collection and Reporting; and §108.1617, Local Reporting. The proposed new Subchapter P moves the subject matter of the *ECI Standards Manual for Contracted Programs*, Chapter 1: DARS ECI Contract, and Chapter 10: Performance Management, into rule. New Subchapter P also adds definitions for the following into rule: monitoring, OMB Circulars, TKIDS, and Uniform Grant and Contract Management Act.

The proposed rule changes are authorized by the Texas Human Resources Code, Chapters 73 and 117; and the Individuals with Disabilities Education Act, as amended, 20 USC §1400 et seq. and its implementing regulations, 34 CFR Part 303, as amended.

Ellen Baker, Acting DARS Chief Financial Officer, has determined that for each year of the first five years that the proposed repeals and new rules will be in effect, there are no foreseeable fiscal implications to either costs or revenues of state or local governments as a result of enforcing or administering the repeals and new rules.

Ms. Baker also has determined that for each year of the first five years the proposed repeals and new rules will be in effect, the public benefit anticipated as a result of enforcing the changes will be improved quality of early childhood intervention services delivered to families resulting from clearer communication of requirements to contractors and assurances to the public that the necessary rules are in place to provide appropriate oversight of contracted early childhood intervention services.

Ms. Baker has also determined that there is no probable economic cost to persons who are required to comply with the proposed repeals and new rules.

Further, in accordance with Texas Government Code, §2001.022, Ms. Baker has determined that the proposed repeals and new rules will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Ms. Baker has determined that the proposed repeals and new rules will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed repeals and new rules may be submitted within 60 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756 or electronically to Nancy.Mikulencak@dars.state.tx.us.

SUBCHAPTER A. EARLY CHILDHOOD INTERVENTION SERVICE DELIVERY

40 TAC §§108.1, 108.3, 108.5, 108.7, 108.9, 108.11, 108.13, 108.15, 108.17, 108.19, 108.71, 108.73, 108.76, 108.77

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

- §108.1. Purpose.
- §108.3. Definitions.
- §108.5. Service Delivery Requirements for Early Intervention Services.
- §108.7. Client Eligibility.
- §108.9. Primary Referral Requirements.
- §108.11. Referral and Pre-Enrollment.
- §108.13. Assessment and Evaluation.
- §108.15. Health Standards for Early Intervention Services.
- §108.17. Individualized Family Service Plan (IFSP).
- §108.19. Required Early Intervention Services.
- §108.71. Service Coordination.
- §108.73. Transition.
- §108.76. Public Outreach.
- §108.77. Safety Regulations.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101768
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 26, 2011
For further information, please call: (512) 424-4050



SUBCHAPTER B. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

40 TAC §§108.101, 108.103, 108.105, 108.107, 108.109, 108.111, 108.113, 108.115, 108.117, 108.119, 108.121,

108.123, 108.125, 108.127, 108.129, 108.131, 108.133, 108.135, 108.137, 108.139

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

- §108.101. Purpose.
- §108.103. Responsibilities.
- §108.105. Prior Notice.
- §108.107. Parental Consent.
- §108.109. Surrogate Parents.
- §108.111. Early Childhood Intervention Procedures for Filing Complaints.
- §108.113. Early Childhood Intervention Procedures for Investigation and Resolution of Complaints.
- §108.115. Confidentiality Notice to Parents.
- §108.117. Access Rights.
- §108.119. Fees for Records.
- §108.121. Amendment of Records at Parent's Request.
- §108.123. Opportunity for a Hearing.
- §108.125. Minimum Requirements for Conducting a Hearing.
- §108.127. Results of Hearing.
- §108.129. Release of Personally Identifiable Information.
- §108.131. Safeguards.
- §108.133. Record Retention Period.
- §108.135. Destruction of Information.
- §108.137. Release of Records.
- §108.139. Enforcement.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER C. EARLY CHILDHOOD INTERVENTION STAFF QUALIFICATIONS

40 TAC §§108.301, 108.303, 108.306, 108.307, 108.309, 108.311, 108.313, 108.315, 108.317, 108.319, 108.321

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of

the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.301. *Staff Health Regulations.*

§108.303. *Professional Requirements.*

§108.306. *Criminal Background.*

§108.307. *Early Intervention Specialist (EIS) Professional.*

§108.309. *Supervision of Entry Level EIS Professionals.*

§108.311. *Fully Qualified EIS Professional Requirements.*

§108.313. *Continuing Professional Education Requirements.*

§108.315. *Registry.*

§108.317. *Grievance Process.*

§108.319. *Early Intervention Specialist Code of Ethics.*

§108.321. *Violations of the EIS Code of Ethics.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman

General Counsel

Department of Assistive and Rehabilitative Services

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SUBCHAPTER G. CONTRACT REQUIREMENTS

40 TAC §§108.701, 108.703, 108.705, 108.707, 108.709, 108.711

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.701. *Application and Program Requirements for Comprehensive Services.*

§108.703. *Contract Award.*

§108.705. *Contract.*

§108.707. *Remedial Contract Actions.*

§108.709. *Financial Management and Recordkeeping Requirements.*

§108.711. *Data Collection and Reporting.*

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman

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Department of Assistive and Rehabilitative Services

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SUBCHAPTER A. GENERAL RULES

40 TAC §§108.101, 108.103, 108.105, 108.107

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.101. *Purpose.*

This chapter is intended to implement the provisions of the Interagency Council on Early Childhood Intervention Act, Human Resources Code, Chapter 73, the Individuals with Disabilities Education Act, Part C (20 USC §§1431 - 1444), and federal regulations 34 CFR Part 303, or their successors. This chapter shall be interpreted to be consistent with these statutes and rules to the extent possible. If such an interpretation is not possible for a portion of this chapter, the federal statutes and rules shall prevail. The Texas statutes and this chapter shall then be given effect to the extent possible.

§108.103. *Definitions.*

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

- (1) Assistive Technology--As defined in 34 CFR §303.12.
- (2) Audiology--As defined in 34 CFR §303.12, including services provided by local educational agency personnel.
- (3) Behavioral Intervention Services:
 - (A) strengthening developmental skills while decreasing severely challenging behaviors;
 - (B) identifying the specific behaviors to change;
 - (C) identifying environmental events that may currently be supporting or failing to support those behaviors;
 - (D) utilizing behavior modification techniques in ways that help achieve the desired behavior change; and
 - (E) using specific behavior analysis plans that may be carried out by persons without professional credentials when designated by the family.

(4) Child--As defined in 34 CFR §303.16.

(5) Child Find--Activities and strategies designed to locate and identify, as early as possible, infants and toddlers with developmental delay.

(6) Complaint--A formal written allegation submitted to DARS stating that a requirement of the Individuals with Disabilities Education Act, or an applicable federal or state regulation has been violated.

(7) Consent--As defined in 34 CFR §303.401(a) and meets all requirements in 34 CFR §303.404.

(8) Contractor--A local private or public agency with proper legal status and governed by a board of directors or governing authority that accepts funds from DARS to administer an early childhood intervention program.

(9) Counseling Services--Counseling services are provided when the parent-child relationship impedes the child's developmental process. In addition to 34 CFR §303.12(d)(3):

(A) conducting evaluation and assessment of the family's strengths and stressors related to the child's disabilities;

(B) consultation with family members, teachers and caregivers to promote function, learning, and development across all domains, with an emphasis on the parent-child relationship as related to the IFSP;

(C) assisting the family in achieving adjustments and decreasing stresses related to their child's delay or disability; and

(D) assisting the family in solving problems and making decisions related to the child's delay or disability.

(10) Days--Calendar days.

(11) DARS--The Department of Assistive and Rehabilitative Services. The entity designated as the lead agency by the governor under the Individuals with Disabilities Education Act, Part C. DARS has the final authority and responsibility for the administration, supervision, and monitoring of programs and activities under this system. DARS has the final authority for the obligation and expenditure of funds and compliance with all applicable laws and rules.

(12) DARS ECI--The Texas Department of Assistive and Rehabilitative Services Division for Early Childhood Intervention Services. The state program responsible for maintaining and implementing the statewide early childhood intervention system required under the Individuals with Disabilities Educational Act, Part C as amended in 2004.

(13) Developmental Screenings--General screening provided by the early childhood intervention program to assess the child's need for further evaluation.

(14) Early Childhood Intervention Program--A program operated by the contractor with the express purpose of implementing a system to provide early childhood intervention services to children with developmental delays and their families.

(15) Early Childhood Intervention Services--Individualized early childhood intervention services determined by the IFSP team to be necessary to enhance the child's development. Early childhood intervention services are further defined in 34 CFR §303.12(a) and Subchapter K of this chapter.

(16) EIS--Early Intervention Specialist. A credentialed specialist who meets specific educational requirements established by DARS ECI and has specialized knowledge in early childhood

cognitive, physical, communication, social-emotional, and adaptive development.

(17) Family--A group of individuals in the same household who identify themselves as a family. Family includes parents, children, adult dependents, and other people residing in the household who are considered members of the family.

(18) Family Education and Training--In addition to 34 CFR §303.12(d)(3), parent-focused training provided by the contractor's early childhood intervention program or accessed through other community services.

(19) FERPA--Family Educational Rights and Privacy Act of 1974 20 USC §1232g, as amended, and implementing regulations at 34 CFR Part 99. Federal law that outlines privacy protection for parents and children enrolled in the ECI program. FERPA includes rights to confidentiality and restrictions on disclosure of personally identifiable information, and the right to inspect records.

(20) Full Year Services--The availability of the array of early childhood intervention services throughout the calendar year.

(21) Health Services--As defined in 34 CFR §303.13.

(22) High Probability of Resulting in Developmental Delay--For a child who has a medical diagnosis with a high probability for a delay to qualify for early intervention services, it must be known and widely accepted within the medical community that the natural course of the diagnosis will result in a developmental delay.

(23) IFSP--Individualized Family Service Plan as defined in 34 CFR §303.14 a written plan of care for providing early childhood intervention services and other medical, health and social services to an eligible child and the child's family when necessary to enhance the child's development.

(24) IFSP Services--The individualized early childhood intervention services listed in the IFSP that have been determined by the IFSP team to be necessary to enhance an eligible child's development.

(25) IFSP Team--An interdisciplinary team that includes the parent and is responsible for developing the IFSP.

(26) Interdisciplinary Team--A team that consists of at least two professionals from different disciplines.

(27) LPHA--Licensed Practitioner of the Healing Arts. A licensed physician, registered nurse, licensed physical therapist, licensed occupational therapist, licensed speech language pathologist, licensed professional counselor, licensed clinical social worker, licensed psychologist, licensed dietitian, audiologist, licensed physician assistant, licensed specialist in school psychologist, or advanced practice nurse.

(28) Medicaid--The medical assistance entitlement program administered by the Health and Human Services Commission.

(29) Medical Services--As defined in 34 CFR §303.12.

(30) Natural Environments--As defined in 34 CFR §303.18.

(31) Nursing Services--In addition to 34 CFR §303.12:

(A) promoting function, learning and development across all domains, with an emphasis on the special healthcare needs of the child as related to the IFSP; and

(B) collaborating with other medical providers outside of the ECI system to gather and provide information regarding the healthcare of an enrolled child.

(32) Nutrition Services--In addition to 34 CFR §303.12:

(A) address development across all domains with an emphasis on the nutritional needs of the child as related to the IFSP;

(B) conducting individual assessments and evaluations regarding nutritional history, dietary intake, body measurements, biochemical and clinical variables, feeding skills and problems, and food habits and preferences;

(C) developing and monitoring plans to address the nutritional needs of eligible children; and

(D) referring to appropriate community resources to carry out nutrition goals.

(33) Occupational Therapy Services--In addition to 34 CFR §303.12:

(A) promoting function, learning and development across all domains, with an emphasis on adaptive behavior, self-help skills, fine and gross motor development, postural development, mobility, sensory development, behavior, play and oral motor functioning as related to the IFSP;

(B) promoting mobility and participation through design or acquisition of assistive and orthotic devices; and

(C) improving the child's functional ability in the home and community setting.

(34) Parent--As defined in 20 USC §1401.

(35) Physical Therapy Services--In addition to 34 CFR §303.12:

(A) promoting learning and development across all domains, with an emphasis on mobility, positioning, fine and gross motor development, strength and endurance, specific motor disorders, sensory development and other areas as related to the IFSP;

(B) promoting mobility and participation through design or acquisition of assistive and orthotic devices; and

(C) promoting sensorimotor function through enhancement of musculoskeletal status, neurobehavioral organization, perceptual and motor development, cardiopulmonary status, and effective environmental adaptation.

(36) Pre-Enrollment--All family related activities from the time the referral is received up until the time the parent signs the initial IFSP.

(37) Primary Referral Sources--As defined in 34 CFR §303.321.

(38) Psychological Services--In addition to 34 CFR §303.12:

(A) promoting function, learning, and development with an emphasis on the social and emotional needs of the child as related to the IFSP;

(B) administering and interpreting psychological tests and interviews; and

(C) providing intensive remediation of mental, emotional, interpersonal, behavioral and learning disorders in eligible children.

(39) Public Agency--DARS and any other state agency or political subdivision of the state that is responsible for providing early childhood intervention services to eligible children under the Individuals with Disabilities Education Act, Part C.

(40) Referral Date--The date the child's name and sufficient information to contact the family was obtained by the contractor.

(41) Service Coordinator--The contractor's employee or subcontractor who:

(A) meets all applicable requirements in Subchapter C of this chapter;

(B) is assigned to be the single contact point for the family;

(C) is responsible for providing case management services as described in §108.405 of this title (relating to Case Management Services); and

(D) is from the profession most relevant to the child's or family's needs or is otherwise qualified to carry out all applicable responsibilities.

(42) Social Work Services--In addition to 34 CFR §303.12:

(A) promoting function, learning, and development across all domains, with an emphasis on providing supports to decrease family stressors and maximize the family's ability to benefit from early intervention services;

(B) collaborating with community resources to improve family functioning in their environment; and

(C) evaluating living conditions and family interactions as they relate to the child.

(43) Specialized Skills Training (Developmental Services)--Rehabilitative services to promote age-appropriate development by providing skills training to correct deficits and teach compensatory skills for deficits that directly result from medical, developmental or other health-related conditions.

(44) Speech and Language Therapy Services--In addition to 34 CFR §303.12(d)(14):

(A) promoting learning and development across domains, with an emphasis on communication skills, language and speech development, sign language and cued language services, oral motor functioning, and identification of specific communication disorders;

(B) providing evaluation and ongoing assessment;

(C) promoting of communication and participation through design or acquisition of assistive devices; and

(D) providing services designed to promote rehabilitation and remediation of delays or disabilities in language-related symbolic behaviors, communication, language, speech, emergent literacy, and/or feeding and swallowing behavior.

(45) Surrogate Parent--A person assigned to act as a surrogate for the parent in compliance with the Individuals with Disabilities Education Act, Part C and this chapter.

(46) Transportation--As defined in 34 CFR §303.12.

(47) Vision Services--In addition to 34 CFR §303.12, including vision impairment services (VI) and orientation and mobility services (O&M) and services provided by Local Education Agency personnel.

§108.105. Safety Regulations.

(a) The contractor must develop and implement written policy and procedures to address accessibility and safety regulations for all buildings and offices where ECI programs are housed.

(1) Buildings must be physically accessible to persons with disabilities.

(2) Buildings must be inspected annually by a local or state fire authority. A safety and sanitation inspection must be completed annually. If the fire or safety and sanitation inspection indicates that hazards exist, these hazards must be corrected.

(3) Buildings must comply with all requirements of any applicable licensing or regulatory body for these types of activities carried on in the building.

(b) If the contractor provides early childhood intervention services in settings other than the child's home, the contractor must develop and implement written policy and procedures that address accessibility and safety issues.

(c) The contractor's system for transportation services for children and families must meet all local and state legal requirements.

§108.107. Health Standards for Early Childhood Intervention Services.

(a) The contractor must implement written policies and procedures that cover the following areas:

- (1) administration of medication, if applicable;
- (2) infectious disease prevention and management including:

(A) adherence to universal precautions as defined by the Centers for Disease Control of the United States Public Health Service;

(B) compliance with the Texas Communicable Disease Prevention and Control Act, Texas Health and Safety Code, Chapter 81; and

(C) immunization guidelines and requirements as specified by the Texas Department of State Health Services.

(b) The contractor must follow all federal and state law and regulations regarding providing services and maintaining records for families and children with HIV or other communicable disease.

(c) Children who participate in any ECI group activities must have immunizations as recommended by the Texas Department of State Health Services. The contractor must inform the family of the importance of immunizations and assist the family with obtaining immunizations if necessary. An exception may be made if medical or religious reasons prevent immunizations. If so, documentation must be maintained, and the family must be notified that the child may be excluded from group activities if a contagious outbreak occurs.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman

General Counsel

Department of Assistive and Rehabilitative Services

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For further information, please call: (512) 424-4050



SUBCHAPTER B. PROCEDURAL SAFEGUARDS AND DUE PROCESS PROCEDURES

40 TAC §§108.201, 108.203, 108.205, 108.207, 108.209, 108.211, 108.213, 108.215, 108.217, 108.219, 108.221, 108.223, 108.225, 108.227, 108.229, 108.231, 108.233, 108.235, 108.237, 108.239, 108.241

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.201. Purpose.

The purpose of this subchapter is to describe general requirements for procedural safeguards pertaining to early childhood intervention services. In addition to the requirements described in this subchapter, the contractor must comply with all federal and state requirements related to procedural safeguards and due process pertaining to early childhood intervention services including: 20 USC §§1431 - 1444; 20 USC §1232g; 42 USC §§2000d - 2000d-7; implementing regulations 34 CFR Part 99 and 34 CFR §§303.170, 303.172, 303.342, 303.400 - 303.406, 303.460, 303.510, and 303.512; and §§101.8011, 101.8013, and 101.8015 of this title (relating to Administrative Hearings Concerning Individual Child Rights, Motion for Reconsideration, and Appeal of Final Decision). In cases of conflict between this subchapter and the federal authorities, the interpretation must be in favor of the higher safeguards for children and families.

§108.203. Responsibilities.

(a) The contractor shall be responsible for:

(1) establishing or adopting procedural safeguards that meet the requirements of the federal and state regulations listed in §108.101 of this title (relating to Purpose) and that also meet additional requirements of this subchapter;

(2) implementing the procedural safeguards; and

(3) providing oral and written explanation to the parent regarding procedural safeguards during the pre-enrollment process and at other times when parental consent is required.

(b) The contractor must make reasonable effort to provide appropriate interpreter or translation services or communication assistance necessary for a parent or child with limited English proficiency or communication impairments to participate in early childhood intervention services. Interpreter, translation, and communication assistance services are provided at no cost to the family.

(c) The contractor must provide the family the DARS ECI family rights publication. The contractor must document the following were explained:

(1) the family's rights;

(2) the early childhood intervention process; and

(3) available early childhood intervention services.

§108.205. Prior Notice.

In addition to the requirements in 34 CFR §303.403, the notice must be in sufficient detail to inform the parent about each record or report considered when the contractor proposes, or refuses to initiate or

change the identification, evaluation, or the provisions of appropriate early childhood intervention services to the child and the child's family.

§108.207. Parental Consent.

(a) In addition to the requirements in 34 CFR §303.404, written parental consent must be obtained before:

(1) beginning any screening, except when performing a developmental screening on a child in the conservatorship of the Texas Department of Family and Protective Services;

(2) conducting any evaluation or comprehensive assessment procedures;

(3) providing early childhood intervention services listed in the IFSP;

(4) changing the type, intensity, or frequency of early childhood intervention services;

(5) contacting medical professionals and other outside sources to coordinate and gather information about the child and family;

(6) reporting personally identifiable information, including disposition of referral, electronically to statewide databases unless release is authorized without consent in FERPA; or

(7) releasing personally identifiable information except as allowed by §108.241 of this title (relating to Release of Records).

(b) In addition to 34 CFR §303.404(b), the contractor must adopt procedures designed to encourage the parent to consent to recommended assessment or evaluation procedures and recommended early childhood intervention services that the parent has refused. The procedures may include:

(1) providing the parent relevant literature or other materials; and

(2) offering the parent peer counseling to enhance their understanding of the value of early childhood intervention and to allay their concerns about participation in Part C programs.

(c) If a specific assessment or service is determined necessary by the IFSP team, the contractor may not limit or deny that assessment or service because the parent has refused consent for another service or assessment.

§108.209. Parent Rights in the IFSP Process.

The contractor must explain the contents of the IFSP to the parents and obtain informed written consent from the parent before providing any early childhood intervention services. The parent has the right to:

(1) be present and participate in the development of the IFSP;

(2) have decisions about early childhood intervention services made on the individualized needs of the child and family;

(3) receive a full explanation of the IFSP;

(4) consent to some, but not all, early childhood intervention services;

(5) receive all IFSP services for which the parent gives consent;

(6) request an administrative hearing or file a complaint if the parent does not agree with the other IFSP team members;

(7) indicate disagreement in writing with a part of the IFSP, even though the parent consents to early childhood intervention services;

(8) have the IFSP written in the parent's primary language or mode of communication; and

(9) receive a copy of the IFSP.

§108.211. Parent.

When situations arise in which more than one person meets the definition of parent, as defined in 20 USC §1401, the contractor must have a method of resolving conflicts in a manner that gives proper deference to the opinions and decisions of the individual or individuals who has the best legal right to act as the child's parent. Written rules or policies developed by the contractor must not violate other state or federal laws.

(1) The biological or adoptive parent, unless such parent does not have legal authority to make health, educational or early childhood intervention services decisions for the child, has priority to act as the parent for the purposes of this chapter.

(2) If both parents have the legal authority to make educational decisions for the child, and one parent submits written revocation of parental consent, the contractor must immediately terminate any activity requiring prior written parental consent even if the other parent has provided prior written parental consent or is willing to provide prior written parental consent.

(A) As long as the parent has the legal authority to make educational decisions for the child, the contractor must accept either parent's written revocation of consent for any activity requiring prior written parental consent.

(B) If a parent, including a parent other than the parent who submitted written revocation of parental consent, later requests that his or her child receive early childhood intervention services, the contractor must treat this request as a new request.

(C) The contractor may not use mediation or due process to overcome a parent's written revocation of parental consent for any activity requiring prior written parental consent. A parent who opposes the cessation of activities requiring prior written parental consent does not have the right to request mediation or a due process hearing to resolve the dispute. The parent only has the right to file a due process request with respect to actions which are the responsibility of the contractor, and not by another parent.

(3) If a judicial decree or order identifies a specific person or persons to act as the child's parent to make health, educational, or early childhood intervention service decisions on behalf of a child, then the contractor acknowledges that person or persons to be the "parent."

(A) The exception to this rule is that no state agency, no DARS ECI contractor or provider, and no public agency that provides early childhood intervention or other paid services to a child or any family member of that child may act as the parent for the purposes of ECI.

(B) Notwithstanding the preceding exception, an individual who is a biological or adoptive parent or family member of the child who has also been identified by a judicial decree to act as the "parent" of the child is not disqualified to act as parent.

§108.213. Surrogate Parents.

(a) The contractor shall ensure that the rights of children eligible under this chapter are protected if:

(1) no parent can be identified; or

(2) the contractor, after reasonable efforts, cannot discover the whereabouts of a parent.

(b) The duty of the contractor includes the assignment of an individual to act as a surrogate parent for the child in a way consistent with existing state laws and regulations. This must include a method for:

- (1) determining whether a child needs a surrogate parent;
- (2) assigning a surrogate parent to the child; and

(3) providing training to ensure that the surrogate parent fully understands their role and responsibilities to represent the best interest of the child.

(c) Criteria for selecting surrogates are as follows.

(1) A person selected as surrogate must have no interest that conflicts with the interests of the child represented.

(2) A person assigned as a surrogate parent must not be an employee of any state agency or a person or an employee of a person providing early childhood intervention services to the child or any family member of the child.

(3) A person who qualifies to be a surrogate parent is not an employee solely because he or she is paid to serve as a surrogate parent.

(4) A person selected as a surrogate parent must have knowledge and skills that ensure adequate representation of the interests of the child.

(5) The requirements of paragraphs (1) - (4) of this subsection ensure that the surrogate parent does not hold a job or a position that would either bias the decisions made for the child or make the surrogate parent vulnerable to the possibility of administrative retaliation for the execution of their responsibilities.

(6) If a person qualifies as a "parent" there is no need to appoint a "surrogate parent" and no need to meet the criteria in this subsection.

(d) A surrogate parent may represent a child in all matters related to:

- (1) the evaluation and assessment of the child;
- (2) development and implementation of the child's IFSPs, including annual evaluations and periodic reviews;
- (3) the ongoing provision of early childhood intervention services to the child; and
- (4) any other rights established under this chapter.

§108.215. Early Childhood Intervention Procedures for Filing Complaints.

(a) An individual or organization may file a complaint with DARS alleging that a requirement of the Individuals with Disabilities Education Act, Part C or applicable federal and state regulations has been violated. The complaint must be in writing, be signed, and include the nature of the violation and a statement of the facts on which the complaint is based.

(b) A complaint may be filed directly with DARS without having been filed with the contractor or local program.

(c) The alleged violation must have occurred not more than one year before the date that the complaint is received by the public agency unless a longer period is reasonable because:

(1) the alleged violation continues for that child or other children; or

(2) the complainant is requesting reimbursement or corrective action for a violation that occurred not more than three years before the date on which the complaint is received by the public agency.

(d) Procedures for receipt of a complaint are as follows.

(1) All complaints received by DARS concerning early childhood intervention services shall be forwarded to the DARS ECI Assistant Commissioner who will log and assign all complaints, monitor the resolution of those complaints, and maintain a copy of all complaints for a five-year period.

(2) A complaint should be clearly distinguished from a request for an administrative hearing under Chapter 101, Subchapter J, Division 3 of this title and from a request for a hearing under §108.227 of this title (relating to Opportunity for a Hearing) concerning the requirements of FERPA.

§108.217. Procedures for Investigation and Resolution of Complaints.

(a) After receipt of the complaint, the DARS ECI Assistant Commissioner will assign a staff person to conduct an individual investigation, on-site if necessary, to make a recommendation to the DARS ECI Assistant Commissioner for resolution of the complaint. The child's and family's confidentiality is protected during the complaint resolution process.

(1) The complainant will have the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint.

(2) All relevant information will be reviewed and an independent determination made as to whether a violation to the requirements of Individuals with Disabilities Education Act occurred.

(b) The DARS ECI Assistant Commissioner resolves the complaint within 60 days of the receipt date.

(c) An extension of the time limit under subsection (b) of this section shall be granted only if exceptional circumstances exist with respect to a particular complaint.

(d) Complainants shall be informed in writing of the final decision of the DARS ECI Assistant Commissioner and of their right to request the secretary of the United States Department of Education to review the final decision of the DARS ECI Assistant Commissioner. The DARS ECI Assistant Commissioner's written decision to the complainant will address each allegation in the complaint and contain:

- (1) findings of fact and conclusions; and
- (2) reasons for the final decision.

(e) To ensure effective implementation of the DARS ECI Assistant Commissioner's final decision and to achieve compliance with any corrective actions, the DARS ECI Assistant Commissioner will assign a staff person to provide technical assistance and appropriate follow-up to the parties involved in the complaint as necessary.

(f) In resolving a complaint in which there is a finding of failure to provide appropriate services, the DARS ECI Assistant Commissioner will remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child and the child's family; and appropriate future provision of services for all infants and toddlers with disabilities and their families.

(g) When a complaint is filed, the DARS ECI Assistant Commissioner will offer mediation services as an alternative to proceeding

with the complaint investigation. Mediation may be used when both parties agree. A parent's right to a due process hearing or complaint investigation will not be denied or delayed because they chose to participate in mediation. The complaint investigation will continue and be resolved within 60 days even if mediation is used as the resolution process.

(h) If a written complaint is received that is also the subject of a request for an administrative hearing under Chapter 101, Subchapter J, Division 3 of this title or a request for a hearing under §108.227 of this title (relating to Opportunity for a Hearing) concerning the requirements of FERPA, or contains multiple issues, of which one or more are part of those hearings, the part of the complaint that is being addressed in those hearings is set aside until the conclusion of the hearings. However, any issue in the complaint that is not a part of such action must be resolved within the 60 day timeline using the complaint procedures.

§108.219. Confidentiality Notice to Parents.

The contractor is responsible for distributing the DARS ECI family rights publication to all parents and explaining requirements related to confidentiality and procedural safeguards.

§108.221. Access Rights.

(a) The parent of a child eligible under this chapter must be afforded the opportunity to inspect and review any records relating to evaluations and assessments, eligibility determination, development and implementation of the IFSP, individual complaints dealing with the child, and any other area under this chapter involving records about the child and the child's family. The records are covered by FERPA. Any participating agency, institution, or program which collects, maintains, or uses personally identifiable information from which information is obtained for the purpose of determining eligibility for or providing early childhood intervention services will be subject to these provisions. The contractor shall comply with a request without unnecessary delay and before any meeting regarding an IFSP or hearing relating to the identification, evaluation, or placement of the child, and in no case, more than 45 days after the request has been made.

(b) The right to inspect and review records under this section includes the right to:

(1) a response from the participating contractor to reasonable requests for explanations and interpretations of the records;

(2) request that the contractor provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) have the parent's representative inspect and review the records.

(c) The contractor may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable state law governing such matters as guardianship, separation, and divorce.

(d) If any record includes information on more than one child, the parent of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(e) The contractor must, on request, provide the parent a list of the types and locations of service records collected, maintained, or used by the contractor.

§108.223. Fees for Records.

(a) The contractor may charge a fee for copies of records which are made for the parent under this section if the fee does not effectively

prevent the parent from exercising their right to inspect and review those records.

(b) The contractor may not charge a fee to search for or to retrieve information under this section.

§108.225. Amendment of Records at Parent's Request.

(a) A parent who believes that information in records collected, maintained, or used under this section is inaccurate or misleading or violates the privacy or other rights of the child, may request the contractor which maintains the information to amend the information.

(b) The contractor decides whether to amend the information in accordance with the request within 30 days.

(c) If, after review of the request, the contractor decides the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it amends the record accordingly and informs the parent in writing.

(d) If the contractor refuses to amend the information in accordance with the request, it informs the parent of the refusal, and advises the parent of the right to a hearing conducted in accordance with the requirements of the FERPA.

§108.227. Opportunity for a Hearing.

The contractor shall, on request, provide an opportunity for a hearing to challenge information in early childhood intervention records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. This hearing must be conducted in accordance with FERPA.

§108.229. Minimum Requirements for Conducting a Hearing.

The hearing must meet at a minimum the following FERPA requirements.

(1) The contractor must hold the hearing within 30 days after it has received the request for the hearing from the parent.

(2) The contractor must give the parent notice of the date, time, and place, reasonably in advance of the hearing.

(3) The hearing may be conducted by any individual including an official of the contractor, who does not have a direct interest in the outcome of the hearing.

(4) The contractor must give the parent a full and fair opportunity to present evidence relevant to the issues under FERPA, including, but not limited to, FERPA regulations at 34 CFR §99.21. The parent may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.

(5) The contractor must make its decision in writing within 30 days.

(6) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.

§108.231. Results of Hearing.

(a) If, as a result of the hearing, the contractor decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child or family, it must amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the contractor decides that the information is accurate and not misleading or otherwise in violation of the privacy or other rights of the child or family, it must inform the parent of the right to place in the record it maintains on the child or family, a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the contractor.

(c) Any explanation placed in the records of the child or family under this section must:

(1) be maintained by the contractor as part of the records of the child or family as long as the record or contested portion is maintained; and

(2) if the records of the child or family or the contested portion is disclosed by the contractor to any party, the explanation must also be disclosed to the party.

§108.233. Release of Personally Identifiable Information.

(a) Unless authorized to do so under 34 CFR §99.31, parental consent must be obtained before personally identifiable information is:

(1) disclosed to anyone other than officials or employees of ECI participating agencies collecting or using the information; or

(2) used for any purpose other than meeting a requirement under this chapter.

(b) A contractor may request that the parent provide a release to share information with others for legitimate purposes. However, when such a release is sought:

(1) the parent must be informed of their right to refuse to sign the release;

(2) the release form must list the agencies and providers to whom information may be given and specify the type of information that might be given to each;

(3) the parent must be given the opportunity to limit the information provided under the release and to limit the agencies, providers, and persons with whom information may be shared. The release form must provide ample space for the parent to express in writing such limitations;

(4) the release must be revocable at any time;

(5) the release must be time-limited not to exceed one year; and

(6) if the parent refuses to consent to the release of all or some personally identifiable information, the program will not release the information.

§108.235. Safeguards.

(a) The contractor must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official for each contractor shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the state's policies and procedures.

(d) Each contractor must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

§108.237. Record Retention Period.

(a) The contractor must retain records for five years after the child has been dismissed from services unless a longer period is required by state or federal law.

(b) A contractor must allow DARS and all appropriate federal and state agencies or their representatives to inspect, monitor, or evaluate client records, books, and supporting documents pertaining to

services provided. The contractor and the subcontractors must make these documents available at reasonable times and for reasonable periods. Upon request, the contractor must submit copies of their records, at no cost, to the DARS designee, DARS ECI, the Texas Health and Human Services Commission, the Texas Attorney General's Office, and representatives of the United States Department of Health and Human Services.

(c) The contractor must keep financial and supporting documents, statistical records, and any other records pertinent to the services for which a claim was submitted to DARS ECI or its agent. The records and documents must be kept for a minimum of five years after the end of the contract period or for five years after the end of the federal fiscal year in which services were provided if a contractor agreement/contract has no specific termination date in effect. If any litigation, claim, or audit involving these records begins before the five year period expires, the contractor must keep the records and documents for not less than five years or until all litigation, claims, or audit finds are resolved. The case is considered resolved when a final order is issued in litigation, or DARS ECI and contractor enter into a written agreement. In this section, contract period means the beginning date through the ending date specified in the original agreement/contract; extensions are considered separate contract periods.

§108.239. Destruction of Information.

(a) "Destruction," as used in this section, means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

(b) The contractor must inform the parent when personally identifiable information collected, maintained, or used under this chapter is no longer needed to provide services to the child and family.

(c) The information must be destroyed upon request of the parent; however, a permanent record of the child's name, address, phone number, service dates, delivered early childhood intervention services, and years completed and dismissed may be maintained without time limitation.

§108.241. Release of Records.

(a) With informed written parental consent, confidential Part C records may be provided to the public schools when the child is enrolled in school. If the parent refuses to consent, confidential Part C records may not be intermingled with public school records, including records relating to special education.

(b) An agency or provider may not, without informed prior written parental consent, redisclose confidential information obtained from another agency or provider, unless such redisclosure is permitted under the terms of the original disclosure made to the agency or provider.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

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Department of Assistive and Rehabilitative Services

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For further information, please call: (512) 424-4050



SUBCHAPTER C. STAFF QUALIFICATIONS

40 TAC §§108.303, 108.305, 108.307, 108.309, 108.311, 108.313, 108.315, 108.317, 108.319

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.303. Definitions.

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

(1) Dual Relationships--When the person providing early childhood intervention services engages in activities with the family that go beyond his or her professional boundaries.

(2) Early Intervention Specialist (EIS) Active Status--When an EIS is employed or subcontracting with a contractor and holds a current active credential.

(3) Early Intervention Specialist (EIS) Inactive Status--When an EIS is not employed or subcontracting with a contractor or does not hold a current active credential.

(4) EIS Registry--A system used by DARS ECI to maintain current required EIS information submitted by contractors. DARS ECI designates Early Intervention Specialists. The EIS credential is only valid within the Texas IDEA Part C system.

(5) National Criminal History Record Information Review--Fingerprint-based national criminal history record information obtained from the Federal Bureau of Investigation under Texas Government Code, Chapter 411.

(6) Professional Boundaries--Financial, physical and emotional limits to the relationship between the professional providing early childhood intervention services and the family.

(7) Service Coordinator Active Status--When a service coordinator is employed or subcontracting with a contractor and is current with continuing education requirements specified by DARS ECI.

(8) Service Coordinator Inactive Status--When a service coordinator is not employed or subcontracted with the contractor or is not current with continuing education requirements specified by DARS ECI.

§108.305. Employment Records.

Employment records, including information in the EIS Registry, are subject to the Public Information Act.

§108.307. Personnel Grievances.

(a) Each contractor must maintain a procedure for local review of personnel grievances.

(b) The contractor must inform staff of personnel grievance procedures.

§108.309. Minimum Requirements for All Direct Service Staff.

(a) The contractor must comply with DARS ECI requirements related to health regulations for all direct service staff. The contractor must comply with 34 CFR Part 85 and Texas Health and Safety Code, Chapter 81.

(b) The contractor must complete a fingerprint-based national criminal history record information review on any employee, volunteer, or other person who will be working under the auspices of the contractor before the person has direct contact with children or families.

(1) Any conviction of the following misdemeanors or felonies precludes a person from having direct contact with ECI children and families:

(A) Offenses Against the Person (Texas Penal Code, Title 5);

(B) Offenses Against the Family (Texas Penal Code, Title 6);

(C) Robbery (Texas Penal Code, Title 7, Chapter 29);

(D) Public Indecency (Texas Penal Code, Chapter 43);

(E) Stalking (Texas Penal Code, Title 9, §42.072);

(F) Criminal Solicitation of a Minor (Texas Penal Code, Title 4, §15.031);

(G) Failure to Stop or Report Aggravated Sexual Abuse of a Child (Texas Penal Code, Title 8, §38.17); or

(H) any like offenses of the law of another state or federal law.

(2) A conviction within the previous 10 years of the following misdemeanors or felonies precludes a person from having direct contact with ECI children and families:

(A) Violations of the Texas Controlled Substances Act (Texas Health and Safety Code, Chapter 481);

(B) Violations of the Civil Rights of Person in Custody; Improper Sexual Activity with Person in Custody (Texas Penal Code, §39.04);

(C) Abuse of Corpse (Texas Penal Code, §42.08);

(D) Cruelty to Livestock Animals (Texas Penal Code, §42.09);

(E) Attack on Assistance Animal (Texas Penal Code, §42.091);

(F) Cruelty to Nonlivestock Animals (Texas Penal Code, §42.092);

(G) Dog Fighting (Texas Penal Code, §42.10);

(H) Making a Firearm Accessible to a Child (Texas Penal Code, §46.13);

(I) Intoxication and Alcoholic Beverage Offenses (Texas Penal Code, Chapter 49);

(J) Purchase of Alcohol for a Minor; Furnishing Alcohol to a Minor (Texas Alcoholic Beverage Code, §106.06);

(K) any other felony committed within the previous 10 years under the Texas Penal Code; or

(L) any like offense of the law of another state or federal law.

(3) A person who has pending charges or who has received deferred adjudication covering an offense listed in this section is precluded from having direct contact with children and families if he or she has not completed the probation successfully or had the pending charges dismissed.

(c) The contractor must comply with DARS ECI requirements related to initial training requirements for direct service staff. Before working directly with children and families, all staff must:

(1) complete orientation training as required by DARS ECI;

(2) hold current certification in first-aid including emergency care of seizures and cardiopulmonary resuscitation for children and infants; and

(3) complete universal precautions training.

(d) The contractor must comply with DARS ECI requirements related to continuing education requirements for direct service staff. All staff providing early childhood intervention services to children and families must maintain current certification in first aid including emergency care of seizures and cardiopulmonary resuscitation for children and infants.

(e) The contractor must verify that all newly employed staff:

(1) are qualified in terms of education and experience for their assigned scopes of responsibilities;

(2) are competent to perform the job-related activities before providing early childhood intervention services; and

(3) complete orientation training as required by DARS ECI before providing early childhood intervention services.

(f) The contractor must comply with DARS ECI requirements related to supervision of direct service staff.

(1) All staff members who work directly with children and families must receive supervision oversight including documented consultation, record review, and observation from a qualified supervisor. Supervisor qualifications are further described in this subchapter in §§108.311(c), 108.313(c), 108.315(c), and 108.317(c) of this title (relating to Licensed Professionals, Early Intervention Specialist (EIS), Service Coordinator and Staff Who Do Not Hold a License or EIS Credential and Provide Early Childhood Intervention Services to Children and Families).

(A) Documented consultation includes evaluation and development of staff knowledge, skills, and abilities, and case-specific problem solving.

(B) Record review includes a review of documentation in child records to evaluate compliance with the requirements of this chapter, and quality, accuracy, and timeliness of documentation.

(C) Observation includes watching staff interactions with children and families to provide guidance and feedback.

(2) The contractor must verify that newly employed staff members receive documented supervision as required by DARS ECI.

(g) The contractor must follow all training requirements defined by DARS ECI.

§108.311. Licensed Professionals.

(a) The contractor must comply with DARS ECI requirements related to minimum qualifications for licensed professionals. The contractor must verify and document that licensed professionals hold a current license in good standing in his or her discipline and practice within the scope of his or her specific state licensure laws and regulations.

(b) The contractor must comply with DARS ECI requirements related to continuing education for licensed professionals. A licensed professional must complete continuing education as required by the applicable licensing board.

(c) The contractor must comply with DARS ECI requirements related to supervision of licensed professionals.

(1) A licensed professional must comply with all established licensing board requirements when receiving or providing supervision; and

(2) The contractor must provide a licensed professional documented supervision as defined in §108.309(f) of this title (relating to Minimum Requirements for All Direct Service Staff) as required by DARS ECI.

(d) The contractor must comply with DARS ECI requirements related to ethics for licensed professionals. A licensed professional must meet all established rules of conduct as required by the applicable board.

§108.313. Early Intervention Specialist (EIS).

(a) The contractor must comply with DARS ECI requirements related to minimum qualification for an EIS. An EIS must either:

(1) hold a bachelor's degree which includes a minimum of 18 hours of course credit relevant to early childhood intervention including three hours in early childhood development or early childhood special education;

(2) hold an associate's degree in child development; or

(3) be registered as an EIS before September 1, 2011.

(b) The contractor must comply with DARS ECI requirements related to continuing education for an EIS. An EIS must complete:

(1) a minimum of ten contact hours of approved continuing education each year; and

(2) an additional three hours of continuing education in ethics every two years.

(c) The contractor must comply with DARS ECI requirements related to supervision of an EIS.

(1) The contractor must provide an EIS documented supervision as defined in 40 TAC §108.309(f) of this title (relating to Minimum Requirements for All Direct Service Staff) as required by DARS ECI.

(2) An EIS supervisor must:

(A) have two years of experience providing early childhood intervention services; and

(B) hold a bachelor's degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, rehabilitation counseling, human development, or related field; or

(ii) an unrelated field and have at least 18 hours credit in child development.

(d) EIS Active Status and EIS Inactive Status.

(1) Only an EIS with active status is allowed to provide early childhood intervention services to children and families. An EIS goes on inactive status when the EIS fails to submit the required documentation by the designated deadline. An EIS on inactive status may not perform activities requiring the EIS active status. EIS active status is considered reinstated after the information is entered into the EIS Registry and is approved by DARS ECI. An EIS may return to active status from inactive status by submitting 10 hours of continuing education for every year of inactive status. An EIS returning to active status

must submit documentation of three hours of ethics training within the last two years.

(2) An EIS who has been on inactive status for longer than 24 months must complete the orientation training.

(e) The contractor must comply with DARS ECI requirements related to ethics for an EIS. An EIS who violates any of the standards of conduct in §108.319 of this title (relating to EIS Code of Ethics) is subject to the contractor's disciplinary procedures. Additionally, the contractor must complete an EIS Code of Ethics Incident Report and send a copy to DARS ECI.

§108.315. Service Coordinator.

(a) ECI case management may only be provided by an employee of an ECI contractor. The contractor must comply with DARS ECI requirements related to minimum qualifications for service coordinators.

(1) A service coordinator must meet one of the following criteria:

(A) be a licensed professional in a discipline relevant to early childhood intervention;

(B) be an EIS;

(C) hold a bachelor's degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, rehabilitation counseling, or human development or a related field, or

(ii) an unrelated field with at least 18 hours in child development; or

(D) hold a high school diploma or certificate recognized by the state as the equivalent of a high school diploma and two years of documented paid work experience with children and families.

(2) Before performing case management activities, a service coordinator must complete DARS ECI required case management training that includes, at a minimum, content which results in:

(A) knowledge and understanding of the needs of infants and toddlers with disabilities and their families;

(B) knowledge of Part C of the Individuals with Disabilities Education Act;

(C) understanding of the scope of early childhood intervention services available under the early childhood intervention program and the medical assistance program; and

(D) understanding of other state and community resources and supports necessary to coordinate care.

(3) A service coordinator must effectively communicate in the family's primary language or use an interpreter or translator.

(b) The contractor must comply with DARS ECI requirements related to continuing education for service coordinators. A service coordinator must complete:

(1) three hours of training in ethics every two years;

(2) an additional three hours of training specifically relevant to case management every year; and

(3) if the service coordinator does not hold a current license or credential that requires continuing professional education, an additional seven hours of approved continuing education.

(c) The contractor must comply with DARS ECI requirements related to supervision of service coordinators.

(1) A contractor's ECI program staff member who meets the following criteria is qualified to supervise a service coordinator:

(A) has completed all service coordinator training as required in subsection (a)(2) of this section;

(B) has two years experience providing case management in an early childhood intervention program or another applicable community-based organization; and

(C) holds a bachelor's degree from an accredited university with a specialization in:

(i) child development, special education, psychology, social work, sociology, nursing, rehabilitation counseling, human development or a related field, or

(ii) an unrelated field with at least 18 hours in child development;

(2) The contractor must provide a service coordinator a minimum of three hours per quarter of documented supervision.

(d) Service Coordinator Active Status and Service Coordinator Inactive Status.

(1) A service coordinator may return to active status from inactive status by submitting 10 hours of continuing education for every year of inactive status.

(2) A service coordinator returning to active status must submit documentation of three hours of ethics training within the last two years.

(3) A service coordinator who has been on inactive status for longer than 24 months must complete the orientation training in addition to the other training requirements in order to provide case management.

(e) The contractor must comply with DARS ECI requirements related to ethics of service coordinators. Service coordinators must meet the established rules of conduct and ethics training required by their license or credential. A service coordinator who does not hold a license or credential must meet the rules of conduct and ethics established in §108.319 of this title (relating to EIS Code of Ethics).

§108.317. Staff Who Do Not Hold a License or EIS Credential and Provide Early Childhood Intervention Services to Children and Families.

(a) The contractor must comply with DARS ECI requirements related to minimum qualifications of direct service staff members who do not hold a license or EIS credential. A direct service staff member who does not hold a license or EIS credential must hold a high school diploma or certificate recognized by the state as an equivalent of a high school diploma: and

(1) have completed two years of documented paid experience providing services to children and families; or

(2) provide behavioral intervention services according to a structured plan supervised by one of the following:

(A) Board Certified Behavior Analyst, or

(B) one of the following who is trained in Positive Behavior Supports or Applied Behavior Analysis:

(i) Licensed Psychologist (LP) licensed by the Texas State Board of Examiners of Psychologists,

(ii) Licensed Psychological Associate (LPA) licensed by the Texas State Board of Examiners of Psychologists,

(iii) Licensed Professional Counselor (LPC) licensed by the Texas State Board of Examiners of Professional Counselors,

(iv) Licensed Clinical Social Worker (LCSW) licensed by the Texas State Board of Social Work Examiners, or

(v) Licensed Marriage and Family Therapist (LMFT) licensed by the Texas State Board of Examiners of Marriage and Family Therapists.

(b) The contractor must comply with DARS ECI requirements related to continuing education of direct service staff members who do not hold a license or EIS credential. A direct service staff member who does not hold a license or EIS credential must complete:

(1) a minimum of ten contact hours of approved continuing education each year; and

(2) an additional three hours of training in ethics every two years.

(c) The contractor must comply with DARS ECI requirements related to supervision of direct service staff members who do not hold a license or EIS credential.

(1) The contractor must provide a direct service staff member who does not hold a license or EIS credential documented supervision as defined in §108.309(f) of this title (relating to Minimum Requirements for All Direct Service Staff) as required by DARS ECI.

(2) An ECI staff member who has two years of experience providing early childhood intervention services is qualified to supervise a direct service staff member who does not hold a license or EIS credential.

(d) The contractor must comply with DARS ECI requirements related to ethics for direct service staff members who do not hold a license or EIS credential. A direct service staff member who does not hold a license or EIS credential must meet the rules of conduct and ethics established in §108.319 of this title (relating to EIS Code of Ethics).

§108.319. EIS Code of Ethics.

An EIS must observe and comply with the following standards of conduct:

(1) EISs must comply with the policies and procedures of both the contractor and DARS ECI.

(2) EISs must operate only within the boundaries provided by their education, training and credentials.

(3) EISs must take measures to avoid imposing or inflicting harm.

(4) EISs must truthfully represent their services, professional credentials, and qualifications. EISs must inform families of the scope and limitations of their credentials.

(5) EISs must strive to maintain and improve their professional knowledge, skills, and abilities.

(6) EISs must maintain the confidentiality of families served by the contractor's ECI program in accordance with the policies and procedures of DARS ECI's.

(7) EISs must establish professional boundaries and avoid establishing dual relationships or conflicts of interest with families.

Any prior relationships with a family member must be reported to the EIS's supervisor immediately.

(8) Sexual or intimate relationships between the EIS and family members of a child enrolled in the contractor's ECI program that employs the EIS are prohibited during the child's enrollment and for three years after the child is no longer enrolled.

(9) Financial relationships between the EIS and family members of a child enrolled in the contractor's ECI program that employs the EIS are prohibited during the child's enrollment.

(10) EISs must not exploit their position of trust and influence with a family by benefiting from relationships established as an EIS.

(11) EISs must not provide direct service while impaired, including impairments that are due to the use of medication, illicit drugs, or alcohol.

(12) EISs must not falsify documentation.

(13) EISs must not refuse to provide services for which they are credentialed on the basis of a child's or family's gender, race, ethnicity, color, religion, national origin, sexual orientation, political affiliation, socioeconomic status, or disability.

(14) EISs must make reasonable efforts to ensure that families receive appropriate services when the EIS is unavailable or anticipates discontinued employment with the contractor.

(15) EISs have a professional obligation to report unethical behavior demonstrated by colleagues throughout the ECI system to their program director and to the appropriate board or state agency.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman

General Counsel

Department of Assistive and Rehabilitative Services

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 424-4050



SUBCHAPTER G. REFERRAL, PRE-ENROLLMENT, AND DEVELOPMENTAL SCREENING

40 TAC §§108.701, 108.703, 108.705, 108.707, 108.709

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.701. Referral Requirements.

The contractor must have written procedures establishing a system for:

(1) accepting referrals;

(2) documenting the referral date and source; and

(3) contacting the family in a timely manner after receiving the referral.

§108.703. Child Referred Who Is Not Eligible.

Upon request, the contractor must provide referrals to appropriate community resources when a child is determined ineligible for early intervention services.

§108.705. Child Referred before Birth.

Information received regarding an unborn child becomes a referral the day the contractor is notified of the child's birth.

§108.707. Pre-Enrollment Activities.

(a) Pre-enrollment begins at the point of referral and ends when the parent signs the IFSP or a final disposition is reached.

(1) The contractor must assign an initial service coordinator for the family and document the name of the service coordinator in the child's record.

(2) The contractor must provide the family the DARS ECI family rights publication and document the following were explained:

(A) the family's rights,

(B) the early childhood intervention process, and

(C) available early childhood services.

(3) The contractor provides pre-IFSP service coordination as defined in 34 CFR §303.12(d)(11) and §303.23.

(4) The contractor must collect information on the child throughout the pre-enrollment process.

(5) The contractor must assist the child and family in gaining access to the evaluation and assessment process. The contractor:

(A) schedules the interdisciplinary initial comprehensive evaluation and assessment; and

(B) prepares the family for the evaluation and assessment process.

(b) The contractor must explain the requirement to provide early childhood intervention services in the natural environment to the family before eligibility determination.

§108.709. Optional Developmental Screenings.

(a) Developmental screenings are only used to determine the need for further evaluation. The contractor must:

(1) use developmental screening tools that are approved by DARS ECI; and

(2) train providers administering the screening tool according to the parameters required by the selected tool.

(b) The parent has the right to decide whether to proceed to evaluation after a developmental screening or request an evaluation instead of a developmental screening.

(c) If a child passes all areas of the developmental screening, the contractor must:

(1) provide written documentation to the parent that further evaluation is not recommended;

(2) offer the parent a comprehensive evaluation; and

(3) conduct a comprehensive evaluation if requested by the parent.

(d) The contractor must coordinate with the Texas Department of Family and Protective Services (DFPS) to accept referrals for children under age three who are in foster care, involved in a substantiated case of child abuse or neglect, identified as being affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure, or suspected of having a disability or developmental delay.

(1) If the contractor receives a completed developmental screening from a foster child's physician indicating the child has a developmental delay, the contractor must offer a comprehensive evaluation to determine eligibility for early childhood intervention services.

(2) If the contractor receives a referral on a child who has not been placed in foster care, but who is involved in a substantiated case of child abuse or neglect, the contractor must offer a developmental screening to determine the need for a comprehensive evaluation. The contractor may use professional judgment to conduct a comprehensive evaluation without a developmental screening.

(3) If the contractor receives a referral on a child who is identified as being affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure, the contractor must offer a developmental screening to determine the need for a comprehensive evaluation. The contractor may use professional judgment to proceed to comprehensive evaluation without first conducting a developmental screening.

(4) If the contractor receives a referral from DFPS due to suspected disability or developmental delay, and the child is not a foster child, not involved in a substantiated case of child abuse or neglect, or not identified as being affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure, the contractor follows their local procedures for accepting referrals.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Department of Assistive and Rehabilitative Services

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SUBCHAPTER I. EVALUATION AND ASSESSMENT

40 TAC §§108.901, 108.903, 108.905, 108.907, 108.909, 108.911, 108.913, 108.915, 108.917

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.901. Definitions.

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

(1) Assessment--As defined in 34 CFR §303.322(a)(2), the ongoing procedures used by appropriate qualified personnel throughout the period of a child's eligibility for early childhood intervention services.

(2) Comprehensive Needs Assessment--The process for identifying a child's unique strengths and needs, and the family's resources, concerns, and priorities in order to develop an IFSP. The assessment process gathers complete information regarding the child's abilities to participate in the everyday routines and activities of the family.

(3) Evaluation--As defined in 34 CFR §303.322(a)(1), the procedures used by appropriate qualified personnel to determine a child's initial and continuing eligibility for early childhood intervention services.

(4) Ongoing assessment--The continuous monitoring of a child's functional progress.

§108.903. Evaluations.

(a) The contractor and the family must determine the most appropriate setting, circumstances, time of day, and participants for the evaluation in order to capture the most accurate picture of the child's ability to function in his or her natural environment.

(b) Comprehensive evaluation must be conducted to determine:

(1) developmental delay; or

(2) conditions that interfere with the child's ability to function in the child's environment as determined by clinical opinion.

(c) Evaluation must be conducted using a test protocol designated by DARS ECI and each developmental area must be evaluated as defined in 34 CFR §303.322. When the designated test protocol is inadequate to accurately evaluate the child's development, the interdisciplinary team must document corroborating evidence from a supplemental protocol designated by DARS ECI. The contractor must ensure that evaluations are conducted by qualified personnel.

(d) Evaluation must be based on informed clinical opinion and include input from the parent or other significant people in the child's life.

(e) The contractor must consider other evaluations and assessments performed by outside entities when requested by the family. The contractor must determine whether outside evaluations and assessments:

(1) are consistent with DARS ECI policies;

(2) reflect the child's current status; and

(3) have implications for IFSP development.

§108.905. Determination of Hearing and Auditory Status.

(a) As part of evaluation the contractor must review the current hearing and auditory status for every child and determine any need for further hearing assessment. This is accomplished through:

(1) analysis of evaluation protocol results for indicators of hearing loss; or

(2) completion of the DARS ECI hearing screening administered only by professional or paraprofessional personnel who are:

(A) trained in the administration of the DARS ECI screening packet, including a hearing screening form; and

(B) licensed or registered professionals in the area of screening, or

(C) the contractor's staff who have experience or education in recognizing impairments and the medical conditions related to the area of screening.

(b) The contractor must refer a child to a licensed audiologist if the child has been identified as having a need for further hearing assessment and the child has not had a hearing assessment within six months of the hearing needs identification. If necessary to access a licensed audiologist, the contractor may refer the child to their primary care physician. The referral must be made:

(1) within five working days; and

(2) with parental consent.

(c) If the contractor receives an audiological assessment that indicates the child has an auditory impairment, the contractor must refer the child within five business days:

(1) to an otologist, an otolaryngologist, or an otorhinolaryngologist for an otological examination. An otological examination may be completed by any licensed medical physician when an otologist is not available. The child's record must include documentation that an otologist, an otolaryngologist, or an otorhinolaryngologist was not available to complete the examination; and

(2) to the LEA to complete the communication evaluation and participate in the eligibility determination process as part of the interdisciplinary team. The contractor must also refer to the LEA any child who uses amplification.

§108.907. Determination of Vision Status.

(a) As part of evaluation the contractor must review the current vision status for every child and determine the need for further vision assessment. This is accomplished through:

(1) analysis of evaluation protocol results for indicators of vision loss; or

(2) completion of the DARS ECI vision screening administered only by professional or paraprofessional personnel who are:

(A) trained in the administration of the DARS ECI screening packet, including a vision screening form; and

(B) licensed or registered professionals in the area of screening, or

(C) the contractor's staff who have experience or education in recognizing impairments and the medical conditions related to the area of screening.

(b) The contractor must refer a child to an ophthalmologist or optometrist if the child has been identified as having a need for further vision assessment and the child has not had a vision assessment within nine months of the vision needs identification. If necessary to access an ophthalmologist or optometrist, the contractor may refer the child to their primary care physician. The referral must be made:

(1) within five working days; and

(2) with parental consent.

(c) If the contractor receives a medical eye examination report that indicates vision impairment, the contractor must refer the child to the LEA and to the local office of the DARS Division for Blind Services, with parental consent and within five days of receiving the report.

(d) The referral must be accompanied by a form containing elements required by the Texas Education Agency completed by an ophthalmologist or an optometrist or a medical physician when an ophthalmologist or optometrist is not available.

§108.909. Comprehensive Needs Assessment.

The contractor must conduct and document an initial comprehensive needs assessment for every eligible child. In addition to requirements in CFR §303.322(b)(2), the comprehensive needs assessment must include information about the interests, activities, and routines of the family.

§108.911. Ongoing Assessment.

The contractor must document ongoing assessment for every child receiving early childhood intervention services to determine that the IFSP is effective, and that the planned services are assisting the parent to address the needs of the child.

§108.913. Identifying Nutritional Needs.

(a) The interdisciplinary team must complete a review of the child's nutrition status no later than 28 days after IFSP development through any of the following:

- (1) a review of the child's medical records;
- (2) a review of the child's nutrition evaluation;
- (3) a review of a doctor's physical examination for the child;
- (4) a review of a nurses' evaluation for the child;
- (5) a thorough discussion of family routines; or
- (6) completion of DARS ECI nutrition screening.

(b) The interdisciplinary team must refer the child to a registered dietician if nutritional needs are identified.

§108.915. Identifying Assistive Technology Needs.

The interdisciplinary team must address assistive technology needs as part of the comprehensive needs assessment. This may be accomplished by:

- (1) a qualified therapist review of needs as part of the comprehensive evaluation; or
- (2) administering a screening tool which includes a review of the child's functioning and needs for assistance in positioning, mobility, communication, and play.

§108.917. Autism Screening.

(a) Autism screening is not required if the child has been screened for autism by another entity or has been identified as having autism.

(b) The contractor does not diagnose autism.

(c) If the enrolled child is 18 months or older and has a social, emotional or behavioral concern, with a cognitive or language delay or atypical speech, a member of the interdisciplinary team must:

- (1) explain the importance of early screening for autism;
- (2) provide case management to assist the parent with having an autism screening done by the child's physician;
- (3) complete the Modified Checklist for Autism in Toddlers (M-Chat) if the child is not screened by the physician or is unable to receive the screening from the physician in a timely manner; and
- (4) complete the M-Chat follow-up interview for children who fail the M-Chat screening.

(d) The contractor must make appropriate referrals if needs are identified.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman

General Counsel

Department of Assistive and Rehabilitative Services

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SUBCHAPTER J. INDIVIDUALIZED FAMILY SERVICE PLAN (IFSP)

40 TAC §§108.1001, 108.1003, 108.1005, 108.1007, 108.1009, 108.1011, 108.1013, 108.1015, 108.1017, 108.1019, 108.1021

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.1001. Definitions.

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

- (1) Family Concerns--Needs identified by the family in regards to the child's development and ability to fully participate in his or her natural environment.
- (2) Family Priorities--The family's prioritization of the IFSP outcomes.
- (3) Family Resources--The natural supports and resources in the child's environment.
- (4) Family Strengths--Characteristics family members identify as contributing to the growth and development of the child and family.
- (5) Frequency--As defined in 34 CFR §303.344, the number of days or sessions that a service will be provided within a specified period of time.
- (6) Functional Ability--A child's ability to carry out meaningful behaviors in the context of everyday living, through skills that integrate development across domains.
- (7) Functional Language--A writing style that is easy to understand, is meaningful to the family, and the family can apply to their daily routines.
- (8) IFSP Outcomes--Statements of the measurable results that the family wants to see for their child or themselves.
- (9) IFSP Services--Individualized early childhood intervention services as determined by the IFSP team and listed in the IFSP.
- (10) Intensity--The length of time a service is provided during a session expressed as a specific amount of time instead of a range.
- (11) Location--The place where a service is provided.
- (12) Method--If the service is delivered in a group or on an individual basis.

§108.1003. IFSP.

(a) The IFSP team must develop a written initial IFSP during a face-to-face meeting with the family, with parental consent, in accordance with 20 USC §1436, 34 CFR §303.321, and 34 CFR §303.340 through §303.346.

(b) The IFSP must be developed based on evaluation and assessment described in 34 CFR §303.322 and §§108.901, 108.903, 108.905, 108.907, 108.909, 108.911, 108.913, 108.915 and 108.917 of this title (relating to Evaluation and Assessment).

(c) The contractor must deliver early childhood intervention services according to the IFSP.

(d) The IFSP team must conduct a periodic review of the IFSP at six month intervals as required in 20 USC §1436 and 34 CFR §303.342.

(e) The IFSP team must conduct an annual meeting to evaluate the IFSP as required in 34 CFR §303.342, or more frequently if the parent requests.

(f) Documentation in the child's record must reflect compliance with all related state and federal requirements. Changes to the IFSP are made by revising rather than by rewriting the entire IFSP. The documentation must reflect continuing or changed services throughout the child's enrollment.

(g) The contractor must maintain the IFSP in the child's record.

§108.1005. Medical Review for Early Childhood Intervention Services.

The IFSP team considers the child's medical history before planning services and throughout the child's enrollment. The IFSP team must:

(1) review all pertinent medical information before developing the IFSP;

(2) request additional health information necessary to develop an appropriate plan of service;

(3) delay or adjust the implementation of any or all procedures or services until the necessary health information is obtained and reviewed;

(4) continue to review medical records that become available after enrollment; and

(5) delay or adjust the implementation of procedures or service if the health or safety of the child is in jeopardy.

§108.1007. Interim IFSP.

(a) An interim IFSP can be developed before completing the evaluation and assessment in accordance with 34 CFR §303.345.

(b) Comprehensive evaluation, needs assessment, and the IFSP must be completed within the time frames required in 34 CFR §303.322(e).

§108.1009. Participants in Initial and Annual Meetings to Evaluate the IFSP.

(a) The initial IFSP meeting and each annual meeting to evaluate the IFSP must be conducted by the IFSP team as defined in 34 CFR §303.343(a).

(b) The initial IFSP meeting and the annual meeting to evaluate the IFSP must be conducted face-to-face.

(c) In addition to the participants required in 34 CFR §303.343(a), the IFSP team must include a minimum of two professionals from different disciplines. At least one of the two professionals from different disciplines must

(1) have been directly involved in conducting the evaluation and assessment; and

(2) be a licensed practitioner of the healing arts (LPHA).

(d) With parental consent, the contractor must also invite to the initial IFSP meeting and annual meetings to evaluate the IFSP:

(1) Early Head Start and Migrant Head Start staff members, if the family is jointly served; and

(2) representatives from other agencies serving or providing case management to the child or family including STAR, STAR+PLUS, or STAR Health Medicaid managed care.

§108.1011. Participants in Meetings for a Child with Auditory or Visual Impairments.

(a) In addition to the requirements in §108.1009 of this title (relating to Participants in Initial and Annual Meetings to Evaluate the IFSP), the IFSP team for an initial IFSP meeting or annual meetings to evaluate the IFSP must include a certified teacher of the deaf and hard of hearing or a certified teacher of the visually impaired if the child has a diagnosed auditory or visual impairment.

(b) Unless there is documentation that the LEA has waived notice, the contractor must:

(1) provide the teacher at least a 10-day written notice before the initial IFSP meeting, any annual meetings to evaluate the IFSP or any review and evaluation that affects the child's auditory or vision services; and

(2) keep documentation of the notice in the child's record.

(c) The IFSP team cannot plan auditory or vision services or make any changes that affect those services if the certified teacher of the deaf and hard of hearing or certified teacher of the visually impaired is not in attendance.

(d) The IFSP team must route the IFSP to the certified teacher of the deaf and hard of hearing or certified teacher of the visually impaired for review and signature when changes to the IFSP do not affect the child's auditory or vision services.

(e) The certified teacher of the deaf and hard of hearing and the certified teacher of the visually impaired may submit a request within five days of the IFSP meeting to have another IFSP meeting if the teacher disagrees with any portion of the IFSP.

(f) The certified teacher of the deaf and hard of hearing or certified teacher of the visually impaired are not required to attend the review when changes do not affect the child's auditory or vision services, but the contractor must obtain their input.

§108.1013. Participants in Periodic Reviews.

Each periodic review must be conducted by individuals that meet the requirements in 34 CFR §303.343(b).

§108.1015. Content of the IFSP.

(a) The IFSP team must develop a written IFSP containing all requirements in 20 USC §1436(d) and 34 CFR §303.344. In addition, the IFSP must include:

(1) a description of the child's functional abilities in the areas of cognitive development, (including hearing, vision, and health status), gross and fine motor development, communication development, social-emotional development, and adaptive development;

(2) information about the family's resources, priorities, and concerns related to enhancing the development of the child, with the concurrence of the family;

(3) measurable outcomes expected to be achieved for the child and the family;

(4) criteria, procedures, and timelines to determine progress toward achieving outcomes;

(5) a statement of the natural environment in which early childhood intervention services will appropriately be provided or written justification if the early childhood intervention services will not be provided in the natural environment;

(6) the name of the service coordinator; and

(7) the steps to be taken to support the transition of the toddler with a disability to preschool or other appropriate services.

(b) The IFSP team must address outcomes before planning early childhood intervention services.

(c) The IFSP must include:

(1) the child's name;

(2) specific early childhood intervention services to:

(A) reach the identified outcomes,

(B) enhance the child's functional abilities, behaviors and routines; and

(C) strengthen the capacity of the family to meet the child's unique needs;

(3) the discipline of the person responsible for implementing each service;

(4) the frequency of each service;

(5) the intensity of each service;

(6) the location of each service;

(7) the method of each service;

(8) the start and end date of each service;

(9) the payment source of each service; and

(10) an indication if assistive technology is included in the IFSP.

(d) In addition to the requirements in subsection (c) of this section, the IFSP must also include:

(1) the family's rights related to services;

(2) dated signatures of all IFSP team members signifying agreement with the IFSP; and

(3) dated signature of the parent giving informed consent to early childhood intervention services.

(e) The IFSP must be fully explained to the parent.

(f) Informed written parental consent must be obtained before the contractor provides IFSP services.

(g) The IFSP must be written in functional language.

(h) The IFSP team plans early childhood intervention services for no more than one year.

(i) The child is enrolled in early childhood intervention services when the parent signs the initial IFSP.

(j) The contractor must provide the parent a copy of the initial IFSP.

§108.1017. Periodic Review.

(a) The purpose of the periodic review is to determine:

(1) the degree to which progress toward achieving the outcomes is being made; and

(2) whether modification or revision of the outcomes or services is necessary.

(b) Additional periodic reviews to evaluate the IFSP may be conducted more frequently if requested by the parent or other IFSP team members. The reviews are conducted with the service coordinator and the parent face-to-face or by other means acceptable to the parents. Other IFSP team members must be present as needed.

(c) If the team determines that changes to the type, intensity, or frequency of services are not needed, the team conducts a complete review with no changes. If a change to an outcome does not result in changes to the type, intensity, or frequency of services, the team must provide to the parent any newly developed and dated outcome pages. All discussions with team members and the family must be documented in the child's record. The IFSP team:

(1) notes the new outcome pages in the progress notes; and

(2) adds the new pages to the IFSP.

(d) If the team determines that changes to the type, intensity, or frequency of services is required, the team must conduct a complete review with revisions. The team must document and provide to the parent:

(1) the reason for the changes and new outcome pages as applicable;

(2) the start date for all early intervention services as

(A) the date of the periodic review, or

(B) the date services are to begin;

(3) the name of the service coordinator;

(4) the signature of the entire team, signifying their agreement with the changes.

§108.1019. Annual Meeting to Evaluate the IFSP.

The annual Evaluation of the IFSP is done following determination of continuing eligibility. In addition to all requirements in 34 CFR §303.342, the documentation of an Annual Meeting to Evaluate the IFSP must meet the requirements for Complete Review with Revisions, and include team discussion of:

(1) reviews of the current evaluations and other information available from ongoing assessment of the child and family needs;

(2) progress toward achieving the IFSP outcomes;

(3) any needed modification of the outcomes and early intervention services.

§108.1021. Partial Review of the IFSP.

(a) A partial IFSP review is a review of portions of the IFSP selected by the IFSP team.

(b) If the IFSP team determines that revision to the type, intensity, or frequency of the early childhood intervention services is needed, but a meeting to evaluate the IFSP is not necessary, the IFSP team conducts a partial IFSP review.

(c) A partial review of the IFSP is also the procedure used to change the designated service coordinator when a meeting to evaluate the IFSP is not necessary.

(d) The contractor must ensure that a partial review of the IFSP is conducted by the service coordinator and parent in a face-to-face

meeting or other means acceptable to the parents and other IFSP team members. Other IFSP team members must be present as needed.

(e) The contractor must continue to provide all planned early childhood intervention services not affected by the change while the IFSP team develops the revision or new IFSP and gathers all required signatures.

(f) Documentation of a partial review must meet the requirements for Complete Review with Revisions.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman

General Counsel

Department of Assistive and Rehabilitative Services

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For further information, please call: (512) 424-4050



SUBCHAPTER K. SERVICE DELIVERY

40 TAC §§108.1103, 108.1105, 108.1107, 108.1109, 108.1111

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.1103. Early Childhood Intervention Services Delivery.

(a) The contractor must:

(1) plan and provide early childhood intervention services that meet the needs of the eligible child in natural environments as defined in 34 CFR §303.18; or

(2) provide written justification in the IFSP if early childhood intervention services are not provided in natural environments.

(b) Early childhood intervention services needed by the child must be initiated in a timely manner as defined by DARS ECI.

(c) The contractor must ensure that early childhood intervention services are appropriate, as determined by the IFSP team, and based on scientifically based research, to the extent practicable. In addition to the requirements in 34 CFR §303.12, all early childhood intervention services must be provided:

(1) to address the development of the whole child within the framework of the family;

(2) in the context of natural learning activities; and

(3) according to a plan and with a frequency that is individualized to the parent and child.

(d) The contractor must make reasonable efforts to provide flexible hours in programming in order to allow options for parent to participate.

§108.1105. Capacity to Provide Early Childhood Intervention Services.

The contractor must have the capacity to provide all early childhood intervention services in 34 CFR §303.12 and additional early childhood intervention services described in this chapter.

§108.1107. Group Services.

(a) The IFSP team plans group IFSP services:

(1) when necessary to help the child reach an IFSP outcome; and

(2) as part of an IFSP that also contains individual IFSP services.

(b) Planned group IFSP services must be documented in the child's IFSP.

(c) The parent or other significant caregiver(s) must participate in group services.

§108.1109. Co-visits.

A co-visit is when two or more service providers deliver services to the child at the same time.

(1) Each service must be listed on the IFSP.

(2) A justification of how the child and family received greater benefit from the services being provided at the same time must be documented in the child's record.

§108.1111. Service Delivery Documentation Requirements.

Documentation of each service contact must include:

(1) the name of the child;

(2) the name of the ECI contractor and service provider;

(3) the date, time, duration and place of service;

(4) type of service (individual or group);

(5) a description of the contact including a summary of activities and the family or primary caregiver's level of involvement;

(6) the IFSP goal that was the focus of the intervention;

(7) the child's progress;

(8) relevant new information about the child provided by the family or other significant caregiver; and

(9) the service provider's signature.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman

General Counsel

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SUBCHAPTER L. TRANSITION

40 TAC §§108.1201, 108.1203, 108.1205, 108.1207, 108.1209, 108.1211, 108.1213, 108.1215, 108.1217, 108.1219, 108.1221

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531,

§531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.1201. Purpose.

The purpose of this subchapter is to implement all federal requirements in 20 USC §1437 and 34 CFR §303.148 related to transition planning and services.

§108.1203. Definitions.

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

(1) Community Transition Meeting--A meeting with the family, the contractor's ECI program staff, and community representatives to assist the family with transitioning from early childhood intervention services to community services, activities, places, or programs the family would like the child to participate in after exiting early childhood intervention services.

(2) LEA--Local Educational Agency as defined in 20 USC §7801(26)(A).

(3) LEA Child Find Notification--Notification to the LEA that the child will shortly reach the age of eligibility for preschool services under the Individuals with Disabilities Education Act, Part B. The parent may opt out of the LEA Child Find Notification.

(4) LEA Notification of Potentially Eligible for Special Education Services--Notification to the LEA that a child is potentially eligible for LEA services. The parent may opt out of the LEA Notification of Potentially Eligible for Special Education Services.

(5) LEA Notification Opt Out--The parent's choice not to allow the contractor to send the child's limited personally identifiable information to the LEA to meet LEA Child Find Notification or LEA Notification of Potentially Eligible for Special Education Services requirements.

(6) LEA Transition Conference--A meeting with the parent, the contractor's ECI program staff, and if possible, an LEA representative to assist a child potentially eligible for LEA special education services to transition from early childhood intervention services to LEA special education services.

(7) Limited Personally Identifiable Information--The child's and parent's names, addresses, and phone numbers, child's date of birth, service coordinator's name and language spoken by the child and family.

(8) Transition Planning--The process of identifying and documenting appropriate steps and transition services to support the child and family to smoothly and effectively transition from early childhood intervention services to LEA special education services or other community activities, places, or programs the family would like the child to participate in after exiting early childhood intervention services.

§108.1205. Transition Education and Information for the Family.

(a) The contractor must explain the transition process at the first meeting with the family after the referral and document the conversation in a progress note.

(b) The contractor must provide the enrolled family an overview of transition concepts and activities including:

(1) ways to plan ahead and help the child adjust to and function in new settings;

(2) a description of circumstances that would cause the child to no longer meet eligibility requirements for early childhood intervention services;

(3) future placement options for the child such as LEA special education services, community childcare settings, and home care;

(4) referral and contact information for relevant advocacy groups, local resources, parent support organizations, waiver and other Medicaid programs and governmental agencies; and

(5) LEA Notification requirements and the LEA Notification Opt Out option.

§108.1207. Transition Planning.

(a) Transition planning is an ongoing process that involves developing and updating appropriate steps and transition services:

(1) jointly with families;

(2) throughout the child's enrollment; and

(3) based on recommendations from the IFSP team.

(b) All transition activities must be documented in the child's record.

(c) The IFSP must contain an appropriate transition statement.

(d) The IFSP team, which includes the parent, must plan appropriate steps and transition services before the child is two years old. The appropriate steps and transition services that the IFSP team plans must be documented in the IFSP and must include:

(1) timelines and responsible party for each transition activity;

(2) the family's choice for the child to transition into a community or educational program or for the child to remain in the home;

(3) appropriate steps and transition services to support the family's exit from early childhood intervention services to LEA special education services or other appropriate activities, places, or programs the family would like the child to participate in after exiting early childhood intervention services; and

(4) program options, if the child is potentially eligible for special education services, for the period from the child's third birthday through the remainder of the school year.

(e) The child's planned steps and transition services must be updated and documented in the IFSP anytime the:

(1) IFSP team identifies new appropriate steps and transitional services; and

(2) parent's goals for the child evolve and change.

(f) At any time during the child's enrollment in early childhood intervention services, the parent may also request that the interdisciplinary team plan steps to support the child and family to transition:

(1) from one contractor to another contractor;

(2) from one family setting to another family setting; or

(3) when the family is moving out of state.

(g) If the child is referred fewer than 45 days before the child's third birthday, the IFSP team is not required to plan appropriate steps and transition services. The contractor can refer the child directly to the LEA with prior written parental consent.

§108.1209. LEA Child Find Notification.

(a) LEA Child Find Notification. The contractor must alert the LEA that the child will shortly reach the age of eligibility for preschool services. The contractor must send the LEA Child Find Notification to the LEA for the area in which the child resides. The LEA Child Find Notification contains the child's limited personally identifiable information, as defined in §108.1203 of his title (relating to Definitions).

(b) Parental consent is not required for the contractor to send LEA Child Find Notification, but the parent may opt out of the LEA Child Find Notification as described in §108.1213 of this title (relating to LEA Notification Opt Out). Informed written parental consent is required before sending information other than the child's limited personally identifiable information to the LEA.

(c) If the parent does not notify the contractor of their decision to opt out of the LEA Child Find Notification before the notification is sent, the contractor must send the LEA Child Find Notification to the LEA for the area in which the child resides. The LEA Child Find Notification is sent no later than 90 days before the child's third birthday.

(d) If the child is referred to the contractor's ECI program less than 45 days before the child's third birthday, the contractor is not required to send the LEA Child Find Notification to the LEA.

§108.1211. LEA Notification of Potentially Eligible for Special Education Services.

(a) The contractor must notify the LEA if a child enrolled in early childhood intervention services is potentially eligible for preschool special education services. If the IFSP team determines the child is potentially eligible for special education services, the contractor must send the LEA for the area in which the child resides the LEA Notification of Potentially Eligible for Special Education Services, which contains the child's limited personally identifiable information as defined in §108.1203(7) of this title (relating to Definitions).

(b) Parental consent is not required for the contractor to send LEA Notification of Potentially Eligible for Special Education Services, but the parent may opt out of LEA notification as described in §108.1213 of this title (relating to LEA Notification Opt Out). Informed written parental consent is required before sending information other than the child's limited personally identifiable information to the LEA.

(c) If the parent does not notify the contractor of their decision to opt out of the LEA Notification of Potentially Eligible for Special Education Services, the contractor must send the LEA for the area in which the child resides:

(1) the LEA Notification of Potentially Eligible for Special Education Services at least 90 days before the child's third birthday and document the date in the child's record; or

(2) a late LEA Notification of Potentially Eligible for Special Education Services for any child aged 33-36 months whom the IFSP team determines is potentially eligible for special education services. The contractor must comply with all reporting requirements in §108.1215 of this title (relating to Reporting Late LEA Notifications of Potentially Eligible for Special Education Services).

(d) With written parental consent, the contractor may send the LEA other pertinent records that would assist the LEA in determining eligibility, such as:

- (1) screening tools;
- (2) assessment tools;
- (3) evaluation tools;
- (4) medical information;

- (5) IFSPs;
- (6) progress notes; and
- (7) other information determined by local agreements.

§108.1213. LEA Notification Opt Out.

(a) The parent may choose not to allow the contractor to send the child's limited personally identifiable information to the LEA. The contractor must:

(1) inform the parent of the LEA Child Find Notification and the LEA Notification of Potentially Eligible for Special Education Services requirements before the parent signs the initial IFSP; and

(2) explain LEA Notification Opt Out to the parent and the consequences of this choice.

(b) The parent may choose LEA Notification Opt Out for either or both of the LEA Notifications. The parent may inform the contractor of their LEA Notification Opt Out choice:

(1) either in writing or verbally; and

(2) at any time up until the time the child's information is released to the LEA.

(c) The contractor must provide the parent written communication regarding LEA Notification that includes the following information:

(1) what information will be disclosed to the LEA;

(2) the scheduled LEA Notification date;

(3) a clear statement that the parent can inform the contractor of their LEA Notification Opt Out choice:

(A) either in writing or verbally, and

(B) at any time up until the time the child's information is released to the LEA;

(4) a statement that indicates when the child's personally identifiable information will be released to the LEA.

(A) The child's limited personally identifiable information will be sent for LEA Child Find Notification no later than 90 days before the child's third birthday, unless the parent contacts the program to opt out before the scheduled notification date.

(B) The child's limited personally identifiable information will be sent for LEA Notification of Potentially Eligible for Special Education Services, unless the parent contacts the program to opt out before the scheduled notification date.

(d) The contractor must provide the parent the written communication regarding LEA Notification as required in subsection (c) of this section:

(1) at least 10 days before the limited personally identifiable information is scheduled to be sent for LEA Child Find Notification no later than 90 days before the child's third birthday; and

(2) at least 10 days before limited personally identifiable information is scheduled to be released:

(A) for LEA Notification of Potentially Eligible for Special Education Services,

(B) as a part of the invitation to the LEA Transition Conference, or

(C) at the LEA Transition Conference.

(e) If the parent opts out of LEA Child Find Notification or LEA Notification of Potentially Eligible for Special Education Services at any time before the notification is sent, the contractor must:

(1) not send the child's limited personally identifiable information to the LEA;

(2) inform the parent that even if he or she opts out of either LEA Notification, he or she can later request that the child's limited personally identifiable information be sent to the LEA; and

(3) document in the child's record:

(A) the date the written communication regarding LEA notification was provided to the parent, and

(B) the parent's request to opt out of LEA Child Find Notification or LEA Notification of Potentially Eligible for Special Education Services.

(f) Referrals 90 to 45 days before the child's third birthday. If the contractor receives the child's referral between 90 and 45 days before the child's third birthday and the IFSP team determines the child is potentially eligible for special education services, the contractor must:

(1) immediately inform the parent of the LEA Notification requirements;

(2) explain LEA Notification Opt Out to the parent and the consequences of this choice; and

(3) comply with all other requirements in this section related to LEA Notification Opt Out.

§108.1215. Reporting Late LEA Notifications of Potentially Eligible for Special Education Services.

When the contractor's ECI program provides LEA Notification of Potentially Eligible for Special Education Services to districts or charter schools less than 90 days before the child's third birthday, the contractor's ECI program must provide a written report to the district or charter school stating the reason for the delay.

§108.1217. LEA Transition Conference.

(a) The IFSP team determines whether a child is potentially eligible for special education services. The IFSP team's decision regarding potentially eligible for special education services is documented in the child's record.

(b) If the parent gives consent to convene the LEA Transition Conference and consent to release the child's limited personally identifiable information to the LEA, the contractor must:

(1) invite the LEA representative 14 days in advance;

(2) document the date of the LEA Transition Conference;
and

(3) document that the setting is appropriate and acceptable to the family, if conducted in a group setting. If a group setting is not acceptable or appropriate to the family, the contractor must convene an individual LEA Transition Conference.

(c) The contractor must conduct the LEA Transition Conference, even if LEA representatives do not attend, and provide the parent information about preschool special education and related services, including a description of the

(1) eligibility definitions;

(2) timelines;

(3) process for consenting to an evaluation and eligibility determination; and

(4) extended year services.

(d) The contractor is not required to conduct the LEA Transition Conference for children referred to the contractor's ECI program less than 90 days before the child's third birthday.

(e) The timeline for extending the invitation to the LEA may be changed by written local agreement. If the contractor becomes aware of a consistent pattern of the LEA representative not attending transition conferences, the contractor must make efforts to meet with the LEA to reach a cooperative agreement to maximize LEA participation.

(f) If the parent has consented to have an LEA Transition Conference, but has not given written consent to release records to the LEA, then the contractor may only release limited personally identifiable information to the LEA. With informed written consent, other personally identifiable information may be released to the LEA.

§108.1219. Transition to LEA Services.

(a) The contractor may continue to provide early childhood intervention services to the child until the child's third birthday even if the Admission, Review, and Dismissal (ARD) meeting has occurred and the Individualized Education Plan (IEP) has been signed.

(b) Early childhood intervention services may be discontinued if the child begins receiving the same services from the LEA if:

(1) prior written notice is given to the parent regarding the discontinuation of early childhood intervention services and the IFSP is revised at an IFSP meeting; or

(2) the parent provides prior written consent to discontinue early childhood intervention services.

(c) The contractor must participate in LEA planning conferences, Admission Review and Dismissal (ARD) meetings, and other LEA meetings at the request of the parent.

(d) All transition activities must be documented in the child's record.

§108.1221. Transition Into the Community.

(a) The contractor must assist the family with transition activities to appropriate community settings before the child's third birthday if the:

(1) parent chooses that the child transition to community services;

(2) parent opts out of LEA Notification of Potentially Eligible for Special Education Services;

(3) parent refuses LEA services; or

(4) child is determined ineligible for special education services.

(b) If the parent requests and provides prior written parental consent, the contractor must make a reasonable effort to convene a community transition meeting with:

(1) the family;

(2) the contractor's ECI program staff;

(3) representatives of the identified community settings;

(4) the DARS Division for Blind Services specialist if the child has a vision impairment or the DARS Office for Deaf and Hard of Hearing Services regional specialist if the child has a hearing impairment; and

(5) other program or agency representatives as appropriate.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman

General Counsel

Department of Assistive and Rehabilitative Services

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For further information, please call: (512) 424-4050



SUBCHAPTER M. CHILD AND FAMILY OUTCOMES

40 TAC §108.1301, §108.1303

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.1301. Child Outcomes.

(a) The contractor must collect and report information on child outcomes as directed by DARS ECI and use that information to improve results for children and families.

(b) Child outcomes address three areas of child functioning necessary for each child to be an active and successful participant at home and in the community. These three outcomes are that children will:

- (1) have positive social relationships;
- (2) acquire and use knowledge and skills; and
- (3) take appropriate action to meet their own needs.

(c) An interdisciplinary team of at least two members must agree on the child outcome ratings for each enrolled child at entry, annual evaluation, and exit.

(1) Entry ratings must be completed:

(A) for every newly enrolled child who is 30 months of age or younger on the date of enrollment;

(B) within two weeks of the initial IFSP or the first Texas IFSP; and

(C) on each of the three child outcomes for each child.

(2) Annual ratings must include the progress item for each outcome and be completed:

(A) within two weeks of each annual evaluation and IFSP;

(B) independently of the entry ratings; and

(C) on each of the three child outcomes for each child.

(3) Exit ratings must include the progress item for each outcome and be completed:

(A) for each child exiting the Texas ECI system who had an entry rating and was enrolled in services for at least six months; and

(B) within two weeks of the dismissal date.

(d) Documentation must:

(1) provide information that reflects the rating decisions of the interdisciplinary team;

(2) record ratings on either the child outcomes summary form or in another section of the child's record as identified by the contractor;

(3) include information related to the child's functional abilities across settings, situations, and people; and

(4) identify source(s) of information such as evaluation, observation, or parent report.

§108.1303. Family Outcomes.

Family outcomes and indicators of family capacity are measured using a family survey. The contractor is required to deliver the family survey as directed by DARS ECI to measure family outcomes and indicators.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Sylvia F. Hardman

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Department of Assistive and Rehabilitative Services

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SUBCHAPTER O. PUBLIC OUTREACH

40 TAC §§108.1501, 108.1503, 108.1505, 108.1507, 108.1509, 108.1511, 108.1513, 108.1515

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.1501. Public Outreach.

The contractor must plan and implement child find, public awareness and interagency coordination goals and strategies that comply with the Individuals with Disabilities Education Act (IDEA), Part C.

§108.1503. Child Find.

(a) The contractor must document that primary referral sources listed in 34 CFR §303.321(d)(3) have been provided current information on:

(1) ECI eligibility criteria;

(2) the ECI array of services;

(3) how to explain ECI service delivery to families, including the family's role;

- (4) how to make a referral to ECI;
- (5) the importance of informing families when a referral is made; and
- (6) the family cost share system of payments for early childhood intervention services.

(b) The contractor must document that any major DARS ECI policy change concerning the types of information described in subsection (a) of this section is communicated to primary referral sources.

(c) The contractor must have written procedures that establish a system to:

- (1) inform primary referral sources of the 34 CFR §303.321 requirement that referrals are made within two business days of the date the child is suspected of having a developmental delay or a medical diagnosis with a high probability of resulting in a developmental delay;
- (2) create an effective method for accepting referrals; and
- (3) monitor referral dates and sources.

§108.1505. Public Awareness.

(a) The contractor must document that families and the general public are provided current information on:

- (1) ECI service delivery, including the family's role;
- (2) eligibility criteria;
- (3) ECI array of services;
- (4) how to make a referral to ECI; and
- (5) the family cost share system of payments for early childhood intervention services.

(b) The contractor's program staff must have the competency to explain to families and the public the information listed in subsection (a) of this section.

(c) The contractor must assist DARS ECI as requested in public awareness activities, including informing families and their community of the DARS ECI Central Directory.

(d) The contractor must establish and maintain ongoing relationships with public and private agencies in their community that serve children and families to:

- (1) increase quality referrals for ECI services; and
- (2) coordinate with community partners to increase access to resources and services for ECI children and families.

§108.1507. Publications.

(a) The contractor must maintain a current inventory of ECI publications and public outreach materials provided by DARS ECI.

(b) Public outreach materials created by the contractor must comply with the ECI Graphics Manual.

§108.1509. Interagency Coordination with Texas Education Agency.

(a) The contractor must comply with all child find and public outreach requirements in all state level DARS ECI memoranda of understanding (MOUs) with the Texas Education Agency (TEA).

(b) The contractor must include the local educational agency (LEA) representatives in an annual review of the following:

- (1) eligibility requirements for public school services, including for Part B services;
- (2) state level MOUs with TEA; and
- (3) if applicable, MOUs with the LEAs.

(c) The contractor must document the results of the annual review required by subsection (b) of this section.

§108.1511. Interagency Coordination with Head Start and Early Head Start.

(a) The contractor must comply with all requirements in DARS ECI memoranda of understanding (MOUs) with Head Start and Early Head Start.

(b) The contractor must include the local Head Start and Early Head Start representative in an annual review of the:

- (1) eligibility requirements for Head Start and Early Head Start placement;
- (2) the state level MOU with Head Start and Early Head Start;
- (3) referral procedures; and
- (4) if applicable, the local MOU with Head Start and Early Head Start.

(c) The contractor must document the results of the annual review required by subsection (b) of this section.

§108.1513. Interagency Coordination with the Texas Department of Family and Protective Services (DFPS).

(a) The contractor must comply with requirements in the MOU between DARS and DFPS concerning referral procedures for children under age three who are involved in substantiated cases of child abuse or neglect, or a child identified as affected by illegal substance abuse, or withdrawal symptoms resulting from prenatal drug exposure.

(b) DARS ECI contractors must collaborate with DFPS staff to develop and implement local agreements as required by the MOU between DARS and DFPS described in subsection (a) of this section.

§108.1515. Interagency Coordination with Local Agencies.

(a) The contractor must document coordination of ECI services with local agencies, as required by 34 CFR §303.321 and others identified by DARS ECI.

(b) The contractor must maintain a current list of community resources for families that includes for each resource:

- (1) services provided;
- (2) contact information;
- (3) referral procedures;
- (4) eligibility requirements; and
- (5) cost to families.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Department of Assistive and Rehabilitative Services

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SUBCHAPTER P. CONTRACT REQUIREMENTS

40 TAC §§108.1601, 108.1603, 108.1605, 108.1607, 108.1609, 108.1611, 108.1613, 108.1615, 108.1617

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.1601. Definitions.

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

(1) Office of Management and Budget (OMB) Circulars--Financial management policies issued by the Office of Management and Budget (OMB) in the Executive Office of the President and made applicable to Texas and its subgrantees and contractors by regulations of the U.S. Department of Education or other funding agencies (See, e.g., 34 CFR Part 74). The Circulars are found in Title 2 of the Code of Federal Regulations or in official White House publications.

(2) Monitoring--Ongoing activities to ensure compliance with the contract, state and federal laws and regulations, and applicable DARS policy. Monitoring includes desk reviews of financial data, consumer records, and other pertinent information and comprehensive on-site visits, follow up on-site visits, and focused on-site visits.

(3) TKIDS--Texas Kids Intervention Data System (TKIDS). DARS's automated data system established by Texas Human Resources Code §73.0051(k) used to plan, manage, and maintain records of client services.

(4) UGMS--Uniform Grant Management Standards (UGMS) adopted by the Governor's Office of Budget and Planning pursuant to 1 TAC §§5.141 - 5.151 and §5.167 (relating to Uniform Grant Management Standards) under the authority of Texas Government Code, Chapter 783.

(5) Uniform Grant and Contract Management Act--Texas Government Code, Chapter 783.

§108.1603. Application and Program Requirements for Early Childhood Intervention Services.

(a) Funds for early childhood intervention services are available to public or private agencies that may be current or potential providers of early childhood intervention services for eligible children.

(b) A competitive procurement process may be used to ensure that DARS obtains the best value in purchasing services.

(c) The application for early childhood intervention services must consist of the forms and related materials that the applicant shall complete to apply to receive funding for providing early childhood intervention services.

(d) Applications must be submitted in accordance with DARS' instructions.

(e) Applications which are late or substantially incomplete may not be accepted and may be returned to the applicant with an explanation.

§108.1605. Contract Award.

(a) Following the review process, DARS will determine approval of funding. Each applicant will be notified in writing of DARS' decision. The general reasons for a denial will be communicated in writing to the applicant.

(b) Applicants will be notified of awards according to the means described in the application package.

(c) Eligibility for continued funding shall be contingent upon the contractor's performance, compliance with state standards, implementation of program review findings, and availability of funds. The contractor shall submit an application for continuation funding as required by DARS.

§108.1607. Contract.

(a) An approved applicant will enter into a contract with DARS prior to being allocated funds. A contract is not fully executed until it has been signed by DARS and the applicant.

(1) The contract must be signed by an official authorized to enter into such agreements on behalf of the contractor.

(2) The contract cannot be altered without authorized officials of both the contractor and DARS providing written approval prior to the effective date of the change. In exigent circumstances as determined by DARS in its sole discretion, the DARS ECI Assistant Commissioner may sign and offer a contract amendment to a contractor and may allow the contractor to accept by performance. The DARS ECI may require a contractor's signature on the amendment before payment for the amended services.

(3) No payment or advance of funds will be made until the contract is fully executed.

(4) By signing the contract the applicant agrees to all terms included therein and to adherence with all applicable statutes, rules, policies and procedures of DARS, including subsequent amendments.

(5) The contract may be renewed if the contract provides for renewal, and the contractor meets the renewal criteria in DARS rules and the contract.

(b) The contract shall:

(1) contain provisions requiring the contractor to comply with applicable requirements in these sections, including the statutes, rules, policies and procedures of DARS, including subsequent amendments, and the fiscal requirements for administering, accounting, auditing, and recovering funds as authorized by the Uniform Grant and Contract Management Act, Uniform Grant Management Standards (UGMS), and federal Office of Management and Budget (OMB) Circulars;

(2) state the contract number of children, when applicable;

(3) authorize DARS to adjust the contract amount as appropriate;

(4) authorize DARS to impose sanctions for noncompliance with contract terms and conditions, statutes, rules, and DARS policies and procedures in accordance with the provisions of the Human Resources Code, §73.0051;

(5) incorporate all or part of the application as part of the contract;

(6) include clearly defined goals, outputs, and measurable outcomes which directly relate to program objectives; and

(7) contain other provisions required by DARS.

(c) Any modifications resulting from changes in state or federal laws and regulations or judicial interpretation of laws and regulations that occur during the contract period are automatically made part of the contract and go into effect on the effective date of the law, regulation, or judicial interpretation.

(d) DARS assigns the effective date of the contract.

(e) The contract shall be concurrent with the state fiscal year, unless DARS approves the contract for a different time period.

(f) The contract shall identify the county(ies) in which the contractor is authorized to perform early childhood intervention services. Contractors that share counties must jointly develop a service area agreement to serve those counties. This service area agreement must be approved by DARS.

(1) A request to change the designated service area must be submitted to the DARS ECI Assistant Commissioner.

(2) All requests for changes in service area assignments must be approved by the DARS ECI Assistant Commissioner before implementation.

(3) DARS will not incur additional expenses as a result of a request to change a service area when the provision of services will be at the same level for the same number of children.

(g) The contract may be amended by mutual agreement between DARS and the contractor during the contract period to change the terms and conditions.

(1) Except for reductions to the contract amount based on applicable contract provisions, the amendment must be in writing and signed by an authorized official of the contractor and the authorized DARS representatives. In exigent circumstances as determined by DARS in its sole discretion, the DARS ECI Assistant Commissioner may sign and offer a contract amendment to a contractor and may allow the contractor to accept by performance. The DARS ECI Assistant Commissioner may require a contractor's signature on the amendment before payment for the amended services. DARS will not pay for the performance of services or work not authorized by a properly executed contract amendment.

(2) DARS develops a written contract amendment when contract changes are determined necessary. A contract amendment may be necessary for reasons including:

(A) sanctions for noncompliance or failure to meet program requirements;

(B) changes in federal or state law that make continued fulfillment of the contract, on the part of either party, unreasonable or impossible;

(C) changes to the assigned service area; or

(D) awards or adjustments for other reasons.

§108.1609. Performance Management.

(a) DARS monitors each contractor's performance throughout the contract period for:

(1) compliance with contract terms and conditions, including any amendments;

(2) compliance with DARS rules, policies, and procedures;

(3) other requested contractor reporting;

(4) identified areas of associated risk; and

(5) other issues that require special attention and monitoring as determined by DARS.

(b) The contractor must fully participate in the performance management process by:

(1) responding to requests by due dates established by DARS;

(2) implementing corrective actions or system changes when requested;

(3) participating in on-site reviews; and

(4) participating in technical assistance and training activities.

§108.1611. Remedial Contract Actions.

(a) DARS may impose remedial contract actions when the contractor fails to follow the terms of the contract or comply with program rules, policies, and procedures. In general, §105.1301 of this title (relating to Adverse Actions) applies.

(b) The remedial actions that DARS may impose on the contractor for noncompliance with the contract are:

(1) adverse actions, which may be appealed; and

(2) non-adverse actions, which may not be appealed.

§108.1613. Financial Management and Recordkeeping Requirements.

(a) The contractor shall comply with the requirements of the contract, the provisions of §105.1013 of this title (relating to General Requirements for Contracting), §105.1101 of this title (relating to Record Requirements), and any program-specific policies related to financial management and recordkeeping requirements.

(b) All contractors will be required to establish third-party billing systems, determine client eligibility for all third-party reimbursement sources, and complete and submit reimbursement requests to corresponding third-party sources. Third parties include, but are not limited to: private insurance, TRICARE, Medicaid programs, and the Children's Health Insurance Program.

§108.1615. Data Collection and Reporting.

(a) The contractor shall collect and report data as required by rules, the contract, and in accordance with applicable instruction manuals. Data shall be submitted in the form, manner, and timeframe specified by DARS. Required data may include, but is not limited to: client data, including personally identifiable information regarding children served or referred; services received by individual eligible children; family information, including family size and income; service provider information, including information about the contractor's individual employees or subcontractors; agency and contractor revenue and expenditure information; and other information that might be determined necessary by DARS to perform their legally authorized functions, including the documentation of early childhood intervention services planned and provided, billing and reimbursement functions, and other purposes.

(b) The contractor must report accurate client, service and service provider information to DARS through TKIDS.

§108.1617. Local Reporting.

DARS reports annually to the public on the performance of each contractor using indicators specified in the State Performance Plan. These reports present the performance of each contractor in relation to state targets and statewide performance. DARS provides the local reporting data to the contractor. The contractor must review the data and report any discrepancies by the due date determined by DARS.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.



CHAPTER 108. DIVISION FOR EARLY CHILDHOOD INTERVENTION SERVICES

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), proposes repeals and new rules to the DARS rules in Title 40, Part 2, Chapter 108, Division for Early Childhood Intervention Services. This proposal repeals all of Subchapter F, System of Fees, and moves the subject matter to new Subchapter N, System of Fees. DARS proposes the repeal of §§108.601, 108.604, 108.605, 108.607, 108.609, 108.611, 108.613, 108.615, 108.619, 108.621, and 108.623. DARS proposes new §§108.1401, 108.1403, 108.1405, 108.1407, 108.1409, 108.1411, 108.1413, 108.1415, 108.1417, 108.1419, 108.1421, 108.1423, 108.1425, 108.1427, and 108.1429.

Subchapter F, System of Fees, and the following sections are to be repealed: §108.601, Purpose and Effective Dates; §108.604, Administration of Family Cost Share System; §108.605, Parent Rights Related to Family Cost Share System; §108.607, Third-party Payors; §108.609, Services at No Cost and IFSP Services; §108.611, Family Cost Share Amount; §108.613, Calculation of Ability to Pay and Family Cost Share Amount; §108.615, Review, Reconsideration, and Adjustment; §108.619, Billing Families for Services; §108.621, Services Subject to Suspension; and §108.623, Program Fiscal and Recordkeeping Policies. The subject matter of these sections is restructured from eleven sections to fifteen sections for increased clarity and is being moved into new Subchapter N, System of Fees. Subchapter F is to be repealed six months after the effective date of new Subchapter N.

New Subchapter N, System of Fees, consists of the following new rules: §108.1401, Purpose; §108.1403, Definitions; §108.1405, Family Cost Share System Administration; §108.1407, Parent Rights Related to the Family Cost Share System; §108.1409, Early Childhood Intervention Services Provided at No Cost to the Parent; §108.1411, IFSP Services Subject to the Family Cost Share Amount; §108.1413, Family Cost Share Amount; §108.1415, Information Used to Calculate Family Cost Share Amount; §108.1417, Zero Family Cost Share Amount; §108.1419, Third-Party Payors; §108.1421, Review of Family Cost Share Amount; §108.1423, Reconsideration and Adjustment of Family Cost Share Obligation; §108.1425, Billing Families for IFSP Services; §108.1427, IFSP Services Subject to Suspension for Nonpayment; and §108.1429, Program Fiscal and Recordkeeping Policies. New Subchapter N adds definitions for "dependent" and "third-party payor;" adds a list of the specific Individualized Family Services Plan (IFSP) services subject to the family cost share amount; adjusts the DARS ECI sliding fee scale from a base of 250% of the Federal Poverty Level (FPL) to 200%; increases the monthly fees for families with income levels greater than 200% of the FPL; adds a description of medical and dental expenses that are allowable deductions; adds the requirement that the parent must attest in writing that information regarding third-party coverage is true and accurate;

adds a requirement that contractors must assist the parent in identifying and accessing other available funding sources to pay for early childhood intervention services; requires contractors to bill a parent \$10 for certain early childhood intervention services if the child is potentially eligible for Medicaid or CHIP and the parent refuses to apply; and requires contractors to bill a parent the family cost share amount assigned to the highest adjusted income range on the DARS ECI sliding fee scale if the child has third-party medical coverage and the parent refuses to give consent to bill for certain early childhood intervention services.

The proposed rule changes are authorized by the Texas Human Resources Code, Chapters 73 and 117; and the Individuals with Disabilities Education Act, as amended, 20 USC §1400 et seq., and its implementing regulations, 34 CFR Part 303, as amended.

Ellen Baker, Acting DARS Chief Financial Officer, has determined that for each year of the first five years that the proposed repeals and new rules will be in effect, there is an estimated \$301,101 in cost savings per year to the State as a result of enforcing or administering the new rules.

Ms. Baker also has determined that for each year of the first five years the proposed repeals and new rules will be in effect, the public benefit anticipated as a result of enforcing the changes will be increased consistency across ECI programs in how family cost share is assigned to families through the added requirement that contractors obtain written attestation of third-party payor coverage, the requirement that contractors assist families in identifying and accessing funding sources, and through the provision of prescriptive lists for services subject to a family cost share amount and for what medical and dental costs can be counted as allowable deductions. Ms. Baker has also determined that there is probable economic cost in the aggregate estimated amount of \$301,101 per year to persons who are required to comply with the proposed new rules.

Further, in accordance with Texas Government Code, §2001.022, Ms. Baker has determined that the proposed repeals and new rules will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Ms. Baker has determined that the proposed repeals and new rules will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed repeals and new rules may be submitted within 30 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756 or electronically to Nancy.Mikulencak@dars.state.tx.us.

SUBCHAPTER F. SYSTEM OF FEES

40 TAC §§108.601, 108.604, 108.605, 108.607, 108.609, 108.611, 108.613, 108.615, 108.619, 108.621, 108.623

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Assistive and Rehabilitative Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin, Texas.)

The repeals are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of

health and human services by health and human services agencies.

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

§108.601. Purpose and Effective Dates.

§108.604. Administration of Family Cost Share System.

§108.605. Parent Rights Related to Family Cost Share System.

§108.607. Third-party Payors.

§108.609. Services at No Cost and IFSP Services.

§108.611. Family Cost Share Amount.

§108.613. Calculation of Ability to Pay and Family Cost Share Amount.

§108.615. Review, Reconsideration, and Adjustment.

§108.619. Billing Families for Services.

§108.621. Services Subject to Suspension.

§108.623. Program Fiscal and Recordkeeping Policies.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101765

Sylvia F. Hardman

General Counsel

Department of Assistive and Rehabilitative Services

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 424-4050



SUBCHAPTER N. SYSTEM OF FEES

40 TAC §§108.1401, 108.1403, 108.1405, 108.1407, 108.1409, 108.1411, 108.1413, 108.1415, 108.1417, 108.1419, 108.1421, 108.1423, 108.1425, 108.1427, 108.1429

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.1401. Purpose.

(a) This subchapter establishes a system of payments for early childhood intervention services as authorized by the Individuals with Disabilities Education Act (IDEA, 20 USC §1400 et seq.) and implementing regulations 34 CFR Part 303. The system of payments includes:

- (1) private insurance;
- (2) public insurance and benefits; and
- (3) fees charged to the parent.

(b) This subchapter also establishes procedures to determine the family cost share amount the contractor bills the parent for IFSP services.

(c) For children and families enrolled in ECI services before the effective date of this subsection, payments (family cost share amount) shall be pursuant to §§108.601, 108.604, 108.605, 108.607, 108.609, 108.611, 108.613, 108.615, 108.619, 108.621, and 108.623 of this title (relating to System of Fees) until the family's next periodic review or annual meeting to evaluate the IFSP. Thereafter, the family cost share amount for that family shall be pursuant to §§108.1403, 108.1405, 108.1407, 108.1409, 108.1411, 108.1413, 108.1415, 108.1417, 108.1419, 108.1421, 108.1423, 108.1425, 108.1427, and 108.1429 of this title (relating to System of Fees).

(d) For children and families who enroll in ECI services on or after the effective date of this subsection, payments (family cost share amount) shall be pursuant to §§108.1403, 108.1405, 108.1407, 108.1409, 108.1411, 108.1413, 108.1415, 108.1417, 108.1419, 108.1421, 108.1423, 108.1425, 108.1427, and 108.1429 of this title.

§108.1403. Definitions.

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

(1) Ability to Pay--The family, as defined in this section, is financially able to contribute to the cost of IFSP services.

(2) Adjusted Income--The gross income of the family, as defined in this section, minus allowable deductions. Adjusted income is used to determine a family's ability to pay and to determine the family cost share amount.

(3) Allowable Deductions--Certain unreimbursed out-of-pocket expenses, not paid for by another source, deducted from gross income to calculate adjusted income.

(4) CHIP--The Children's Health Insurance Program (CHIP) administered by the Texas Health and Human Services Commission.

(5) CIHCP--County Indigent Health Care Program (CIHCP) administered by the Texas Department of State Health Services.

(6) CSHCN--Children with Special Health Care Needs (CSHCN) administered by the Texas Department of State Health Services.

(7) Dependent--Any person who meets the definition of 26 USC §152 Dependent Defined.

(8) Family--When used in this subchapter, family shall mean the child's parent, the child, and other dependents of the parent.

(9) Family Cost Share Amount--The maximum amount of money the family must pay per month based on the family's adjusted income, family size, and, when applicable, certain other factors as described in this subchapter.

(10) Family Cost Share System--The system of collecting fees for early childhood intervention services including the collection of private insurance, public insurance and benefits, and fees charged to the parent.

(11) Federal Poverty Level--The poverty guidelines updated periodically in the Federal Register by the United States Department of Health and Human Services under the authority of 42 USC §9902(2).

(12) Gross Income--All income received by the family, as defined in this section, for determination of family cost share amount.

from whatever source, that is considered income by the Internal Revenue Service before federal allowable deductions are applied.

(13) Inability to Pay--The determination that the family, as defined in this section, is not able to financially contribute to the cost of early childhood intervention services. Placement on the sliding fee scale at \$0 indicates an inability to pay.

(14) PHC--Primary Health Care (PHC) administered by the Texas Department of State Health Services.

(15) SKIP--State Kids Insurance Program (SKIP) administered by the Texas Health and Human Services Commission.

(16) Sliding Fee Scale--The federal poverty level based scale of graduated family cost share amounts developed by DARS.

(17) SNAP--Supplemental Nutrition Assistance Program (SNAP) administered by the Texas Health and Human Services Commission.

(18) SSI--Supplemental Security Income (SSI) is a Federal income supplement program funded by general tax revenues.

(19) TANF--The Temporary Assistance for Needy Families (TANF) program administered by the Texas Health and Human Services Commission.

(20) Third-Party Payor--A company, organization, insurer, or government agency that makes payment for early childhood intervention services received by a child and family. Third-party payors include commercial insurance companies, TRICARE, Medicaid, SKIP, CHIP, HMOs and PPOs.

(21) TRICARE--The U. S. Department of Defense health care entitlement for active duty, Guard and Reserve and retired members of the military, and their eligible family members and survivors.

(22) WIC--Women, Infants and Children (WIC) nutrition program administered by the Texas Department of State Health Services.

§108.1405. Family Cost Share System Administration.

The contractor must implement the family cost share system for each child enrolled in early childhood intervention services in compliance with this subchapter, DARS policy concerning ECI, and the contract.

§108.1407. Parent Rights Related to the Family Cost Share System.

(a) The contractor must fully inform the family of the following rights before collecting information regarding third-party coverage and income and before charging any family cost share amount.

(1) The family has a right to receive certain early childhood intervention services at no cost.

(2) The family has the right to refuse any early childhood intervention services they do not wish to receive.

(3) The family has the right to receive information about any method the contractor may use to verify the family's gross income and allowable deductions.

(4) The family has the right to receive information about the contractor's process for determining the family cost share amount before signing the family cost share agreement.

(5) The family has the right to request a reconsideration of the calculated adjusted income, assigned family cost share amount, or the parent's ability to pay the family cost share obligation for any particular month(s).

(b) The family's inability to pay for early childhood intervention services will not result in the delay or denial of early childhood intervention services to the child or the family.

§108.1409. Early Childhood Intervention Services Provided at No Cost to the Parent.

(a) Early childhood intervention services that must be provided at no cost to the parent are:

(1) child find;

(2) evaluation and assessment;

(3) development of the IFSP;

(4) all early childhood intervention services to children with auditory or visual impairments eligible for a free and appropriate public education from birth based on the Texas Education Code, §29.003(b)(1);

(5) case management;

(6) translation and interpreter services; and

(7) administrative and coordination activities related to the implementation of procedural safeguards and other components of the statewide system of early childhood intervention services.

(b) Early childhood intervention services that must be provided at no cost to the parent, shall:

(1) not be denied or delayed if the family fails to provide information related to third-party coverage, gross income, or family size;

(2) begin or continue during any period of reconsideration;

(3) begin or continue regardless of whether or not the parent has a signed family cost share agreement; and

(4) be continued during any suspension period.

§108.1411. IFSP Services Subject to the Family Cost Share Amount.
IFSP services subject to the family cost share amount include:

(1) behavioral intervention;

(2) occupational therapy services;

(3) physical therapy services;

(4) speech therapy services;

(5) nutrition services;

(6) counseling services;

(7) nursing services;

(8) psychological services;

(9) health services;

(10) medical services for determining developmental status and need for early childhood intervention services;

(11) social work services;

(12) transportation; and

(13) specialized skills training (previously known as developmental services).

§108.1413. Family Cost Share Amount.

(a) The monthly family cost share amount is the maximum amount the contractor bills the family for all IFSP services delivered in

any particular month. The parent is responsible for the assigned family cost share amount unless no IFSP services, other than those listed in §108.1409 of this title (relating to Early Childhood Intervention Services Provided at No Cost to the Parent), were delivered in the month.

(b) The family cost share amount is the maximum amount billed to the family. The assigned monthly family cost share amount does not increase if the family has more than one child receiving IFSP services.

(c) The contractor determines the family's assigned family cost share amount based on the family's placement on the DARS ECI sliding fee scale. Placement on the sliding fee scale is based on family size and annual adjusted income. The sliding fee scale is based on the formula in the figure in this subsection. The sliding fee scale must be provided to the parent and additional copies can be obtained from DARS.

Figure: 40 TAC §108.1413(c)

(d) Family size is calculated by adding: the child, the number of parents living in the home, and the number of the parent's other dependents.

(e) The annual adjusted income is calculated by subtracting allowable deductions from the annual gross income.

(f) The contractor calculates the allowable deductions amount using:

(1) the actual amounts that were paid over the previous 12 months and are expected to continue during the IFSP period; and

(2) projections for new expenses expected to occur during the IFSP period.

(g) Allowable deductions are limited to the following family expenses that are not reimbursed by other sources:

(1) medical or dental expenses that meet the requirements in subsection (h) of this section;

(2) childcare and respite expenses;

(3) costs and fees associated with the adoption of a child; and

(4) court-ordered child support payments for children who were not counted as family members or dependents in calculating the adjusted income and family cost share amount.

(h) Allowable deductions for medical and dental expenses are costs to primarily alleviate or prevent a physical or mental defect or illness. Allowable deductions for medical and dental expenses are limited to the cost of:

(1) diagnosis, cure, alleviation, treatment, or prevention of disease;

(2) treatment of any affected body part or function;

(3) legal medical services delivered by physicians, surgeons, dentists, and other medical practitioners;

(4) medication, medical supplies, and diagnostic devices;

(5) premiums paid for insurance that covers the expenses of medical or dental care;

(6) transportation to receive medical or dental care; and

(7) medical or dental debt that is being paid on an established payment plan.

(i) In situations where there is shared physical custody or shared legal or financial responsibility for a child, the adjusted income(s) of the parent who financially supports the child will be considered unless conditions warrant otherwise.

(j) The parent must sign a family cost share agreement acknowledging the monthly family cost share amount the parent is responsible for paying. The contractor must not provide IFSP services subject to a family cost share amount until the parent signs a family cost share agreement.

§108.1415. Information Used to Calculate Family Cost Share Amount.

(a) The parent must attest in writing that information regarding third-party coverage, family size, and gross income is true and accurate. If the parent refuses to attest in writing that information regarding third party coverage, family size, and gross income is true and accurate, then the contractor must bill the parent the family cost share amount assigned to the highest adjusted income range on the DARS ECI sliding fee scale.

(b) The parent must attest in writing that information regarding allowable deductions used to calculate the annual adjusted income is true and accurate.

(1) The contractor bases the family cost share amount solely on annual gross income if the parent refuses to attest in writing that allowable deductions information is true and accurate.

(2) The contractor may implement written local policies requiring verification of allowable deductions in addition to the family's required written attestation.

§108.1417. Zero Family Cost Share Amount.

(a) The family is assigned a family cost share amount of \$0, and a note of the exemption is included on the family cost share agreement, when:

(1) a family has an adjusted income at or below 200 percent of the Federal Poverty Level;

(2) the parent provides written attestation that the child is already enrolled in a low income benefit program including WIC, PHC, CSHCN, CIHCP, SKIP, Medicaid, CHIP, SNAP, SSI or TANF;

(3) the child is in the conservatorship of the State including foster care; or

(4) the child has auditory or visual disabilities and has been determined eligible for a free and appropriate public education from birth based on Texas Education Code, §29.003(b)(1), which allows the child to receive all early childhood intervention services at no cost to the family.

(b) Enrollment of a child in a Medicaid waiver program is not evidence of inability to pay, so the contractor must calculate the family cost share amount.

§108.1419. Third-Party Payors.

(a) The contractor must assist the parent in identifying and accessing other available funding sources to pay for early childhood intervention services.

(b) The contractor must always obtain prior written parental consent before:

(1) releasing personally identifiable information to any third-party payor; or

(2) billing third-party payors unless the child is enrolled in Medicaid or CHIP.

(c) The contractor must obtain prior written parental consent before releasing personally identifiable information, as required in subsection (b) of this section, but the contractor is not required to obtain parental consent before billing:

(1) Medicaid or CHIP for early childhood intervention services; or

(2) private insurance if the parent has private insurance for the child in addition to Medicaid or CHIP.

(d) If the parent refuses to give consent for the contractor to bill the third-party payor for early childhood intervention services, the contractor must bill the parent the family cost share amount assigned to the highest adjusted income range on DARS ECI sliding fee scale.

(e) The contractor must assist the parent with enrolling a potentially eligible child in Medicaid or CHIP. If the parent refuses to apply for Medicaid or CHIP, the contractor must bill the parent the family cost share amount based on the sliding fee scale or \$10, whichever is greater.

(f) Full or partial third-party payment satisfies the family cost share amount for the month the IFSP service was delivered.

(1) The parent is responsible for the assigned family cost share amount for any month the third-party payor completely denies payment for IFSP services subject to fees. Payment may be denied because the service is not covered under the child's individual policy, because the insurance deductible has not been met, or for other reasons specific to the terms of the individual policy.

(2) The contractor must adjust the amount billed to the family if the contractor or parent successfully disputes a denied claim and full or partial payment is received.

(g) Effectively, DARS ECI absorbs the cost of insurance co-pays and co-insurance because these fees are not billed to the family when the contractor receives full or partial third-party payment. The contractor must bill the parent for insurance deductibles up to the family cost share amount for the month IFSP services are delivered only when the third-party payor denies all payment. The contractor must not bill the parent more than the assigned family cost share amount for the month the IFSP services are delivered even if the insurance deductible exceeds the assigned family cost share amount.

§108.1421. Review of Family Cost Share Amount.

(a) The contractor must review the assigned family cost share amount at annual meetings to evaluate the IFSP, and anytime the family requests a review. The contractor may also review the assigned family cost share amount at periodic reviews.

(b) The contractor may review the family's financial situation without completing a new family cost share agreement when there has been no change in third-party coverage, gross income or family size since the previous review.

(c) The parent must sign an updated family cost share agreement if there have been changes in third-party coverage, gross income, or family size since the previous review. The updated family cost share agreement takes effect the beginning of the following month.

(d) The contractor must review all assigned family cost share amounts any time the United States Department of Health and Human Services changes the federal poverty level. If a change in the federal poverty level results in a change in a family's assigned family cost share amount, the parent must sign an updated family cost share agreement.

§108.1423. Reconsideration and Adjustment of Family Cost Share Obligation.

(a) The contractor must develop a local process to reconsider and adjust the family cost share obligation based on extraordinary circumstances.

(b) Adjustments may be made to the ongoing assigned family cost share amount and current or overdue family cost share obligation.

(c) Only the program director or designated administrator has authority to reconsider and adjust the family cost share obligation. The reconsideration may include an assessment of adjusted income, assigned monthly family cost share amount, or the parent's ability to pay the family cost share obligation in any particular month(s).

(d) Extraordinary circumstances that require a reconsideration of the family cost share obligation are:

(1) increase or decrease in income;

(2) unexpected short-term medical expenses;

(3) unanticipated child care or respite expenses;

(4) change in family size;

(5) catastrophic loss such as fire, flood or tornado;

(6) short-term financial hardship such as major repair to the family home or car; or

(7) other extenuating circumstances for which the family requests reconsideration.

(e) The parent must attest in writing that information regarding extraordinary circumstances is true and accurate. The contractor may implement written local policy requiring verification of extraordinary circumstances from families, or the contractor may rely solely on the family's required written attestation. The contractor must deny a request for reconsideration if the parent refuses to provide written attestation that the information related to extraordinary circumstances is true and accurate.

(f) The adjusted family cost share amount takes effect the beginning of the following month if the contractor determines an adjustment to the family cost share amount is warranted. The parent must sign an updated family cost share agreement if the family cost share amount is revised.

(g) The family's last signed IFSP and family cost share agreement remain in effect during the reconsideration process.

§108.1425. Billing Families for IFSP Services.

(a) The contractor must bill the family and collect the assigned family cost share amount.

(b) A balance remaining unpaid by the parent 30 days after the bill date is delinquent unless the delay in payment is due to a delay in:

(1) third-party reimbursement; or

(2) notice of denial of a claim from a private or public third-party payor.

§108.1427. IFSP Services Subject to Suspension for Nonpayment.

(a) The contractor must suspend IFSP services subject to a family cost share amount as required by §108.1411 of this title (relating to IFSP Services Subject to the Family Cost Share Amount) when the balance remains delinquent for 90 days. For a family consenting to payment by third-party payors, the 90-day time period begins the date the contractor receives notice that the third-party payor has denied claims for reimbursement and all appeals are exhausted, if applicable.

(b) Families must be notified that:

(1) IFSP services subject to a family cost share amount will be suspended when a balance is delinquent for 90 days; and

(2) the contractor cannot guarantee the same schedule or the same individual service provider if IFSP services are later reinstated.

(c) Respite vouchers may be denied for payment during a suspension period.

(d) A notation must be made on the family cost share agreement that IFSP services subject to a family cost share amount have been suspended due to non-payment.

(e) The contractor must reinstate suspended IFSP services when the family's account is paid in full or the family negotiates an acceptable payment plan with the contractor. The IFSP team must reassess the appropriateness of the IFSP before reinstating IFSP services if IFSP services are suspended for more than six months. The contractor must document the reinstatement of IFSP services date on the IFSP and the family cost share agreement.

(f) The contractor must maintain written local policy for collecting delinquent family cost share accounts. Documentation must reflect all reasonable attempts to collect unpaid balances. Reasonable attempts include multiple attempts at written notification, phone notification, and e-mail.

§108.1429. Program Fiscal and Recordkeeping Policies.

(a) The contractor must:

(1) use revenue received from the family cost share system only for early childhood intervention services within the DARS ECI system;

(2) not supplant any other local fund sources; and

(3) report fees collected to DARS ECI as program income.

(b) The family cost share agreement and any financial records related to income, deductions, and payment history shall be kept separate from the child's other educational records, and these records must not be forwarded to a school district or other non-ECI service provider(s) at any time unless requested by the family. All financial records must be maintained in a manner consistent with the Family Educational Rights and Privacy Act.

(c) If a family transfers between DARS ECI contractors, the family cost share agreement, other financial records and the IFSP are transferred to the receiving DARS ECI contractor.

(d) The family cost share agreement and financial records are subject to subpoena.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.

TRD-201101766

Sylvia F. Hardman

General Counsel

Department of Assistive and Rehabilitative Services

Earliest possible date of adoption: June 26, 2011

For further information, please call: (512) 424-4050



SUBCHAPTER H. ELIGIBILITY

40 TAC §§108.801, 108.803, 108.805, 108.807

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), proposes new rules to the DARS rules in Title 40, Part 2, Chapter 108, Division for Early Childhood Intervention Services. DARS proposes new Subchapter H, Eligibility, with new rules §108.801, Definitions; §108.803, Eligibility; §108.805, Initial Eligibility Criteria; and §108.807, Continuing Eligibility Criteria.

Chapter 108 is being extensively restructured and expanded from seven subchapters to fifteen subchapters in order to move requirements from the DARS Early Childhood Intervention (ECI) policy manual, *ECI Standards Manual for Contracted Programs*, into rules and to increase clarity and minimize duplication of or conflicts with federal statutes and rules. The *ECI Standards Manual for Contracted Programs* will be discontinued effective September 1, 2011. New Subchapter H moves portions of the subject matter of the *ECI Standards Manual for Contracted Programs*, Chapter 15: Eligibility, into rules. New Subchapter H adds specific criteria for children who qualify with developmental delay, expressed in terms of percentage of delay; adds a requirement that contractors must use a standardized tool designated by DARS to determine the extent of delay for eligibility; and removes atypical development as a separate type or category of eligibility, and clarifies that it is a qualitative analysis of developmental delay on the basis of informed clinical opinion. The proposed new rules narrow eligibility for early childhood intervention services to serve a client base allowed by anticipated appropriation.

The proposed new rules are authorized by the Texas Human Resources Code, Chapters 73 and 117; and the Individuals with Disabilities Education Act, as amended, 20 USC §1400 et seq., and its implementing regulations, 34 CFR Part 303, as amended.

Ellen Baker, Acting DARS Chief Financial Officer, has determined that for each year of the first five years that the proposed new rules will be in effect, there are expected cost savings in the amount of \$36,590,747 in All Funds, which includes \$330,000 in State Funds, as a result of enforcing or administering the new rules.

Ms. Baker also has determined that for each year of the first five years the proposed new rules will be in effect, the public benefit anticipated as a result of enforcing the proposal will be assurances to the public that the necessary rules are in place to provide clear guidance to contractors relating to the eligibility criteria for early childhood intervention services. Ms. Baker has also determined that there is no probable economic cost to persons who are required to comply with the proposed new rules.

Further, in accordance with Texas Government Code, §2001.022, Ms. Baker has determined that the proposed new rules will not affect a local economy, and, therefore, no local employment impact statement is required. Finally, Ms. Baker has determined that the proposed new rules will have no adverse economic effect on small businesses or micro-businesses.

Written comments on the proposed new rules may be submitted within 60 days of publication of this proposal in the *Texas Register* to Nancy Mikulencak, Rules Coordinator, Texas Department of Assistive and Rehabilitative Services, 4800 North Lamar Boulevard, Suite 200, Austin, Texas 78756 or electronically to Nancy.Mikulencak@dars.state.tx.us.

The new rules are proposed pursuant to HHSC's statutory rule-making authority under Texas Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of

the Texas Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies.

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

§108.801. Definitions.

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

(1) Adjusted Age--The chronological age of a child minus the number of weeks or months of prematurity.

(2) Developmental Delay--As defined in Texas Human Resources Code §73.001(3) and determined to be significant in compliance with the criteria and procedures in this subchapter.

§108.803. Eligibility.

(a) The contractor must determine that a child meets eligibility requirements in order to provide early intervention services to the child and family.

(b) Child eligibility criteria are standardized for all contractors. If a child is determined eligible in one area of Texas, the same eligibility criteria are applied if the family moves to another part of the state.

(c) The contractor must:

(1) establish a system of management oversight to ensure consistent eligibility determination;

(2) determine the child's eligibility for early intervention services based on the decision of an interdisciplinary team that includes the parent and at least two professionals from different disciplines;

(3) include in the child's record an eligibility statement from the interdisciplinary team that:

(A) verifies medical eligibility or describes the details for a determination of developmental delay; and

(B) is updated when eligibility changes or is re-determined;

(4) maintain all test protocols and other documentation used to determine eligibility in the child's record;

(5) re-determine the child's eligibility for early intervention services at least annually; and

(6) provide written notice to the parent when the child is determined to be ineligible for early intervention services.

§108.805. Initial Eligibility Criteria.

(a) To be eligible for early intervention services, a child must be under 36 months of age and meet one of the following eligibility criteria. The child must have:

(1) a medically diagnosed condition that has a high probability of resulting in developmental delay and which has been approved by the DARS ECI Assistant Commissioner based on prevailing medical opinion. Copies of the list of medically qualifying diagnoses can be obtained from DARS. To determine eligibility for a child who has a qualifying medical diagnosis the interdisciplinary team must:

(A) review medical documentation to determine initial and continuing eligibility; and

(B) determine and document a need for early intervention services.

(2) an auditory or visual impairment as defined by the Texas Education Agency rule at 19 TAC §89.1040 (relating to Eligibility Criteria).

(3) a developmental delay that meets one of the following criteria:

(A) a documented delay of at least 33 % in one of the following developmental areas: communication, cognitive, gross motor, fine motor, social emotional or adaptive

(B) a documented delay of at least 25% two or more of the following developmental areas: communication, cognitive, gross motor, fine motor, social emotional, or adaptive

(C) a documented delay of at least 33% for children whose only delay is in expressive language

(D) a qualitative determination of delay, as indicated by responses or patterns that are disordered or qualitatively different from what is expected for the child's age, and significantly interfere with the child's ability to function in the environment. When the team finds, after administration, that the standardized test is inadequate to accurately represent the child's development, qualitative criteria for determining developmental delay are used.

(b) In determining the extent of developmental delay, an adjustment for children born prematurely must be applied as follows:

(1) age is adjusted for children born before 37 weeks gestation and is based on a 40-week term;

(2) the developmental age must be measured against the adjusted age rather than chronological age until the child is 18 months old; and

(3) the age adjustment cannot exceed 4 months.

§108.807. Continuing Eligibility Criteria.

(a) Qualifying Medically Diagnosed Condition.

(1) A child remains eligible for comprehensive early intervention services as long as:

(A) the qualifying medical diagnosis is present; and

(B) the child continues to need early intervention services.

(2) The contractor must ensure that the child's record contains written documentation of any change in medical diagnosis.

(b) Auditory or visual impairments. Auditory or visual impairments must continue as defined by the Texas Education Agency rule at 19 TAC §89.1040 (relating to Eligibility Criteria).

(c) Developmental Delay.

(1) Continuing eligibility must be determined through a comprehensive evaluation and be based on the child's results on a standardized tool designated by DARS ECI.

(2) a child whose initial eligibility was based on a qualitative determination of delay is eligible for up to six months. For a child to remain eligible beyond six months the initial criteria for percent of delay described in §108.805(a)(3) of this title (relating to Initial Eligibility Criteria) must be met.

(3) For all other children to remain eligible the child must demonstrate a documented delay of:

(A) at least 20% in one area of development; or

(B) at least 15% two or more areas of development.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on May 16, 2011.
TRD-201101767

Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Earliest possible date of adoption: June 26, 2011
For further information, please call: (512) 424-4050

